

Primer

on

NEGOTIATION

Alternative Dispute Resolution Board

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I.

Introduction

You're in NLS at the absolute peak of the golden era of negotiation. Over the past three years, we've won two of the most prestigious competitions in the world, one of them twice in a row. There are good reasons for the increasing popularity of negotiation as an activity, and as we've begun to take it more and more seriously, we've done increasingly well at it.

Of all the activities you will participate in while in law school, negotiation probably has the best payoff to effort put in ratio. Once you understand the basics, how well you do really does depend upon the execution. At the best international competitions, arbitrariness is truly minimal, and when you walk out of a round knowing you nailed it, well, you probably did.

Moreover, negotiation is inherently not about the law. It's about business sense, and hammering out a deal that benefits you while also making sure you're not hurting the other party too much, and ruining any long term relationships you might have with them. It is, at all times, an incredibly fine balancing act – doing the best you can for yourself, but never antagonizing the other party or making them feel like you're pulling one over on them. Knowing you've managed to do this is an incomparable high.

For those of you who're more pragmatically minded, the soft skills developed will serve you well both in other extra-curricular and in the rest of life –the good negotiator is an incredibly effective communicator, knowing how to get her point across, able to understand and factor in what the other side wants, and keep everyone happy while doing well for themselves.

Haggling and bargaining fail at all of these objectives, and fail miserably. What is required is a methodical, well thought-out approach, one which treats negotiation as a science, not as an art, as a subject that can be learned, not as an inherent talent. The modern conception of negotiation as a science was developed in Harvard by William Ury and Roger Fisher, and has been refined and brought forward by more recent stalwarts like Deepak Malhotra and Chris Voss. Their methods turn face-to-face confrontation into side-by-side problem solving. And they believe that good negotiators are not born, they are trained.

Over the next few pages, you begin your training.

II.

Team-mate & Role Division

Choosing the “right” teammate: Choosing the “right” teammate is paramount for getting a good rank in any negotiation competition. Most negotiation competitions have a teamwork component in their scoring criteria. The kind of teammate that you have will also directly impact your coordination in the round itself.

But what exactly is a “right” teammate? Ideally, it is someone whom you have known for certain amount of time. Further, both of you should be able to understand each other’s verbal and nonverbal cues. It should ideally be someone who is a close friend, a roommate or a boyfriend/girlfriend. This is not a joke. A lot of razor close rounds are decided by the kind of coordination that the team shows during the round. At the very least it should be someone with whom you have spent some amount of time with. This helps in reading the nonverbal cues of your teammate during a round. There have been teams which have done exceptionally well when the teammates did not know each other, however the cases of the same are few and far between and I will strongly suggest that you do not take that risk. Unless you have no other options, team up with someone whom you have known for a long period of time.

The second advantage of teaming up with someone that you do know is the trust factor. Unlike a debate or a moot, where the teammates take turns in speaking, in a negotiation both you and your partner will be negotiating at the same time. This means that if your teammate is not sticking to your strategy, because of whatever reason, you will really not have the time to correct him or her. If you have known your teammate for a long period of time, through nonverbal cues and at extreme times verbally, you can get them back on the right track. The worse realization during a negotiation is to find out that your teammate is Sir Prize or Miss Take and not Mr/Mrs Right.

What to do once you have found your teammate? Congratulations! You have successfully managed to find a negotiation partner for the University Rounds. Now the most important and the most obvious thing to do is to **read** the problem. Both of you should read it separately and then together. Most negotiation problems will have some indicators to gauge the agreement that the other party is seeking and the interests that you absolutely need to protect. There might even be times when a certain sentence or paragraph is open to interpretation and is not as straightforward as it may seem.

*For tfxample: Bihaan Leather Tanneries sold the raw materials to Ishit Textiles. However, it was not until later, when the production process had started that Ishit realized that the raw materials had gone bad and could not be used.*¹

At a first read it may seem that Bihaan Leather Tanneries is at fault for providing Ishit Textiles with bad raw materials, however it is also possible that they were usable when they were delivered and went bad when they were with Ishit Textiles. To find small kinks like this you need to read the problem repeatedly. Further discussing it with your partner will help in looking at things from a different point of view and will help you uncover details you might have missed.²

Secondly, research on the problem that you have for the University Rounds. If the problem is based on the renewable energy sector, you should have done at least a basic reading on the same. Look at what the basic regulations and the recent controversies are with that sector. This will help you pad your arguments during the rounds itself. Next watch **Amy Cuddy's Ted Talk on body language**.³ This will not only help you with your own body language, but to some extent will help you in figuring out how your opponent is feeling about the negotiation.

Once you are done with this part, try to do at least two practise rounds. Find someone to judge you. For teams which are partnering for the first time, use the first round to figure out your nonverbal communication. This will help in ensuring that you do not speak over each other and are on the same page at all times. Non-verbal communication can be a tap on the thigh system or discreetly passing of notes between team mates. Use this round to also figure out the team's role division.

Role Division: Role division is a very important component of negotiation. Good teams have lost rounds because of improper role division. A negotiation round may either have attorney - attorney or client attorney format. In this segment, I will be dealing with what are the roles of a client and attorney and the same should help you in deciding who should be the client and who should be the attorney.

¹ This example is inspired from the ELSA Maynooth, 2016 Prelims 2 problem. The problem dealt with a case of negligence however, could be argued as contributory negligence if the facts were scrutinized.

² It is necessary to not stretch these grey components beyond what can be reasonably interpreted. Most judges will mark you low for unethical negotiation if you try to come up with unreasonable interpretations.

³ Find it here: https://www.youtube.com/watch?v=Ks-_Mh1QhMc.

Client: The client is the central stakeholder in a negotiation. He or she has both a financial stake in the negotiation and is emotionally involved in it. The client has to keep a few things in mind during the negotiation. Primarily, it is necessary to show some emotional involvement with the issues at hand. This effectively means that if the other party is low balling you, it is necessary to show some concern. Further the offers and the counter offers should *ideally* be made by the client. After all you are supposed to be more conversant with your business than your attorney.

