

Continuing Professional Development Intensive <sup>1</sup>  
Session 1: Advanced Commercial Negotiation and  
Mediation Skills

William Lye <sup>2</sup>

*Barrister at Law, Victorian Bar*

---

## I. Introduction

It is often said that “negotiation is the art of letting others have your way.” <sup>3</sup> While this might sound opportunistic and calculated, in simplistic terms negotiation is all about persuading your counterpart to say “yes” in order to meet all of your or your client’s real interests. <sup>4</sup>

Yet, to achieve a perceived “win-win” result is easier said than done. We need, however, to remember the words of John F. Kennedy when he said: “let us never negotiate out of fear. But let us never fear to negotiate.” <sup>5</sup> The question then is: how do we become better at the negotiation game?

For the lawyer, negotiation is an inevitable part of the daily routine of running and managing a legal practice, especially when dealing with his or her staff, clients and opponents. Thus, a lawyer already has experience in negotiation. This paper, however, considers advanced negotiation concepts in the context of the commercial world where capital environment and monetary values are the dominant features. <sup>6</sup> These concepts are equally applicable in the context of a mediation process.

This paper does not, however, seek to be an exhaustive or definitive exploration of commercial negotiation and mediation skills as matters of practice are ultimately about taking a common sense approach but there are some different thinking which could be explored in order to aid the lawyer to take a more effective approach to negotiating and solving the right problem. Further, by referring to “advanced” commercial negotiation, it is not intended that this paper provide a rule based approach to negotiation.

The ideas in this paper are based on the author’s own experience and learning as a practising barrister, non-executive director, board member, facilitator, negotiator, mediator and entrepreneur.

---

<sup>1</sup> Paper presented at the Continuing Professional Development seminar organised by Leo Cussen Institute on the topic of Advanced Commercial Negotiation and Mediation Skills on 27 March 2009

<sup>2</sup> Master of Entrepreneurship and Innovation (Swin, pending), LLM (Mon), BSc (Computers), MAICD.

<sup>3</sup> This quote is attributed to Daniele Vare, an Italian expatriate who lived in China in the 1920s. Some sources referred to him as being an Italian Diplomat

<sup>4</sup> Fisher, R, Ury, W, Patton, B, 2007, *Getting to Yes: Negotiating An Agreement Without Giving In*, 2<sup>nd</sup> ed, Random House (reprint), London

<sup>5</sup> Inaugural Presidential address delivered on 20 January 1961

<sup>6</sup> Kennedy, G, Benson, J, McMillan, J, 1987, *Managing Negotiations*, 3<sup>rd</sup> ed, Hutchinson Business, pp. 138-149

## II. Negotiation styles and what works best

From the earliest induction into law school and right through professional practice, lawyers are trained to focus on the content of their argument and are skilled in putting cogent arguments across the table.

They generally don't, however, put enough thought into evaluating the underlying personality of the person they are dealing with and/or how they could deliver the argument or message creatively and effectively. Principally, the reason is that lawyers are not generally taught how to negotiate. They just do it by trial and error. Over a long period of time, there is an imprint on how negotiation is done (rightly or wrongly).

In the corporate environment, Sebenius<sup>7</sup> considered that "executives might know a lot about negotiating but still fall prey to a set of common errors". He proffered six mistakes that keep negotiators from solving the right problem. These mistakes could be summarised as follows:<sup>8</sup>

- Failing to see or neglecting the other side's problem
- Dictating price over other interests
- Pushing positions over real interests
- Searching too hard for common ground
- Neglecting to find "the best alternative to a negotiated settlement"
- Failing to correct biases and wrong perceptions

Much theory on negotiation has developed over the last 30 years and behavioural studies have emerged to describe how people actually negotiate.<sup>9</sup> In their classic book *Getting to Yes*, Fisher and Ury<sup>10</sup> was able to expound four methods on how to negotiate: separate the people from the problem; focus on interests, not positions; invent options for mutual gains; and insist on using objective criteria. The complexities of commerce, however, bring on a new kind of tension – how to create value on the one hand and how to minimise the competition claiming those values on the other hand?

While these methods are still relevant today as when it was first articulated by Fisher and Ury, times have changed with easy access to technology by emerging nations and ease of travel between continents thereby creating a hot-pot of knowledge and cultural diversity.

