

THE NEGOTIATOR'S ASSEMBLY LINE

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Abstract

This thesis explores how a weaker negotiating party may be able to effectively manage information as a tool to leverage power imbalances in negotiations. Although these imbalances may never be completely resolved, the effective management of information will enable the weaker party to stack their advantages in their favour to increase their chances for a fairer outcome.

The thesis will look at the management of information through the phases of gathering, processing and conveying information. It is proposed that these phases are managed by three specific professionals, the analytical investigator, the innovative inventor and the diplomatic salesperson. These archetypes personify certain attributes that a negotiator can evoke when extracting applicable intelligence from raw information to use in negotiation discussions. The intention is for raw information to be processed as applicable intelligence through these phases in an assembly-line fashion to produce options for mutual gain for the negotiating parties.

In the process of establishing this assembly line, the thesis will also explore the interplay between competitive and collaborative negotiation strategies. With this exploration, a negotiator may be able to be integrate these strategies to negotiate on both bargaining and problem-solving platforms using the Negotiator's Assembly Line.

Word length

The text of this paper (including abstract, table of contents, footnotes and bibliography) comprises approximately 49881 words.

Subjects and Topics

Negotiation-Information Management, or
Alternative Dispute Resolution-Factfinding, or
Insurance-Claims.

I Introduction

A Negotiation Issues: Preliminary Observations

1 Negotiation strategies

Negotiators have their own sets of strategies and approaches to a negotiation. To understand the motivation behind the use of these strategies, one must look to their underlying negotiation models. Although these models can be presented in myriad of combinations, Menkel-Meadow¹ and Schneider² indicate that there are essentially two main models: adversarial/competitive and collaborative, or respectively, distributive bargaining and integrative problem-solving.

Distributive bargaining includes competitive and cooperative/compromising strategies that are at different ends of the same spectrum.³ They are based on bargaining and the idea of the negotiating parties (parties)⁴ contending for limited resources,⁵ where in order for one party to win the other has to lose (a zero-sum perspective).⁶ Integrative problem-solving involves mutual-cooperation (collaboration) strategies to have the parties work together.⁷ Moreover, distributive bargaining focuses on claiming value while integrative problem-solving is about creating value.⁸ The differences between the models is known as “the competition-collaboration dichotomy”.⁹

¹ Carrie Menkel-Meadow “TOWARD ANOTHER VIEW OF LEGAL NEGOTIATION: The Structure of Problem Solving” (1984) 31 UCLA L Rev 754.

² Andrea Kupfer Schneider “Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style” (2002) 7 Harv Negot L Rev 143.

³ Donald Gifford “A Context-Based Theory of Strategy Selection in Legal Negotiation” (1985) 46 Ohio St LJ 41 at 54.

⁴ In this thesis, the term ‘party’ or ‘parties’ describes the negotiator(s) and their clients. And ‘counterpart’ is used to describe the other side’s negotiator(s) in a negotiation.

⁵ Gifford, above n 3, at 69.

⁶ I William Zartman and Maureen R Berman *The Practical Negotiator* (Yale University Press, New Haven, 1982) at 12.

⁷ Gary Goodpaster “A Primer on Competitive Bargaining” [1996] 2 J Disp Resol 325 at 327.

⁸ David A Lax and James K Sebenius *The Manager as Negotiator* (Free Press; Collier Macmillan, New York and London, 1986) at [30-33].

⁹ Gary Lowenthal “A General Theory of Negotiation Process, Strategy, and Behavior” (1982) 31 U Kan L Rev 69 at 74.