The client is also the one who has to engage with the client from the opposite party. It is necessary to acknowledge the past relationship that the parties had. If you have been in the wrong, an apology goes a long way in building foundations for a new relationship.

Lastly, the client should be the one seeking clarifications – about the offers made.

Attorney: An attorney should only speak when absolutely necessary. Do not be fazed if you have barely spoken during a round. Most of the communication has to be done by the clients themselves.

However, the attorneys must be alert at all times during the negotiation. There will be times when the opposite party will try to corner your client. They will try to milk out concessions if they feel that your client is at fault. This is when you need to step in. Feel free to remind the other party that they are making your client uncomfortable, especially when accusations against your client are made. It is necessary to ensure that your client's interests are protected at all times and that your client is not getting bullied by the other party.

There will also be times when you need to give your legal opinion on a certain matter. Hence it is necessary to do a background reading of at least contract, tort and corporate laws for negotiations. The attorney should also keep an eye on the time – so as to ensure that the client is not stuck on one issue for far too long. There will be times when the client and the opposite party may be discussing about frivolous matters, or may be accusing each other's past performance in the relationship. At these times it is necessary for the attorney to jump in to ensure that the negotiation is moving forward and that both the parties are brought back to the agenda.

Lastly, there will be times when the attorney would want to ask clarifications. Feel free to do so, but do not hijack the conversation from your client.

III.

Pre-Round Preparation

Before Release of Confidential Information: At this stage, you will have access to a set of common facts which will govern the basic fact scenario of your round. At this stage, you should try and notice the several details from the common facts. Regardless of the form it takes, the aim of this preliminary disclosure is acquaint the teams with the following details:

- **General Area & Theme:** Discern the sphere the problem inhabits. For example, it could be a commercial dispute, or a family property dispute, or a personal relationship dispute. It is possible that it is a combination of one or more spheres. Your aim must be to become aware of the ordinary practices relating to such a sphere. Thus, if your problem contains a partnership dispute, you should be aware of the nature of the relationship between partners, and their mutual rights and obligations, in ordinary course.
- **Actors:** Be very clear on the parties and characters which inhabit the problem. Become familiar with the characters and roles, if disclosed by the problem. Remember: Such minute details may help you in establishing a good relationship, and in providing justifications your stances during the round. They could help you coax the other team into accepting your offers.
- **Concepts:** List out concepts which you might have difficulty with. Business and Accounting Terms are the commonest example of this (hedge funds, ROFR, and whatnot). Indulge in a basic reading on such concepts, if they are relevant to the problem.
- **Legal Issues/Ideas:** Be sure to read up on any legal concepts/ideas that might seem relevant to the problem area. It would be ideal to have a basic idea of the law relating to the same. For example, in a contractual negotiation, have a basic idea of which contracts are permissible, and which are not.
- **Possible Areas of Conflict:** Try to guess what the areas of conflict could be in the problem. A problem might just have listed them out, or you may have to take hints from the fact narration. The kind of information that is available about the parties will be a guide to their areas of disagreement and to the possible solutions.
- **Possible Solutions:** Look for facts which could aid possible solutions, and which could serve as bargaining chips.

A One-Pager: It will be helpful to create a one-page summary of the problem for your ready reference during the round. Do not clutter this document; mention only important information on it. This will be supplemented at the time when you are in possession of the confidential information. Be sure to mention names of the parties, and their roles, and the basic facts of the dispute, at the very least.

After Release of Confidential Information: Once you are in possession of the confidential information, try to anticipate what the corresponding confidential information could be from the other side. Look out for three basic types of information. First, specific numerical information pertaining to the main issues of negotiation. Secondly, information relating to personal relations/issues. Thirdly, additional information which provide opportunities for creative solutions. It is useful to condense the information from the confidential information onto the One-Pager discussed above. Once you have gone through the confidential information, you should note the following down, after discussion with your teammate:

- Needs & Interests
- Non-Negotiable Objectives
- Bargaining Chips
- Possible Ranges of Settlement, in case of numerical values
- BATNA

It is important that both members of the team agree on the strategy to be pursued, in the preparation period. Pay special attention to the order of discussion of issues, and the approach to offers and counter-offers. You should also be clear on how much you value your bargaining chips, and in what circumstances you are willing to give them up.

IV.

Opening a Round

There are two components to opening a round – the opening statements and the agenda. The most important advice for both of these components is not to spend too much time on them during the round.

Opening Statements: Your opening statement should be tailored according to the length of the entire round. For the University Rounds, the **opening statements of both the teams should not exceed one minute.**

An opening statement is effectively an introduction to the negotiation. It should lay down why you are here, what do you seek to achieve. The opening statement is also the best time to directly address a past issue in the relationship between the parties, if any.

For example: Suvam Manufactures Pvt. Ltd. could not deliver the consignment on time to Wakhlu Pvt. Ltd. It was the second time that such a delay had taken place.

Here, assuming that you are representing Suvam Manufacturers Pvt. Ltd., an opening statement is the perfect time to apologize for the repeated delays. The opening statement has to be concise and succinct. Too many times teams spend too much time discussing their past relationship and their opening statements, that very little time is left for the actual negotiation.

During the opening statement the attorney should emphasize on the fact that they are a part of the negotiation **only in their legal capacity** and to protect the interests of their client.

Use the limited time of the opening statement to set the tone of the negotiation and to set out your broad goals. A rehearsed and a crisp opening statement also ensures that the judges have a good first impression of the team. At the same time do not spend too much time on this aspect of the negotiation.

Setting the Agenda: After the introductions and the opening statement, it is necessary to set up the agenda. While setting the agenda you should know the priority of the issues at hand. You can either choose to put the issue most important to you as the first item on the agenda or put an easier issue as the first item, so as to ease into the negotiation. Given the paucity of time in the University Rounds, I would suggest that you use the first approach.

Your agenda should be prepared during the time the confidential information has been released to you. You should have identified the priorities of the issue. Once the opening statements are finished, request the other team if you can set the agenda. After setting the

agenda, give an opportunity to the other team to change it. This change can either be the prioritization of the issues or addition of some issues.