In order to be a more effective negotiator in today's times, it is necessary to reinforce the proposition that all negotiations must begin with understanding the individual's

---

<sup>7</sup> Sebenius, JK, 2001, "Six Habits of Merely Effective Negotiators", *Harvard Business Review*, April, pp. 87-95

<sup>8</sup> *Ibid.* at pp. 88-94

<sup>9</sup> Lax, DA and Sebenius, JK, 2006, *3-D Negotiation: Powerful Tools to Change the Game in Your Most Important Deals*, Harvard Business School Publishing, Boston, MA; Fisher, R, and Shapiro, D, 2005, *Beyond Reason: Using Emotions as You Negotiate*, Viking Penguin, New York; Bazerman, MH and Neale, MA, 1992, *Negotiating Rationally*, The Free Press, New York; Ury, W, 1991, *Getting Past No*, Bantam Books, New York; Lax, DA and Sebenius, JK, 1986, *The Manager as Negotiator*, The Free Press, New York; Raifa, H, 1985, *Art and Science of Negotiation*, Harvard University Press, Cambridge, Massachusetts; Fisher, R and Ury, W, 1981, *Getting to Yes: Negotiating Without Giving In*, Boston, Houghton Mifflin Company

<sup>10</sup> *Loc. cit.*

personality traits and culture. The goal thereafter is to acquire a new way of looking at the negotiation process in order to find and implement a sustainable solution. Ultimately, it is still a game to be played out by the parties.

## **A. Understand personality traits**

We all have preferred habits of thought that influence how we make decisions and interact with others. It is important, however, to understand the general characteristics of the different personality traits and cultural issues during the negotiation process so that the lawyer could better prepare and tailor negotiation strategies for better outcomes.

Williams and Miller<sup>11</sup> considered that there were five behavioural styles of decision making that arises after conducting research into the decision making styles of more than 1,600 executives. They are charismatics, thinkers, skeptics, followers and controllers. Their research showed that when it came to making tough decisions that required complex considerations and serious consequences people tend to resort to a single, dominant style.<sup>12</sup>

Let's consider each of these behavioural styles in turn. According to Williams and Miller, charismatics are enthusiastic, captivating, talkative, and dominant. They like new ideas but through experience they look for balanced information, not just emotions. In order to negotiate effectively with such a person, they suggest resisting the urge to join in the excitement but to focus the discussion on results. Simple and succinct arguments supported by visual aids are most effective when discussing about features and benefits of the transaction or deal.

Thinkers are more difficult to persuade. Thinkers thrive on logic and intelligent discussion. They like arguments that are validated by data. They are conservative, averse to risks and generally slow to make a decision. Negotiating with thinkers would be futile if you are not prepared with supporting data to back your argument or message. Thinkers like to see all options.

Skeptics are the naysayers. They tend to be critical and demanding. They can be destructive and argumentative. They also tend to be suspicious of anything presented to them which fall outside their viewpoint. They can be aggressive and like to take control of the situation. In order to break the barriers when negotiating with skeptics, gaining credibility prior to commencing negotiation is the key ingredient.

Followers regard precedent as paramount. They tend to be cautious and averse to risks. They like to see proven methods and value track records. When negotiating with a follower, the more success stories provided the easier it is to break down the barriers and persuade followers to embrace your point of view.

Controllers don't like uncertainties and ambiguity. They like to know the facts and analysis. They tend to be logical, objective and unemotional. Negotiating with controllers require a structured and methodical approach supported by detailed analysis. Controllers like "feasibility studies".

---

<sup>11</sup> Williams, GA and Miller, RB, 2002, "Change the Way You Persuade", *Harvard Business Review*, May, pp. 65-73

<sup>12</sup> *Ibid.* at p. 66

Williams and Miller<sup>13</sup> recognised that these categories were not meant to be labels but merely descriptive of the behaviour in each group. Although they only had five categories, from years of experience in engaging in the negotiation process, the author considers that a six category described as “Jumpers” would be apt to describe a group of people who tend to “jump” into anything that fits their materialistic viewpoint.

Jumpers tend to like excitement. They are also not risk averse. They tend to live from one opportunity to another. They are impulsive yet calculative. To them, it is all about getting the deal. Jumpers are more likely to adopt a “do first and ask later” approach. When negotiating with Jumpers, they like being presented with a “carrot” or an incentive.