These two models have their benefits and drawbacks. Competitive strategies tend to be easier to use as they “require no preparation”.¹⁰ This however, comes at the cost of the relationship of the parties and potentially leaves unexplored value on the negotiation table. Parties experiencing another's adversarial behaviour may feel resentful at being forced to accept a less than ideal agreement.¹¹

Collaborative strategies may be harder to execute as they require more time and effort to establish trust and respect between the parties before they collaborate.¹² If the parties appear too accommodating this may raise doubts whether the negotiators are acting in the best interest of their clients. Collaboration however, may enable a greater understanding between the parties to generate better options to address each party's underlying interests.¹³

There are reservations about whether negotiators can successfully blend the models.¹⁴ The models are contradictory and on a practical level it would be difficult for parties to shift from a competitive approach to a collaborative one.¹⁵ However, it is proposed that a shift of strategies is not only possible,¹⁶ but necessary as the negotiation evolves.¹⁷ Essentially, many negotiations contain a blend of problem-solving and bargaining strategies.¹⁸

Given that competitive strategies can result in negotiations becoming adversarial, why use these strategies? An idea is that competition helps to create mutual-cooperation rather than being divisive and creating rifts.¹⁹ However, the parties that shift towards a

¹⁰ Roger Fisher, William Ury and Bruce Patton *Getting to yes* (3rd ed, Random House, London, 2012) at 153.

¹¹ Goodpaster, above n 7, at 377.

¹² Roy J Lewicki, Alexander Hiam and Karen Olander *Think before you speak* (JWiley, New York, 1996) at [65-66].

¹³ Fisher, Ury and Patton, above n 10, at [11-15].

¹⁴ Dean G Pruitt *Negotiation Behavior* (Academic Press, New York and London, 1981) at [15-16].

¹⁵ Richard E Walton and Robert B McKersie *A behavioral theory of labor negotiations* (second ed, ILR Press, Ithaca, New York, 1991) at [165-167].

¹⁶ Gerald R Williams *Legal Negotiation and Settlement* (West Publishing Co, St Paul, Minnesota, 1983) at 41.

¹⁷ Lewicki, Hiam and Olander, above n 12, at 54.

¹⁸ Stephen Hooper, Peter Spiller and Ian Macduff “Negotiation” in *Dispute Resolution in New Zealand* (Oxford University Press, Auckland, 1999) at 39.

¹⁹ Gerard I Nierenberg *The Art of Negotiating* (Barnes & Nobel, Inc, New York, 1995) at viii.

collaborative approach to generate options may also find themselves competing later to claim new value.²⁰

Although there is an assumption that strategies can be universally applied,²¹ the context of the situation inevitably dictates the methods employed by the negotiator. Rather than only investing in strategies from either a bargaining or problem-solving model,²² like all good financial portfolios, negotiators should diversify their choices.

Accordingly, negotiators should be knowledgeable in both bargaining and problem-solving methods. Having this knowledge not only helps one to identify and defend against competitive strategies, but it also enables the agility to switch between the models to choose the most appropriate strategies. This agility also enables a bespoke outcome rather than settling for 'off the rack' solutions that may not fit the client's interests perfectly.

Today, negotiation knowledge appears to have become more accessible to lay people through books²³ with anecdotal writing. The legalese and algebraic equations once associated with mainstream negotiation literature is marginalised to specialist journals for economic strategists, social scientists and law academics. From the late 1970s the adversarial nature of negotiation also began to change.²⁴

The work from programmes such the Harvard Negotiation Project²⁵ assisted in popularising integrative problem-solving methods over distributive bargaining approaches.²⁶ This in turn appears to have spurred lawyers to re-evaluate their traditional adversarial approaches to integrate more collaborative strategies into their methods. Accordingly, negotiations have become vehicles for creativity rather than pure legalism,²⁷ or economics.

²⁰ Lax and Sebenius, above n 8, at 33.

²¹ Menkel-Meadow, above n 1, at 776.

²² Lewicki, Hiam and Olander, above n 12, at 76

²³ Fisher, Ury and Patton, above n 10; Martin E Latz *Gain the Edge! Negotiating to Get What You Want* (St Martin's Press, New York, 2004); Deepak Malhotra and Max H Bazerman *Negotiation Genius* (Bantam Dell, New York, 2008).

²⁴ Gifford, above n 3, at 42; Schneider, above n 2, at [145-146].

²⁵ This programme was set up in 1979 by William Ury and Roger Fisher, for which many of the programme's academics have also contributed to the growing pool of integrative problem-solving knowledge.

²⁶ Gifford, above n 3, at 54.

²⁷ Zartman and Berman, above n 6, at 15.