Many a times, teams are in a race to set the agenda. Fret not, if your team was unable to set the agenda. Before the negotiation begins, you should always request the other team to either add something to the agenda or to change the priority of issues at hand.

There are unfortunately a few (bad) judges, who do take the prioritization of the issues set during the agenda very seriously. They do award brownie points to the team which has control over the setting of the agenda and the manner in which the issues are set. However, it is important for both the teams to remember that much like the opening statement it is not wise to spend too much time in setting the agenda. Hence if you have been unable to set the agenda, but the other team has agreed to change the agenda as requested by you, do move on with the negotiation.

Always bring out all your issues when setting up the agenda. Do not try to blindside your opposing team by introducing a new issue once the negotiation has formerly begun.

Setting an agenda is the easy aspect, the tougher part is to stick to the agenda. Always keep in mind that most of the issues are interconnected and do not work in silos. Hence it is important for your agenda to be somewhat flexible. If your Issue 1 is connected to Issue 3, be quick to adapt and negotiate Issue 3 alongside Issue 1.

For tfxample: The agenda between Babloo Designer Shoes and White Nano Industries is set as follows

- *Payments*
- *Damages for Past Performance*
- *Merchandize*
- *Opening of New Stores*

If Babloo Designer Shoes while negotiating the first issue realises that he can ask for a lower payment as long as his percentage for the merchandize is increased, he should point it out to White Nano Industries. They should then work on both the issues simultaneously.

This sounds extremely easy on paper. However, in a negotiation more often than not both the parties will stray away not only from these two issues, but the agenda altogether. Hence always keep an eye on the agenda, especially when you feel that the negotiation has reached a stalemate.⁴

⁴Ideally the attorney should be the one who ensures that the parties do not stray away from the agenda.

V.

Positional Bargaining v. Interest-Based Negotiation

Whether a negotiation concerns a contract, a family quarrel, or a peace settlement among nations, people routinely engage in positional bargaining. Each side takes a position, argues for it, and makes concessions to reach a compromise.

When negotiators bargain over positions, they tend to lock themselves into those positions. The more you clarify your position and defend it against attack, the more committed you become to it.

In positional bargaining you try to improve the chance that any settlement reached is favourable to you by starting with an extreme position, by stubbornly holding to it, by deceiving the other party as to your true views, and by making small concessions only as necessary to keep the negotiation going. The same is true for the other side. Each of those factors tends to interfere with reaching a settlement promptly. The more extreme the opening positions and the smaller the concessions, the more time and effort it will take to discover whether or not agreement is possible.

The basic problem in a negotiation lies not in conflicting positions, but in the conflict between each side's needs, desires, concerns, and fears. The parties may say: "I am trying to get him to stop that real estate development next door." Or "We disagree. He wants \$300,000 for the house. I won't pay a penny more than \$250,000." But on a more basic level the problem is: "He needs the cash; I want peace and quiet." Or "He needs at least \$300,000 to pay off the mortgage and put 20 percent down on his new house. I told my family that I wouldn't pay more than \$250,000 for a house."

Reconciling interests rather than positions works for two reasons. First, for every interest there usually exist several possible positions that could satisfy it. All too often people simply adopt the most obvious position. When you do look behind opposed positions for the motivating interests, you can often find an alternative position that meets not only your interests but theirs as well. Reconciling interests rather than compromising between positions also works because behind opposed positions lie many more interests than conflicting ones.

We tend to assume that because the other side's positions are opposed to ours, their interests must also be opposed. If we have an interest in defending ourselves, then they must want to attack us. If we have an interest in minimizing the rent, then their interest must be to maximize it. In many negotiations, however, a close examination of the underlying interests

will reveal the existence of many more interests that are shared or compatible than ones that are opposed.

For example: Look at the interests a tenant shares with a prospective landlord:

- *Both want stability. The landlord wants a stable tenant; the tenant wants a permanent address*
- *Both would like to see the apartment well maintained. The tenant is going to live there; the landlord wants to increase the value of the apartment as well as the reputation of the building.*
- *Both are interested in a good relationship with each other. The landlord wants a tenant who pays the rent regularly; the tenant wants a responsive landlord who will carry out the necessary repairs.*

They may also have interests that do not conflict but simply differ. For example:

1. The tenant may not want to deal with fresh paint, to which he is allergic. The landlord will not want to pay the costs of repainting all the other apartments.
2. The landlord would like the security of a down payment of the first month's rent, and he may want it by tomorrow. The tenant, knowing that this is a good apartment, may be indifferent on the question of paying tomorrow or later.

When weighed against these shared and divergent interests, the opposed interests in minimizing the rent and maximizing the return seem more manageable. The shared interests will likely result in a long lease, an agreement to share the cost of improving the apartment, and efforts by both parties to accommodate each other in the interest of a good relationship. The divergent interests may perhaps be reconciled by a down payment tomorrow and an agreement by the landlord to paint the apartment provided the tenant buys the paint. The precise amount of the rent is all that remains to be settled, and the market for rental apartments may define that fairly well.

If positional bargaining had been employed, reaching an agreement would have been harrying, if not downright impossible. Interest-based negotiation made a mutually-beneficial solution possible.

The point is, interest-based negotiation is the way to go.

VI.

Information tfxchange & Communication

This is the most important part of the negotiation. Faulty communication will thwart effective solutions. On the other hand, a full picture of all the facts from both sides will help you tailor your offers/counter-offers and your proposed solutions, such that they fulfill the interests of both parties to the negotiation.

Eliciting Information: While both sides will provide some level of information on their own, it is important to remember that the other party might be withholding part of their confidential information. This is natural, but you are expected to ask relevant questions that would lead to the discovery of this withheld information. This information is vital to the process of identifying legal and non-legal issues, and conducting the ensuing negotiation.

What questions are relevant will depend on your analysis of the confidential information that you will have reviewed in the preparation stage. This will already have given you a basic idea of your own side's objectives and interests, as well as the bargaining chips at your disposal. Based on this, you will have gauged what the objectives and interests of the other party possibly could be. It is this basic idea of both parties' objectives and interests that will inform your idea of what kinds of questions to ask.