There are also standard personality tests and indicators like Myers-Briggs<sup>14</sup> which could be taken to assess one’s personality traits. While it is beyond the scope of this paper to consider the various psychological preferences of how people perceive the world and make decisions, a deeper understanding of one’s own traits and that of the opponent would provide a better approach when negotiating for better outcomes.

Sun Tzu said these words as essentials of triumph:

*“Know the other and know yourself, one hundred challenges without danger. Know not the other and yet know yourself, one triumph for one defeat. Know not the other and know not yourself, every challenge is certain peril.”*<sup>15</sup>

## **B. Identify cultural connections**

Australia’s proximate geographical location to the South East Asia region gives it a unique advantage over other Western countries. For example, China was Australia’s largest two-way trading partner in 2007 for imports and exports of both goods and services.<sup>16</sup> More recently, the Australia-New Zealand free trade agreement was signed with ASEAN.<sup>17</sup> While China had dominated the media and India was a close second, it is now considered that ASEAN is Australia’s largest trading partner.<sup>18</sup>

Knowing culture and its values is therefore vital in being able to negotiate effectively. The challenge, however, of mutual understanding is vast when it comes to acting for a client who is doing cross border transactions.

Western values and culture obviously differ markedly from the Asian culture. It is often the case that Western negotiators see Chinese negotiators as inefficient, indirect and even dishonest, while the Chinese see Western, particularly American, negotiators as aggressive, impersonal and excitable.<sup>19</sup> While the above behavioural styles categorised by Williams and

---

<sup>13</sup> Williams, GA and Miller, RB, *op. cit.*, at p. 73

<sup>14</sup> Myers, IB with Myers, PB, 1995, *Gifts Differing. Understanding Personality Type*, Davies-Black Publishing. The Myers-Briggs Type Indicator (MBTI) is a psychometric questionnaire designed to measure personality types

<sup>15</sup> Wing, RL (trans), 1988, *The Art of Strategy: The Leading Modern Translation of Sun Tzu’s Classic The Art of War*, Chapter 3, Thorsons, London

<sup>16</sup> See <http://www.abc.net.au/news/stories/2007/08/31/2020938.htm>

<sup>17</sup> See <http://www.dfat.gov.au/trade/fta/asean/aanzfta/>

<sup>18</sup> See <http://business.theage.com.au/business/our-biggest-asian-trading-partner-its-not-china-20090304-8okb.html>

<sup>19</sup> Graham, JL, and Lam, NM, 2003, “The Chinese Negotiation”, *Harvard Business Review*, October, pp. 82-91

Miller<sup>20</sup> have general application, it is not easy to navigate cultural differences merely based on behavioural styles.

Understanding the roots of each culture is therefore not only necessary but essential for effective negotiation to be successful. The failure to understand the broad context of culture and values is more likely to leave parties unable to resolve their differences or obtain a favourable result.

For example, when dealing with the Chinese, there are groups of Chinese comprising of Malaysian Chinese, Singaporean Chinese, Hong Kong Chinese, Mainland Chinese, Taiwanese Chinese, Indonesian Chinese, etc. How does each culture differ in negotiation styles?

Graham and Lam<sup>21</sup> considered the Chinese culture to be rooted in agrarianism, morality, pictorial language and a wariness of foreigners.<sup>22</sup> These threads of culture might help explain the importance of a communal or collective approach adopted by the Chinese and the hierarchical importance of the rank and file amongst the Chinese. They also observed that “Chinese negotiators are more concerned with the means than the end, with the process more than the goal.”<sup>23</sup>

The Chinese also place great importance on personal connections and social status. It is not just about “who you know” but it converges to “who knows who”. Underpinning this approach is the appearance of “keeping a distance” through the use of nominees or facilitators thereby allowing the parties to build trust slowly but at the same time providing an avenue for saving face as a means of escape.

Communication is also another hurdle as the Chinese language is a pictorial language and tends to convey “layered messages” rather than straight talking. While Mandarin might be the main spoken and written language in China, there are hundreds of dialects. Reading and interpreting these subtleties and hidden meanings are essential.

Clearly, cultural differences and language have an impact on how one approaches the negotiation process. These differences arrive at truth in different ways.<sup>24</sup> It is important therefore to work out the differences, and then to find ways to benefit from that understanding.