2 *Power and information*

Negotiation power is dictated by various elements. Two in particular deserve acknowledgement: 1. the parties' perceptions of power²⁸ - whether power is limited or expansive, and therefore fluid over the course of a negotiation;²⁹ and 2. the dependency relationship between the parties.³⁰

If negotiations are perceived as a 'zero-sum game', negotiators will likely bargain and compete for the resources and rights they believe to be limited.³¹ The zero-sum perception will influence the parties' view of power, in that if power is seen as limited, sharing it would be a disadvantage.³² Switching to a positive-sum perception enables negotiators to accept that even if their counterpart also has power, this does not necessarily diminish their own.³³

In respect of the influence of a dependency relationship on power, how much a party is perceived to require the other will bestows a level of influence towards the more needed party.³⁴ In effect, the stronger party is the one with the better "best alternative to a negotiated agreement" ("BATNA").³⁵

As power inequality is not uncommon in a negotiation, and can be almost impossible to change,³⁶ the weaker negotiator can only try to "stack" as many advantages in their favour to improve their situation.³⁷ In particular, weaker negotiators benefit from collaborative models rather than from adversarial ones.³⁸ In seeking to collaborate, the

²⁸ Samuel B Bacharach and Edward J Lawler *BARGAINING Power, Tactics, and Outcomes* (Jossey-Bass, San Francisco, 1981) at 51.

²⁹ Garry Bellow and Bea Moulton *The Lawyering Process* (The Foundation Press Inc, New York, 1981) at 78.

³⁰ Bacharach and Lawler, above n 28, at 59; Richard M Emerson "Power-Dependence Relations" (1962) 27 *Am Sociol Rev* 31 at 32.

³¹ Zartman and Berman, above n 6, at [12-14].

³² Bacharach and Lawler, above n 28, at 67.

³³ At 92.

³⁴ At 63.

³⁵ Fisher, Ury and Patton, above n 10, at [100-104].

³⁶ At 99.

³⁷ Richard J Machowicz *Unleash the Warrior Within* (Da Capo Press/Life Long, Philadelphia, 2008) at 151.

³⁸ Dean Tjosvold and Morris Okun "Effects of Unequal Power on Cooperation in Conflict" (1979) 44 *Psychol Rep* 239 at 239.

weaker party may first look to reduce their counterpart's power advantage,³⁹ through managing the perception of the weaker party's dependence on their counterpart. However, stronger parties may feel a moral responsibility to assist their weaker counterpart.⁴⁰

To enable the above, weaker negotiators may adopt strategies that: 1. improve their status in a negotiation by demonstrating their worth to their counterpart's interests;⁴¹ and 2. assist in creating trust and mutual respect to bring on collaboration. Coupled with this, preparation is one of the keys to a successful negotiation;⁴² it involves the management of negotiation information.⁴³ Accordingly, it is proposed that the careful and methodical management of information is a way of achieving the above strategies.

Through managing information, the negotiator's goal is to attain applicable intelligence: the most accurate and relevant information to the negotiation.⁴⁴ This intelligence can assist a negotiator to evaluate a party's BATNAs,⁴⁵ to attain an understanding of the negotiation and form options to attempt to satisfy everyone's interests.⁴⁶

B Questions

The abovementioned observations raise the questions of, how can a weaker party:

- improve their negotiation power?
- shift zero-sum perceptions to positive-sum ones?
- influence their stronger counterpart to act with more moral responsibility?
- demonstrate their worth to their counterpart to improve their status in a negotiation?
- assist in creating and promulgating trust and mutual respect?

³⁹ Gifford, above n 3, at 64.

⁴⁰ Bacharach and Lawler, above n 28, at 177.

⁴¹ Jeswald W Salacuse *Real Leaders Negotiate!* (Palgrave Macmillan US, New York, 2017) at [173-175 and 184].

⁴² Michael Ross Fowler *Mastering Negotiation* (Carolina Academic Press, Durham, North Carolina, 2017) at [43-44].

⁴³ At [49-50].

⁴⁴ Anthony Manley *The Elements of Private Investigation: An Introduction to the Law, Techniques, and Procedures* (Taylor and Francis Group, Boca Raton, Florida, 2010) at 133.