Thus, questions must explore numerical or legal or non-legal or socio-economic or personal information, while seeking to understand what exactly the other party wants, and why they want it. This becomes especially relevant when you have to recommend a particular course of action. If the lawyers elicit these pieces of information, they shall be better able to devise the appropriate way forward, tailored specifically to suit their own interests and objectives, as well as the other party's. Thus, relevant questioning forms the bedrock of the negotiation process.

Your objective must be to elicit information pertaining to, *inter alia*:

- Objectives & Interests of the other party
- Relevant Emotions, if any, related to the dispute
- Bargaining Chips
- Prioritization of Issues by the other party
- Specific Numerical Details

As a general point, you must also account for the possibility that there are hidden issues at play. Therefore, do not make the mistake of myopically focusing on a single issue. You must

explore the possibility that the other party has several interconnected or unrelated issues or interests.

Remember that it is not impolite to put specific questions to the other party. You may ask specific questions about the other party's numerical figures as well, even though it is not incumbent upon them to answer your question.

Further, while parties do not disclose the exact values of their range, the key is to look for clues in the numbers that they do offer. They are usually a good indicator of the position and range of the other party. Similarly, prioritization can also be gauged.

Disclosing Information: The commonest question faced by most novice teams is: Is it alright to give away my confidential information? The short answer to that question is: Yes! It is completely okay for you to reveal parts of your confidential information to the other party. This should of course be done in way so as to not hamper your bargaining position. Thus, it may be a bad idea to give away your exact range of settlement. However, details of your interests, and your prioritization of issues can easily be, and should be, shared. Further, it may also be useful to communicate if a proposed number is the lowest or highest that you can accept or offer, respectively (if that is the case, in reality). In fact, the judges will be assessing you on appropriate, and strategic disclosure of information. Thus, disclosure should be treated as a tool to further your interests, and to better arrive at a solution. This also ties in to relationship building, since openness with the other party signifies and builds trust, and helps arrive at a more collaborative solution. You must however keep in mind that any disclosure you make should not rob you of any strategic advantages. If your confidential information directs that a certain piece of information is to be kept confidential, then that should obviously be adhered to, notwithstanding what is said above.

Lying: In no case is it appropriate to lie during the round, *suo moto* or in response to a general or specific question. If the other party asks a question you are not comfortable answering, the best course of action is to politely say so.

Active Listening: At the risk of sounding idiotic, active listening implies actively listening as opposed to passively hearing. Listening is distinguished from hearing. Listening is an active process that entails a conscious decision to listen to and understand what the speaker is saying, as opposed to hearing, which requires no conscious thought, and just happens of its own accord. The object of active listening is to focus one's full concentration on the speaker. It is popularly described as listening with all the senses (well, most of them). Not only will it ensure that you actually absorb the full import of the other party's concerns, but will also

ensure that they perceive that you are giving them their full attention. Thus, it subscribes to the thought that not only must you listen to the other party, but also that you are seen to be listening. In the alternative, the other party may get the impression that you are bored by, or uninterested in, what the client has to say.

Interest in what the other party is saying can be communicated by both **verbal** and **non-verbal** cues. Verbal cues could include brief positive prompts like “Alright”, “Mm Hmm” or “Go on”, while non-verbal cues could include eye contact or head nodding. By providing such verbal and non-verbal feedback, the other party will feel more at ease in communicating with you. An active listener must also maintain neutrality and should not be judgmental in responding to them. The reactions must be calm and composed; they must be measured. Excessive emotiveness (verbal or non-verbal expressions of surprise or joy or anger or disgust) might suggest to the other party that you are passing judgment, or that you are flippant about the negotiation.

Let us now discuss the methods of active listening. These are some of the commonest cues, all of us express (consciously and more often than not, subconsciously) on a daily basis. The attempt is to enumerate them so you can pay greater attention to these.

Active Listening: Non-Verbal Cues

- **Eye Contact:** Normally, the other party will find it encouraging to see you looking at them, while they are speaking. It indicates a greater level of engagement with them. A healthy amount of eye contact, while also taking some breaks to write on the pad or something else, is ideal. However, eye contact can also turn intimidating or uncomfortable for many people. Make sure that eye contact doesn't turn into a 'glare'. You will have to gauge how much eye contact is appropriate in a given situation. Further, avoid eye contact with judges or others in the room.
- **Expressions:** Facial expressions are an important component of active listening. These usually come across in the form of smiles or frowns or expressions of surprise and disgust. These are natural reactions; I only state them for the sake of enumeration. They become more relevant when it becomes your job to hide those reactions. Brief smiles, when combined with other non-verbal cues like nodding and eye contact, can be highly effective. Ideally, your expressions should be mild, and not extreme.
- **Nodding:** This is the easiest way to indicate that you are paying attention to the client's story. Appropriately placed nods in response to important points raised by the

other party can be very effective. They can also convey curiosity, understanding and comprehension.

- **Posture:** This is one of the biggest indicators of body language. An active listener will normally lean forward in his chair to signify his engagement with the other party. You should avoid slouching in their seats and should maintain an active and alert body posture. Leaning back could also indicate dominance, disinterest or negativity. ‘Closed’ body postures (for example, folded arms, crossed legs or body tilted away from the client) must be avoided. These usually signify aggression and non-receptiveness. ‘Open’ body postures signify receptiveness. Legs should remain uncrossed, and arms open. Hands should ideally be placed on the table with palms open. This universally signifies a willingness to listen.
- **Fidgeting & Distraction:** This is perhaps the toughest of all. You must avoid fidgeting. Avoid checking the time on a clock or a watch, and checking your messages on your phone during the client interview. Avoid doodling or playing with your hair or biting your fingernails. These actions are distracting for the other party, and indicate that you are bored or that you want the session to end soon. It is, of course, alright to take notes during the round. Other than that, however, you must take care to keep your hands still. People sometimes find it easier to avoid fidgeting if they decide a fixed posture for their hand.
- **Mirroring:** It is the process by which one person subconsciously imitates the non-verbal language (such as gestures, body language, expressions, speech patterns or mannerisms) of another. This is something that takes place everyday subconsciously, and is a sign of agreement, sympathy or understanding. ‘Mirror neurons’ in the body react to and cause such body language, allowing individuals to feel a greater sense engagement and belonging in any situation. While this happen subconsciously naturally, it could be useful to subtly mirror the other party.