---

<sup>20</sup> Williams and Miller, *loc. cit.*

<sup>21</sup> Graham and Lam, *loc. cit.*

<sup>22</sup> *Op. cit.*, pp 84-85

<sup>23</sup> *Op. cit.*, pp. 84

<sup>24</sup> Morrison, T and Conaway, WA, 2007, “*Kiss, Bow, or Shake Hands: Asia*”, Adams Media, Massachusetts

## C. Negotiate by persuasion

Ultimately regardless of personality types or cultural diversity, all negotiation is about the ability to persuade.<sup>25</sup> Persuasion is not about talking at someone and putting a viewpoint across. Conger<sup>26</sup> considered that “effective persuasion becomes a negotiating and learning process through which a persuader leads colleagues to a problem’s shared solution”. He proffered four essential steps for effective persuasion:<sup>27</sup>

- Establish credibility
- Frame goals to identify common grounds
- Use vivid language and images to make an impact
- Make an emotional connection

What works best in a given scenario will depend very much on the negotiator’s personality traits, understanding of culture and persuasiveness. Effective negotiators would be able to pull these threads together and bring out constructive solutions.

Having an appreciation of these concepts is the starting point. The next phase in the process is to consider how to manage resistance and break an impasse.

## III. Managing resistance and overcoming an impasse

Breaking deadlocks during a negotiation process is not necessarily a more difficult skill to acquire. Successful negotiation is about “making many small agreements along the way to a concluded resolution of the matter”.<sup>28</sup> The negotiator has to be a good listener as it takes time and patience to explore underlying issues which led to the impasse in the first place.

Malhotra and Bazerman<sup>29</sup> pointed out that by challenging assumptions and gathering critical information regarding the opponent’s perspective, it was possible to unravel the underlying cause and free up the path to a negotiated solution. They proffer an investigative detective approach to be adopted in resolving impasse. This necessarily involves asking the right type of questions.

### A. Don’t assume anything but ask “why” to determine the real reason

During a long negotiation to resolve a dispute between a property developer and its builder, the developer decided that he had enough and wanted to terminate the process. The parties were \$500 apart. Neither side was willing to concede any further.

---

<sup>25</sup> Gleeson, JT, Higgins, RCA (eds), 2008, *Rediscovering Rhetoric*, The Federation Press, Sydney, Australia

<sup>26</sup> Conger, JA, 1998, “The Necessary Art of Persuasion”, *Harvard Business Review*, May-June, pp. 84-95

<sup>27</sup> *Ibid.* at p. 87-88

<sup>28</sup> Misino, DJ, Coutu, DL, 2002, “Negotiating Without a Net: A Conversation with the NYPD’s Dominick J. Misino”, *Harvard Business Review*, October, pp. 49-54

<sup>29</sup> Malhotra, D, and Bazerman, MH, 2007, “Investigative Negotiation”, *Harvard Business Review*, September, pp. 73-78

It was not about the money. It was about who was going to make the last offer. So, there was an impasse, which could have been easily resolved by one or other of the party.

The negotiator was not going to allow the egos of the parties to resist coming to a resolution. Eventually, he found out that the developer had to leave because he wanted to see the trainer of his horse scheduled to race the next day. The negotiator asked whether or not the parties were willing to flip the coin for the last \$500. It worked and the matter resolved!

Parties tend to adopt a concrete stance when they appear to have reached a position where there was no more room to negotiate. Malhotra and Bazerman<sup>30</sup> suggested that by adopting an investigative detective approach, it was possible to unlock the solution. In the above example, the negotiator was able to find a way to resolve the impasse by understanding that the developer was likely not to be averse to playing the odds. It appealed to his sense of “fun” and removed the psychological obstacle of being the last person to make the offer.

By concentrating less on persuading the other party to accept a view point but focusing more on understanding the other party’s perspective, the seemingly obvious would emerge. The key is to ask “why” something could not or would not be done and this could give rise to unexpected answers.

## **B. Identify what is causing the blockage and help the other side solve it**

A climate change consultant was contemplating suing her former employer for wrongfully terminating her contract. The employer alleges that she had attempted to poach one of its clients and thereby terminated her contract. During the negotiation to resolve the matter, she disclosed that she had been unable to obtain meaningful employment both locally and overseas within the sector because she believed that the Managing Director had been defaming her although she could not prove it.