⁴⁵ Fisher, Ury and Patton, above n 10, at 107.

⁴⁶ At [11-14].

- create a framework to manage information to:
 - properly evaluate the negotiation?
 - understand everyone's interests?
 - generate mutual options?
 - bargain for collaboration?

C Hypothesis

Weaker parties may be able to affect positive changes to their negotiation relationships and address power imbalances through the effective management of information. To do this, negotiators can setup a framework for methodically approaching the phases of how information is gathered, processed and utilised.

Accordingly, the thesis will explore how information can travel through various stations in a conveyer-belt fashion, where each professional at these stations play a part in refining and using the information gathered. The intention is to draw together a framework to understand how weaker negotiators can work more effectively with information through this assembly-line model, either in a team or individually.

The Negotiator's Assembly Line ("NAL") is a metaphor for viewing the relationship of the negotiator's different roles and how they interact to manage information. The different phases in the negotiation are personified in compartmentalised roles to gather and process information. Accordingly, negotiators can imbue themselves with the attributes of certain professionals whose niche talents are linked to the specific tasks of managing information. This personification of roles can also be seen in the works of Ancona and Caldwell⁴⁷ with specialist "activities" and de Bono⁴⁸ with "thinking hats".

Through the thesis author's negotiation experience, the specific roles of the analytical investigator, the innovative inventor and the diplomatic salesperson (the professionals) have been selected as the focus for the NAL. The thesis assigns these roles to the individual members of a negotiation team. This sets out a clear delineation of each role with each team member playing towards their strengths. The aim is to have these

⁴⁷ Deborah Gladstein Ancona and David F Caldwell "Beyond Task and Maintenance: Defining External Functions in Groups" (1988) 13 *Group Organ Manag* 468.

⁴⁸ Edward de Bono *Six Thinking Hats* (revised ed, Penguin Books Ltd, London, 2000).

professionals work symbiotically and seamlessly together to control the flow of information.

Ideally, the applicable intelligence refined through the NAL will be used to support bargaining and problem-solving strategies in the negotiation discussion. As more information is shared, a greater understanding of everyone's interests is gained, assisting the parties to shift from an adversarial mind-set into a collaborative one to partake in cultivating ideas to reach an agreement.

D Methodology

1 Theoretical foundation

The research will review a selection of literature to provide a theoretical foundation for the thesis. The first part of this literature review focuses on negotiation models, while the second part explores other negotiation components such as power, information and mutual cooperation. This theoretical basis provides a platform to build the NAL by providing further insight into:

- the reasons for parties to diversify their strategies;
- the rationale for the integration of competitive and collaborative strategies;
- possible obstacles to this transition;
- dynamics of relational power;
- the importance of information; and
- how mutual cooperation may be formed and maintained.

2 Building the NAL

As the topic of negotiation is inherently multi-disciplinary, this research will draw upon diverse topic areas to form the NAL framework. This framework will be shaped according to the professionals and their tasks, as follows:

- (1) The Analytical Investigator:
 - (a) Information gathering.
 - (b) Creation and refinement of the negotiation hypothesis.
 - (c) Evaluation and critical analysis of information.

- (d) Refinement of applicable intelligence from raw information.
- (2) The Innovative Inventor:
- (a) Creativity and lateral thinking.
 - (b) Fitting 'out of context' ideas with applicable intelligence.
 - (c) Generating options that dovetail the parties' mutual interests.
- (3) The Diplomatic Salesperson:
- (a) Bargaining for collaboration through persuasive communication.
 - (b) Managing the parties' relationship.
 - (c) Shepherding the process to a resolution.

E Limitations

As negotiation is more than just mastering a handful of strategies,⁴⁹ the focus of the thesis is directed towards the overarching framework for managing information. This study's brief discussions on certain negotiation tactics illustrate certain approaches that supplement the information framework. This thesis is not intended to be a one-stop repository of strategic negotiation advice. Given the necessarily limited focus of the thesis, there will not be any substantial consideration about other negotiation elements, such as culture, gender, personality traits and ethics. As the research is primarily literature-based, empirical testing may be considered at a later stage for further research.