Active Listening: Verbal Cues

- **Summarizing & Restating:** Stating a brief summary of the other party’s position, or your own interests, in your own words, in a clear and logical way is an important way of displaying comprehension. The summary must retain all the important points, and must allow for the other party to correct your account, if necessary. This should obviously be done at the end of the ‘obtaining information’ stage. However, where the negotiation becomes confusing during this stage, it may serve as a useful tool, to

clarify a part of the issue as well. These could take the form of: 'So let me get this straight', 'It sounds like ...', 'What I'm hearing is ...', 'Let's pause to make sure we're on the same page', followed by a summary.

- **Clarifying, Probing & Questioning:** Seeking clarifications and asking questions to gain a full picture of the other party's interests or prioritization serves as a subliminal reminder to them that you are paying attention, and that you are committed to seeking out all relevant facts, to arrive at a solution. This can be achieved through a restatement as well, where you can restate an issue which they are unclear about, and seek clarifications thereupon. These could take the form of: 'What do you mean by ...?', 'I'm not sure that I understand ...', 'Could you tell me a bit more about ...?', 'Let me make sure I've got this right?', 'What would happen if ...', and so on.
- **Brief Encouragement & Acknowledgement:** Brief positive prompts can be used to indicate that you are listening attentively. These could be in the form of: 'Umm, Hmmm', 'Okay', 'Alright', 'Oh?', 'I understand', 'And?', 'Then?', 'What did you do then?', 'Fair enough', 'That makes sense', 'You're kidding!', 'Really?', 'When?', 'How?', and so on.
- **Minimal:** While positive verbal reinforcement is useful, you must use it sparingly, and make sure that you are not using it excessively. When used excessively, it may be taken as a sign of impatience, and can hugely irritate the other party.
- **Remembering & Referring:** Remembering important details and reminding the other party of them through the round can give the important message that you are listening attentively. Effective note-taking can hugely aid in this process. It reinforces the message that what the other party sought to communicate has been listened to. Further, it could also be used to gain an upper hand over the other party, by justifying your own proposal with what they might have said.
- **Recognition & Validation:** This entails briefly recognizing what the other party may be feeling, and expressing your understanding, comprehension and sympathy. This could take the form of: 'I'm sensing that you're feeling ...', 'I understand', 'I appreciate that you are talking about something so difficult and personal', and so on.

Form of Questions/Statements: Phrasing of questions/statements must be kept neutral and non-judgmental. Further, be sure to keep your questions short and succinct, and to state them simply. Further, try and keep your voice even-toned, to further make sure that your questions/statements sound neutral and unbiased.

Note-taking: Effective note-taking is vital to a negotiation session. There is a fine line between comprehensiveness and an overload of unnecessary detail. Try to write neatly and legibly; you might need to share your notes with your teammate. Try to be as brief as possible without missing important points. Further, try to fit all relevant information in one or two pages, at best. If you go beyond that there is high likelihood that you will lose the functionality of your notes. Information in your notes must be easy to locate and comprehend. Do not try to transcribe exactly what the other party is saying; use your own words- this will help your own comprehension, and will save time and space. Use appropriate underlining or highlighting to make sure that your notes are easy to reference.

VII.

Relationship Building

Trust & Comfort Level: Establishing trust and a certain comfort level with the other team throughout the round is vital. An integral part of the same is appropriate demeanour and responses throughout the interview session. This includes subliminal messaging, such as non-verbal cues, posture, demeanour and facial expressions. These are discussed above in the section on Active Listening. Management of emotions, if any expressed, is also a very significant part of this. Sensitive personal information must be dealt with utmost care. Appropriate expression of apology, regret, sympathy, empathy, anger, condemnation, joy etc. on your part may be required depending on situation. Thus, you must remember to focus on material and non-material needs and interests of the other party during the negotiation.

Acknowledging interests: The most important factor in relationship building is to acknowledge and account for the interests of the other party. The judges will also be assessing you in this sphere. You must look out for the other party's interests, while also focusing on your own. Thus, you must seek to be collaborative in your approach. This will be evident in two ways. First, in the manner in which you elicit and acknowledge the interests of the other party. Secondly, in your proposed solutions. The oft repeated phrase is 'increasing the size of the pie', as opposed to dividing the pie. The relationship building exercise will succeed if you are collaborative, and seek to accommodate the other party's interests as part of your proposed solutions.

Style & Manner: The most obvious factor to take into account is your manner and style. This includes the factors discussed in the section on 'Active Listening'. Further, the choice of phrasing, style of questioning, and tone are also important. It may be useful to use appropriate buzzwords like 'mutual cooperation', 'collaborative solution' and so on.

Managing Sensitive/Personal Information (If any): Many pieces of information may be difficult for the other party to talk about. This could relate to personal problems (for example, pertaining to marriage, past misconduct by you, etc.) These issues could be emotionally difficult for the other party to talk about. While asking for or receiving or managing information of this nature, you must maintain appropriate demeanour and expressions, while also reacting to the same, with sympathy, empathy, condemnation, anger, consolation, etc., as appropriate. The lawyers must offer reassurance to the other party, without judgment. You must endeavour to make the other party feel comfortable during the negotiation. You may need to manage the impact of some past action you may have done. An apology may be in

order depending upon circumstance. Unless, such emotions are appropriately dealt with, there will be no trust in between the parties, and might hinder the negotiation.

Openness: This has already been addressed in the section on Communication & Information Sharing. Try to be open with the other party. Make appropriate disclosures of your interests and other parts of your confidential information. Be polite in case you wish to withhold any information. Do not lie in any scenario. Do not be obstructionist. Make sure that you are not unreasonable when it comes to your monetary offers or other attendant conditions.