To the former consultant, the inability to obtain employment in her chosen field far outweighed any monetary sum she might have obtained. One possible solution to remove the blockage was to persuade the parties to jointly agree to make a public announcement to deal with the perceived blockage but without actually stipulating precisely its terms.

Effective negotiators will try to discover the constraints which might hinder a possible solution and help find ways to overcome them. Being able to read the correct signal is important because it is not often the case that one party is being unreasonable or motivated by self interest.

---

<sup>30</sup> *Ibid.* at p. 75

### **C. Find a way to save face**

In some cultures, the concept of “saving face” or “maintaining decorum” is of utmost importance. In Chinese business dealings, a person’s reputation and social status is assessed quantitatively rather than qualitatively.<sup>31</sup> It is a measure of one’s social status, intelligence, wealth and fortune.

Savvy negotiators understand this concept very well. Take the example of crisis negotiator, Dominick J Misino, where he negotiated with a young man with a loaded shotgun who had blockaded himself inside a crowded building to surrender. The gunman said that he could not surrender because it would make him look weak. Misino told the gunman that if he cooperated, Misino would make it look as if the gunman had struggled in order not to let others think that he was a coward. The gunman agreed and at the right moment the gunman came out of the building shouting and screaming. Misino learnt early as a negotiator that “if you want to win, you have to help the other guy save face”.<sup>32</sup>

Although the circumstance surrounding a hostage negotiation is very different from a commercial negotiation, the concept of “saving face” is equally applicable and is far more important at times to the resolution of deadlocks.

## **IV. How to achieve the best outcome for you and your client**

Fortgang, Lax and Sebenius<sup>33</sup> cautioned that “different parties could hold wildly divergent expectations about a deal, even when they have signed the same piece of paper.” They considered that “while experienced negotiators were comfortable in working out the terms of the economic contract, they pay little attention to the spirit of the deal.”

They proffered an approach of negotiating the spirit of the deal in order to better manage expectations. This necessarily involves knowing how to play the game, and formulating a strategy in advance to better the odds of winning the game.

The net result could be to implement an outcome that was sustainable into the future.

### **A. Know how to play the game**

Negotiation is an information game of strategy. If you do not know how to play the game, you will always lose. Therefore, it involves careful preparation, knowing the players in the game, knowing the rules of the game, having a clear goal as to how to win the game and playing the game to achieve the best outcome. While this process might seem simple enough to follow, Lax and Sebenius<sup>34</sup> uncovered barriers in three dimensions after analysing hundreds of negotiations that stood in the way of getting to “yes”. These barriers were considered to be:

---

<sup>31</sup> Williams and Lam, *loc. cit.*, p. 90

<sup>32</sup> Misino, DJ, Coutu, DL, *loc. cit.*, p. 54

<sup>33</sup> Fortgang, RS, Lax, DA, and Sebenius, JK, 2003, “Negotiating the Spirit of the Deal”, *Harvard Business Review*, February, pp. 66-75

<sup>34</sup> Lax, DA, and Sebenius, JK, 2003, “3-D Negotiation. Playing the Whole Game”, *Harvard Business Review*, November, pp. 64-74



- Tactics
- Deal design
- Negotiation setup

By tactics, Lax and Sebenius considered that the traditional way focused on the “how to” which inevitably would lead to a dogmatic approach when dealing with the personality traits and cultural issues of the people involved because it only focused on interpersonal actions. Here, the negotiator was more likely to explore the underlying emotions driving the parties, and find a way to meet those needs but is often unable to overcome an immovable position.

Having a working knowledge of tactics is important but in order to achieve a better outcome, negotiators need to be flexible in discarding the rules where appropriate, and adopt a different approach particularly when one party appears to have the upper hand or have their “hands tied”.

The second common barrier according to Lax and Sebenius was the way in which negotiators often end up designing the deal with little understanding of the true expectations of the parties. Having negotiated a deal or the resolution of a matter, there is a danger in getting bogged down by the economics of the deal or the positions of the parties. Negotiators often revert back to position bargaining and ignore the underlying interests driving the parties in the first place. The danger in attempting to clarify the economic terms would realign the parties’ own understanding of what the expectations were in the first place.

The least focused approach according to Lax and Sebenius was on designing the negotiation setup. By neglecting this third dimension, negotiators often end up negotiating with people without authority and incompatible interests. Little thought was given to this dimension because negotiators often do not see the dynamics of the relationships between different parties and/or stakeholders not present at the negotiation table. Advance preparation would separate the correct parties with authority to make decisions from those who are the wrong parties but continue to control the process.