F Testing

A case study will be used to show a basic application of the NAL; the scenario is taken from the author's work in the New Zealand insurance industry. A simplified and tailored example of an insurance claim between an insurer and its customer was chosen to demonstrate a very basic application of the NAL's framework. The study does not engage all of the NAL's elements but should allow a sample of its main ideas as a general proof of concept.

⁴⁹ Menkel-Meadow, Carrie "Legal Negotiation: A Study of Strategies in Search of a Theory" [1983] Am Bar Found Res J 905 at 936.

G Analysis

Although the NAL may not balance out the power inequalities in a negotiation, it is proposed that the NAL will, at the very least, assist weaker negotiators to improve their chances of attaining collaboration with their stronger counterparts. The thesis presents a framework to cultivate some level of fairness in an uneven negotiation. The aim is to promote a 'production line' of interlocking roles to enhance the effective management of information. This will enable negotiators to move between bargaining and problem-solving to benefit their negotiations.

II Theoretical Overview

The first half of this chapter presents an overview of basic negotiation theory. It begins with traditional distributive bargaining and takes the reader through to modern ideas of integrative problem-solving. The thesis then explores the ideas of negotiation power, mutual cooperation and information as further components of the NAL. The literature referenced in this research consists of a combination of modern and older sources. The older material, has been traced back through contemporary works that have borrowed from these original ideas, making the older sources still relevant.

A Negotiation Models

A negotiation model, in the context of this thesis, refers to how negotiators perceive the negotiation. For instance, a distributive bargaining model has negotiators vie for a fixed value, compared to an integrative problem-solving model where negotiators undertake to expand and share value. The underlying model dictates the characteristics of the strategies open to negotiators.

In this thesis a “strategy”, is the collective term for the set of specific tactics that negotiators can employ to interact with their counterpart. Negotiators using a distributive bargaining model, may utilise a competitive strategy, where they act upon a set of competitive or ‘hardball tactics’ which include snow jobs,⁵⁰ intimidation and aggressive behaviour.⁵¹

Although Lewicki, Hiam and Olander identified five ideal-type strategies to manage negotiations,⁵² others⁵³ focus on three strategy types (competing, compromising and collaborating). These strategies essentially stem from distributive bargaining and

⁵⁰ A snow job is when a party overwhelms their counterpart with “so much information” that they are unable to determine important information from less important information.

⁵¹ Roy J Lewicki, David M Saunders and Bruce Barry *Negotiation* (7th ed, McGraw-Hill Education, New York, 2015) at [71-73].

⁵² Lewicki, Hiam and Olander, above n 12, at [57-58].

⁵³ Goodpaster, above n 7; Gifford, above n 3; Pruitt, above n 14.

integrative problem-solving models. Menkel-Meadow⁵⁴ and Schneider⁵⁵ referred to these models respectively as “adversarial” and “problem-solving” approaches.

Distributive bargaining can be characterised as negotiators claiming value, while integrative problem-solving is centred on creating value.⁵⁶ To understand this value creating/claiming or competitive/collaborative dichotomy, it is useful to see them in the context of distributive bargaining and integrative problem-solving.

1 Distributive Bargaining

Distributive bargaining (“DB”) is an adversarial model where parties can adopt either competitive or cooperative compromise strategies to manage their participation in a negotiation. DB is concerned with fixed value or limited resource such as money or rights.⁵⁷

Gains are obtained from the other party’s losses, hence taking away the most value from their counterpart is the aim of competitive negotiators,⁵⁸ and presents a natural conflict between the parties’ interests. From a game theory perspective, DB is ‘zero-sum’. In other words, in order for a negotiator to gain a resource, the other side will lose the possibility of that gain (in exchange for something else), given the fixed value of what is being negotiated.⁵⁹ Taking a reductionist perspective of DB, the final outcome of most DB negotiations is predicted to lie at the midpoint between the first offers of each party.⁶⁰

In a DB model, the intention is to establish the parties’ objectives and limits (also known as reservation prices or bottom lines) to establish a “zone of possible agreement”⁶¹ or “*bargaining range*”⁶², for the parties to reach. This zone/range is the space between the parties’ bottom lines. First offers are used to establish from whose side of the bargaining range the negotiation will start. This leads to a process of offer and counteroffer and then reciprocal concessions. The responses to the offers are used to assess the objectives and

⁵⁴ Menkel-Meadow, above n 1.