VIII.

Take it, or Leave it: The Art of Making Offers & Counter-Offers

You have made significant progress – you have made your opening remarks, have made an agenda and have discussed issues that are on it, for a while now. About half or more of your time has elapsed, and you feel its time to concretize the parties’ discussions and get closer to that sweaty-palm-handshake. But you’re anxious, and you’re asking yourself the million-dollar question that you have discussed with your partner many, many times and have disagreed upon – “Should I *hardball*? Or should I *softball*? Should I go ahead and make this offer? Or should I let the bloke opposite make his? Ugh, #whatisthislife #alwaysbeballin”.

In this part of the primer, I attempt to give you some clarity on how not to lose your calm in situations such as these. “Offers” are an inevitable part of the negotiation process. They begin conversations relating to, and set the tone of, the final outcome of the negotiation. Equally inevitable, is responding to offers and making counter offers. Last-minute bargaining is the most common *faux pas* that one may commit that may turn an otherwise good round into a terrible one. Understand that, it may be wise to end a round sans any outcome, than to reach an outcome without going through the whole process of analyzing offers. I will divide this part of the primer into a five sub-parts, each of which would explain a phenomenon that governs offers, counter offers or both. Having said that, it is important to note that preparing an offer or a counter is something that one cannot really be prepared for, prior to the round. This is because successful evaluation of all considerations begets knowledge of confidential information and opposite party’s stance on the things listed on the agenda.

Anchoring

Anchoring is an old school marketing technique, that exploits human beings’ cognitive biases. Anchoring is what your auto-rickshaw driver does when she “names her price”. She announces a price that becomes the “anchor” around which further negotiation happens. Essentially, anchoring entails concretizing discussions regarding parties’ interests into a number and putting it on the table. When anchored successfully, discussions tend to become pivoted around this number. This makes a strong case for making a first offer. In fact, the results of a study conducted at various B-schools in the US⁵ suggests that making the first offer almost always ensures that the final deal price is closer to the “anchor”. That said, one

⁵ Find it here: <https://www.pon.harvard.edu/daily/dealmaking-daily/resolving-the-first-offer-dilemma-in-business-negotiations/>.

must always ensure that sufficient information backs the first offer, lest one should make an offer which demands less of the other party than they are willing to offer. The deciding factor, therefore, regarding whether one should make that first offer is the information at one's disposal at the time of making the offer. When unsure, let the offer slide from the other end of the table. Naturally, one may fear being pivoted by an aggressive anchor if they left the other end speak first. However, at this point one might want to consider dealing with the anchor, than risk creating a misinformed one.

There are many ways of dealing with an aggressive anchor. *First*, is deviating the discussion. This must be done cautiously, so as to make it clear to the judges that it is a strategy and not a mistake. The idea is to acknowledge and then ignore the anchor, and take control of the round. *For example*, Saag Barap thinks that the first price quoted by Spinach Budey Inc. for her greeting cards is too steep. She deviates the discussion by saying "I think we may be approaching the greeting cards issue from opposite ends of the spectrum. Why don't we instead talk about the other stationery products and get back to this in a while?"

Second, one may offer a counter-anchor quickly to offset the effect of the first one. It's easy to be abrupt and sound disrespectful while adopting this strategy. *For tfxample*, when asked for a 20% off on her Sunday brunch consulting services, Shambhu replied, "Actually, we have recently reassessed our costs and adjusted them for inflation. It turns out that we must increase our consulting fee by 8% to justify our risk-adjusted costs."

While the above two techniques work best when encountered with an aggressive anchor, feel free to clarify, summarize or use non-verbal cues to suggest your discomfort with the aggressive anchor as well.

Objective Criteria

This is a jargon you'll find thrown around in negotiation circles a lot. As the name suggests, an objective criterion is an independent metric that may be used to justify a proposition. Shambhu's aforementioned statement is a good example of a proposition backed by an objective criterion. Shambhu could have instead responded to a number with another. But that would have initiated a bargaining contest which would have led the discussion nowhere. An objective criterion opens up the discussion to creative solutions. At CDRC, I remember that upon discussing our reservations with offers in a round, the discussion opened up to opportunities where the parties could collaborate. We were later specifically told how the problem drafters had drafted the confidential facts in such a manner that justifying offers using an objective criterion was the only way the solution could have been reached.

In order to ensure that you always communicate the objective criterion of your proposition, think of and communicate the “why” of your proposition, in addition to the “what”. Having said that, a lot of times there is no objective criterion specified in the problem or the confidential information that may justify your proposition. In such a situation, you are allowed to construct an objective criterion, as long as it does not conflict with the rest of the facts, and does not give you an unfair advantage. Typical excuses for not moving from a position, when no objective criterion is given, are – “our calculations on a risk-adjusted costs’ basis suggest...”, “that is the minimum that I need to take back to my Board”, “to keep our numbers in the alpha, we must...” and many more. All of these are acceptable.

The Package Deal

While you may divide issues into separate points for the purposes of agenda-setting, it is important to remember that all issues are at the end of the inter-connected. The negotiation can only result in a package deal in most cases. Since the interests of the parties are inter-connected, it is only natural that this is the case. The point is: it may not be possible to separate all the issues. Thus, during the negotiation, you will have to engage in a back and forth to ensure that your interests are best met. Use your bargaining chips wisely!

Evaluation and Reality Testing

Basically when a solution is suggested that you don’t want to counter, hammer down specific details. For example: Where for quality control one party suggests a more recurrent audit, and other party is okay with it, reality testing would entail asking questions like – ‘Who would bear increased cost?’ and ‘Who would select auditor?’. This is useful, since it allows both parties to effectively assess the feasibility of the option suggested. Be warned though, this may not be useful in all cases, since the problem may be lacking in details such as these.

Accepting

Make sure that there is *consensus ad idem*, for lack of a better phrase. Make sure that you summarize the other party’s offer while accepting, so that there is a full understanding of the conclusion. Make sure that both parties agree on the issues in the same sense. It is not appropriate to renege on an agreement already made on an issue in the course of the round. Make sure, that you agree on a summary of the entire deal at the end of the round.