When you are clear about the process of how to play the negotiation game, the ensuing tactics will be a natural next step in the planning process.

## **B. Design the negotiation in your favour even before you get to the table**

Lax and Sebenius<sup>35</sup> coined the concept of a 3-D negotiation strategy as a way of negotiating more effectively. Their central message was “don’t just skilfully play the negotiating game you are handed; change its underlying design for the better.”<sup>36</sup> They considered that the 3-D moves the party away from the negotiating table by changing the negotiation’s setup which would create greater value for the parties.

According to them, “successful 3-D negotiators induce target players to say “yes” by improving the proposed deal, enhancing their own BATNAs<sup>37</sup>, and worsening those of the other parties. 3-D players intend such moves mainly to claim value for themselves but also to create value for all sides.”<sup>38</sup>

The strategy here is to find a way to shift the emphasis of the negotiation. Indeed, it might be appropriate to walk away from the issues on the table and introduce a totally unexpected event or party. Examples are to introduce an outsider who might benefit from being involved in the negotiation process.

## **C. Getting past “Yes”**

Negotiation is not the destination. Implementation is what counts. Ertel<sup>39</sup> proffered five approaches to help negotiators move from a “deal maker mindset” to an “implementation mindset” as follows:

- Start with the end in mind by considering whether the deal is workable
- Help your opponent prepare to negotiate a workable deal
- Align your interests with your opponent as a shared responsibility
- Communicate the terms of the deal to stakeholders quickly
- Manage negotiation like a business process and ensure that terms are not only capable of implementation but are being implemented

By starting with the end in mind, the negotiator is able to see how far beyond that point the parties are able to go. This would necessarily involve crafting a solution which does not

---

<sup>35</sup> *Ibid.* at p. 66

<sup>36</sup> *Ibid.* at p. 67

<sup>37</sup> Acronym for “Best Alternative to a Negotiated Agreement”

<sup>38</sup> *Ibid.*

<sup>39</sup> Ertel, D, 2004, “Getting Past Yes: Negotiating as if Implementation Mattered”, *Harvard Business Review*, November, pp. 60-68

merely satisfy the immediate needs of the parties but would allow the parties to make it sustainable. By sharing these responsibilities, the parties would own the solution in a meaningful way.

Often only the immediate parties affected know of the limits of their bargain. In order to sustain the solution past the point of “yes”, there must be a “buy-in” from key stakeholders, even though it might only involved an acknowledgement that a negotiated solution was reached. By managing the negotiation process from the outset and ensuring the parties don’t just stop at the end goal of getting to “yes” but going beyond that point of signing the document to implementing a workable solution, the best outcome would have been reached.

As Ertel pointed out “the product of a negotiation is not a document, it is the value produced once the parties have done what they agreed to do.”<sup>40</sup>

## **V. The mediation process as a form of negotiation**

In today’s tough economic times, there is a lot to be said about resolving disputes and avoiding costly litigation early. However, what often prevents companies from saving time, money and the business relationship is the desire to win rather than resolve the matter and avoid litigation.<sup>41</sup>

Ultimately, it is not so much about how much one has won but it is more of a question of how much one has lost in order to win. Certainly, litigation does not produce acceptable solutions which parties could live with.

Mediation, on the other hand, is often seen as the alternative rather than a primary way of resolving disputes. Engaging in mediation therefore enables parties to resolve their own disputes with the help of a mediator. The mediation process, however, depends largely on the choice of the mediator and the parties’ personalities. Choosing a mediator not suited to the parties’ personalities and who do not have the expertise to understand the issues is more likely to lead to failure.

While mediators often play many roles: they facilitate discussions, set objectives, identify and analyse underlying problems, isolate the hidden motivations and interests and formulate various options for considerations, they are essentially engaged in negotiation.

Thus, the mediation is the application of good negotiation skills. Understanding both the technical aspects of how to negotiate and the deeper underlying issues of personality and culture are necessary if the mediation process is to be successful. These matters have already been discussed in this paper.

---

<sup>40</sup> *Ibid.* at p. 68

<sup>41</sup> Carver, TB, and Vondra, AA, 1994, “Alternative Dispute Resolution: Why It Doesn’t Work and Why It Does”, *Harvard Business Review*, May-June, pp. 120-130

There are two matters of form rather than substance which the author would like to raise for further reflection.

### **A. When to make the offer and when to sit tight – dropping the anchor approach**

If parties are to negotiate a solution to their differences, someone must make the first move. There are many occasions in which neither party are prepared to do so because of a perceived weakness by making the first move. Such an approach has also been the traditional negotiation approach.

Consider a dispute in Australia between two mainland Chinese over an alleged breach of contract. Each party want to resolve their differences but neither party is willing to make the first offer because culturally it would be taken as an admission of weakness and thereby causing one to lose face. In order to overcome the stalemate, a possible approach would be to suggest to the party to drop an “anchor”<sup>42</sup> in order to influence the terms of which the negotiation would proceed. Hammond, Keeney and Raiffa explained that “when considering a decision, the mind gives disproportionate weight to the first information it receives. Initial impressions, estimates, data anchor subsequent thoughts and judgments.”<sup>43</sup>

Galinsky<sup>44</sup> considered that by making the first move, you can gain a powerful psychological advantage as you “anchor” what might be possible during the negotiation. According to Galinsky, “high anchors draw one’s attention to an item’s positive qualities and low anchors draw one’s attention to its flaws”.<sup>45</sup> He also considered that an aggressive first offer would likely be advantageous because it would give the opponent the satisfaction of extracting concessions and possibly reach an agreement which might be better than one’s BATNA.

Thus, by anchoring early the negotiator is also able to work out the possible areas of agreement which could be explored. The first anchor dropped would place a marker on the minds of the parties and unless one is aware of its effects, the negotiation process could be skewed towards a result above where the marker was set.

### **B. Use visual aids to reinforce the point**

Anchoring also works very well when visual aids are used. Traditionally, lawyers present their cases or points of view by way of oral arguments and/or written submissions. This is a “left brain” function and appeals to logic and reasoning.

Where emotions often run high in commercial negotiation, it could be tactically advantageous in a mediation process to place an imprint on the “right brain” with key messages visually presented.

---

<sup>42</sup> Hammond, JS, Keeney, RL, and Raiffa, H, 1998, “The Hidden Traps In Decision Making”, *Harvard Business Review*, September-October, pp. 47-58

<sup>43</sup> *Ibid.* at p. 48

<sup>44</sup> Galinsky, A, 2004, “Should You Make the First Offer”, *Negotiation*, Harvard Business School Publishing, July

<sup>45</sup> *Ibid*

For example, when all parties see a “price” anchored visually through a power point presentation, it is inevitable that a reference point has been set in the mind. The psychological impact would likely be significant in steering subsequent negotiation towards the desired figure.

## **VI. Conclusion** <sup>46</sup>

Effective negotiation skills will become increasingly more important in tough economic times. People can no longer afford to litigate and will require their lawyers to help resolve their differences by engaging in friendly negotiation.

Most lawyers consider that they are able to negotiate as they have learnt the skill by experience. While experience is a great teacher in most cases, the initial imprint of a negotiation process in one’s mind inevitably leads to approaches which do not tackle the multi faceted dimensions of a parties’ dispute. Most basic negotiations involve the consideration of a one or two dimensional aspect of the problem.

Thus, negotiators need to begin any negotiation process with sufficient preparation and understand that in the end, it is a game where the person who knows how to play the game has better odds of winning if he or she was able to understand the holistic nature and dynamics of the game and therefore better able to design the negotiation setup.

The negotiator ought to consider commencing the negotiation process by looking at the individual’s personality traits and culture, including his or her own. Having a sense of awareness, the negotiator could tailor his or her strategy and use valuable skills in managing resistance and impasse. The negotiator should be able to act with less haste and listen more. The negotiator must not only persuade but design a tactical approach to reach beyond a value created outcome.

Ultimately, the skilled negotiator is one who persuades by directing the landscape in which he or she wishes the parties to take. This could be achieved by anchoring a position early in the process or using a visual approach to reinforce the message.

As Sun Tzu said:

*“A Leader who understands the advantages in the variations knows how to execute a Strategy”* <sup>47</sup>

---

<sup>46</sup> The author can be contacted at [wemlye@foleys.com.au](mailto:wemlye@foleys.com.au) for further information

<sup>47</sup> Wing, RL, *Loc. cit.*