IX.

Breaking Impasses: Dealing with Conflict, and with Difficult Teams

You used your active listening skills. You were clear in your opening statement about what your interests were. You wanted to brainstorm solutions together, and collaboratively solve the problems that have clearly arisen in front of you. You've done everything right, but somehow, for some reason, you're getting no closer to a deal. The other side is not budging. Your offers are being thrown back into your face. It's just not working out.

Whether it's by virtue of a difficult problem, your own mistakes, or an unreasonable opposing party, impasses happen in rounds much more often than you'd expect. There exist, however, specific techniques that allow you to break these impasses. They won't work in every single case – however, the fact that you applied these techniques is in itself sufficient to gain you a lot of credibility.

I'm going to highlight the five most common real-world barriers that get in the way of a solution, and address possible ways of bringing down these barriers.

Barrier one: Your own reactionary conduct: When you're under stress, or feel you are being attacked, or if the other side is absolutely not budging, you naturally feel like fighting back. Unfortunately, this is in most cases counter-productive. All it accomplishes is the perpetuation of the action-reaction cycle that leaves both sides losers.

If you're a more conflict averse person and being attacked, you might have the opposite reaction. You might just decide that the relationship is more important than the precise commercial terms, or more likely, that you don't enjoy the confrontation, and simply give in. In this case, not only do you end up with poor terms for yourself, you also send out a clear message – you can be exploited. All that negotiate with you after will try to exploit you.

The problem here is not simply the conduct of the other side, but your own impulsive reactions.

Since the first barrier is your natural reaction, the first step involves suspending that reaction. To engage in joint problem-solving, you need to regain your mental balance and stay focused on achieving what you want.

To do this, first you need to understand what the other side is doing. If you realize the other side's tactic as a stone wall, you are less likely to believe that they are inflexible. If you realize that the other side is attacking you to push you outside your comfort zone, you are less likely to fall prey to fear and discomfort.

Additionally, recognize not only what they are doing but also what you're feeling. Recognizing your emotional reactions allows you to control your emotional reactions. If you hate being called weak and you know you hate it, you can prepare yourself to deal with it. When someone calls you weak, you can simply shrug it off. The danger lies in not realizing that you're acting impulsively, out of emotion.

You obviously can't eliminate your feelings, nor do you need to do so. You need only to disconnect the automatic link between emotion and action. Buy yourself some time – breathe, review what is happening, possibly summarize, clarify. Take the time you need to get out of the emotional reaction that's likely to lead to conflict.

Barrier two: The other side's negative emotions: The other party may not be your best friends. If there has never existed a working relationship, then there may lie fear of the unknown, fear that you will exploit them. If there was a relationship and it broke down, then the situation is almost certainly poisoned, and they will act out owing to their distrust. They may be angry; they may be fearful. And it is these negative emotions that underpin their aggression, their obduracy, their hard-balling.

To create the right climate for joint problem-solving, you need to defuse their negative emotions. To do this, you need to do the opposite of what they expect. They expect you to behave like an adversary. Instead, you should try listening to them, acknowledging their points, understanding why they feel a certain way, and show them respect.

Use your active listening skills to acknowledge what they are saying, make sure they feel like they're being heard. Listening to someone, truly listening, may be the cheapest concession you can make. People derive genuine satisfaction from voicing their feelings and resentments. When they wind down, ask if there is anything more they would like to add. Ask for clarifications. Acknowledge that you understood. Acknowledge also how they must be feeling, their emotions. Apologize where necessary. Agree to things you can agree to without making strategic concessions.

And then express your viewpoint. Emphasize commonalities, and speak as respectfully as you can. Be optimistic while acknowledging the points of difference, speak of wanting to work through them. Tone matters. The atmosphere you set matters. Tiny things like these can defuse negative emotions, and create a viable climate for negotiation.

Barrier three: The other side using positional bargaining: In joint problem-solving, you face the problem and attack it together. The barrier in the way is the other side's positional behaviour: their habit of digging into a position and trying to get you to give in. Often they

know no other way to negotiate. They are merely using the conventional negotiating tactics they first learned in the sand-box. In their eyes, the only alternative is for them to give in—and they certainly don't want to do that.

This is hard to do, however, when the other side digs into their position and tries to get you to give in. It's natural to feel like rejecting their position, but this will only lead them to dig in further. So do the opposite. Accept whatever they say and reframe it as an attempt to deal with the problem. For example, take their position and probe behind it: "Tell me more. Help me understand why you want that." Act as if they were your partners genuinely interested in solving the problem.

The name of the game here is reframing. Reframing means redirecting the other side's attention away from positions and toward the task of identifying interests and inventing creative options. Instead of rejecting their hard-line position, you treat it as an informative contribution to the discussion. Reframe it by saying, "That's interesting. Why do you want that? Help me understand what issues you're facing in this regard, and tell me why this is so important for you." The moment they answer, the focus of the conversation shifts from positions to interests.

Sometimes, if they're taking absurdly aggressive positions, you can even ask them how they would behave in your shoes, and if they say they would do what they're asking you to do, ask them how they would justify it.

Reframe stonewalls and personal attacks as dealing with the problem. If they say they won't go beyond 10%, ask them what restricts them from going beyond 10%. If they say they feel you're being unreasonable, ask them what's lead to them feeling this way, apologize, and ask them what they think could be reasonable in the circumstances. If they're speaking of past wrongs, move to what can be done in future to remedy the situation. Move beyond clear cut positions to interest based negotiation by asking the right questions, by responding in a way that is interest-oriented. Redirect attention to the problem at all times.

Barrier four: The other side being dissatisfied: Your goal may be to reach a mutually satisfactory agreement, but you may find the other side not at all interested in such an outcome. They may not see how it will benefit them. Even if you can satisfy their interests, they may fear losing face if they have to back down. And if it is your idea, they may reject it for that reason alone. You may feel like pushing them, but this will only make them more resistant. So do the opposite. You need to bridge the gap between their interests and yours. You need to help them save face and make the outcome look like a victory for them.

Negotiation is not just a technical problem-solving exercise but also a process in which the different parties must participate and craft an agreement together. You may feel frustrated that negotiations take as long as they do, but remember that people see things differently when they become involved. They may make allowances they would not otherwise make. They may become comfortable with ideas they once rejected. As they infuse their ideas into the proposal, they make it their own. So build on their ideas. Frame what you're offering on their terms, and use their language. Speak of their contribution to the idea, or how what you're offering is linked to what they said. Ask them to criticize any positive ideas you're coming up with, this invests them in your ideas.

It may be that they do agree and are on board, but need to save face. In that case, try to show how circumstances have changed, and how they can therefore budge. Use an independent assessor, which takes away the sting of either party giving in. Use an objective criteria as much as possible – it's much more difficult to criticize the same number when you know how exactly it was arrived at. If they still seem hesitant, explain to them how they can present it in the most positive light, perhaps even as a victory.

Barrier five: The other side using power plays: If the other side sees the negotiation as a win-lose proposition, they will be determined to beat you. If they can get what they want by power plays, why should they cooperate with you?

You may be tempted at this point to escalate. Threats and coercion often backfire, however, and lead to costly and futile battles. The alternative is to use power not to escalate, but to educate. Enhance your negotiating power and use it to bring them back to the table. Show them that they cannot win by themselves but only together with you.

Treat the exercise of power as an integral part of the problem-solving negotiation. Instead of seeking victory, aim for mutual satisfaction. If the other side refuses to come to terms despite all your efforts, it is usually because they believe they can win. They believe that their BATNA is better than whatever you can offer them – proving them wrong is your job.

Act as if they have simply miscalculated how best to achieve their interests. Focus their attention on their interest in avoiding the negative consequences of no agreement. Don't use power-play to impose what you want on them. Seek instead to shape their decision-making matrix, so that they make a decision that is in their interest and yours.

Attack their BATNA by asking questions which test it. Probe, and see how grounded in reality their expectations really are. Make clear the consequences of not reaching an agreement, and how that reality is much worse than the reality in which an agreement is

reached. Don't phrase any of this as a threat – instead, state it as objective reality. Not I will do this to you, but this will happen to you. Make sure emotion doesn't become part of it.

Assert your BATNA when necessary. If they're lowballing you to the point of absurdity, make clear to them that this isn't something that will work for you, that you can do better, and that this is a real choice you're willing to make. Neutralize whatever attacks they're making as well as you can, by pointing out why they won't affect you. Point out that you too have power – and point out how you aren't using it, because you want to reach a mutually beneficial solution, at the end of the day.

As you educate the other side about the costs of no agreement, you need to remind them continually of the other options you've generated for them. Don't rescind your last best offer. In fact, re-emphasize it. Nothing will do more to reduce resistance than the possibility of an attractive way out.

None of this guarantees that the impasse will break – if the other side is just unwilling to listen to reason, then the other side is just unwilling to reason. But even in those scenarios, if you do your best to break that impasse and use these techniques, you can be sure that you will not be the one to suffer when the score-sheets come out.

X.

Concluding a Negotiation

The last minute or thirty seconds of the negotiation should be reserved for concluding. Once the time is up there are three likely outcomes. Either you were able to tackle all the issues during the negotiation or you could tackle some issues in the negotiation or the negotiation went nowhere. A common advice for the second last and last scenario is that during this time no new issue should be introduced in the last minute of the round.

When the negotiation has successfully concluded: If both the teams have successfully managed to tackle all the issues in the negotiation, one of the teams, an attorney ideally should summarize the issues and the negotiated agreement for each issue.

Once this is done, thank the opposing team. If there are any agreements to be drafted, the attorneys can agree to send the same to each other at a later point.

When some issues have been resolved and some are not: If you have managed to resolve some of the issues but not all, summarize those issues which have been resolved. Then agree to meet the other party at a later date to resolve the other issues. If you have been able to reach agreements only in principal, then agree to hammer out the details of the same in the next meeting.

Once this is done, thank the opposing team. If there are any agreements to be drafted, the attorneys can agree to send the same to each other at a later point.

When none of the issues have been resolved: This is possibly the worst situation to be in. This can happen either due to bad time management or because of unrealistic expectations of the two teams.

Sum up whatever information you have gathered from the opposing party and their demands. Also summarize your own interests and positions to the other party. Conclude by agreeing to meet the other party at a later date.

Sometimes you are in the third paradigm due to no fault of your own. Maybe the other party was not bulging from their position and the time ran out. However, as long as you have shown your own skills you will be marked well and you will get a good rank.

~

Best of Luck.

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Annexure I: Negotiating on a Virtual Platform

Negotiation in an online setup involves certain unique challenges. These guidelines are meant to cover certain general points that might make the experience smoother for everyone involved in the process.

- The participants should find a suitable place for their rounds. It should be made sure by the participants that they are in a quiet location, which is preferably private and closed.
- The participants should ensure that they have a working audio-visual setup in their device for the rounds. For that purpose, the participants should have a steady camera and preferably external microphones for clear audio-visual quality. It is advisable to do a trial run of the same before the rounds.
- It is of utmost importance for the participants to have a stable internet connection. Participants are recommended to use an ethernet cable to connect to the internet in order to ensure the same. If the participants use a Wi-Fi connection, the device must be kept in close proximity to the same. Participants are recommended to run a speed test before joining the Zoom Rounds.
- When everyone's just a face on the screen, it's very hard to co-ordinate as you're not co-located with your teammate. Negotiation is all about being on the same page as your teammate. To avoid any communication gap between the teammates, the participants should discuss beforehand as to how they will privately communicate with each other during the round. It is advisable to practice using the private chat feature on Zoom (should you decide to use that!) in order to avert the risk of private conversations containing important confidential information being sent to everyone in the meeting.
- The Participants may time themselves in addition to the official time-keeper, to improve their time management.
- The participants are recommended to wear formals. However, no strict dress code will be enforced.
- In case one of the teammates drops from the call, do not panic. They must immediately attempt to re-join the meeting and the other teammate should notify the judges and the other team of the same.