⁵⁵ Schneider, above n 2.

⁵⁶ Lax and Sebenius, above n 8, at [30-33].

⁵⁷ Lewicki, Saunders and Barry, above n 51, at 35.

⁵⁸ Goodpaster, above n 7, at 342.

⁵⁹ Zartman and Berman, above n 6, at [12-14].

⁶⁰ Menkel-Meadow, above n 1, at 767.

⁶¹ Malhotra and Bazerman, above n 23, at 23.

⁶² Lewicki, Saunders and Barry, above n 51, at 38.

limits of each party. The process continues until a compromise can be reached within the zone of possible agreement, resulting in negotiators more often than not using a “‘split the difference’ solution”.⁶³ Within this structure, parties operate with competitive and cooperative compromise strategies.

Cooperative compromise (“CC”) is also a DB strategy, as both parties are still bargaining for limited value. In contrast to a competitive strategy, and similar to a collaborative one, a CC negotiator wants to be reasonable and achieve a fair outcome. Compromise is seen as either a principle or a necessity, whereas their competitive counterpart sees compromise as a requirement only if necessary.⁶⁴ The CC negotiator prioritises the maintenance of their relationship with their counterpart through accommodating their interests. Parties using CC however, may do so to their detriment as it may mean prematurely giving up value to sustain the relationship,⁶⁵ which may contradict their clients’ interests.

With DB’s competitive strategies, bargaining tactics are used to control the flow of information, enabling a competitive negotiator to gain concessions from their counterpart. Competitive negotiators may exploit their counterpart’s weaknesses through deception or forced ultimatums.⁶⁶ Often when parties want an indivisible resource or when one party’s desires are in direct conflict with the other party’s desires they will likely bargain competitively for the resource.⁶⁷ “Tough” approaches taken by competitive DB practitioners, with high levels of aspiration, can range from 1. making initial high demands and maintaining these demands throughout the negotiation process; to 2. making fewer and smaller concessions.⁶⁸

Traditionally, negotiations were seen as adversarial encounters,⁶⁹ coloured by competitive strategies and tactics. It was normal to be suspicious of one’s counterpart

⁶³ Menkel-Meadow, above n 1, at 770.

⁶⁴ Goodpaster, above n 7, at 327.

⁶⁵ At 371.

⁶⁶ Lewicki, Saunders and Barry, above n 51, at [69-70 and 547-548].

⁶⁷ Goodpaster, above n 7, at 328–329.

⁶⁸ Ian E Morley and GM Stephenson *The Social Psychology of Bargaining* (G Allen & Unwin, London, 1977) at 83.

⁶⁹ Menkel-Meadow, above n 1, at [764-765].

especially if the objective was to take everything on the negotiation table.⁷⁰ The tendency for parties to partake in competitive approaches may be linked to the point that negotiators have tended to be lawyers, as “[n]egotiation is central to lawyering.”⁷¹ Given that lawyers are trained to work in “the adversarial nature of [the] judicial system”,⁷² they may find it natural to gravitate towards DB.

Gifford stated that “most of the early texts used in law schools to teach negotiations focused on the “competitive strategy” and, at least implicitly, endorsed such a strategy.”⁷³ Schneider observed that “adversarialism” is reinforced from the first year of law school, in not only what is taught, but how it is taught. In particular, adversarial court cases are used in lessons, reinforcing the view of the law profession being combative. Moreover, the engagement in class between lecturer and student, through the Socratic method can become confrontational.⁷⁴

There is little guidance on what behaviour is acceptable in a negotiation; this may justify the use of morally ambiguous practices akin to those found in DB. The lawyer’s “duty to zealously represent” is also looked upon to mean that they “should negotiate by any means possible”. Although there are ethical rules against fraud, it appears that other adversarial tactics such as exaggeration and ‘puffing up’ claims is permitted and not discouraged.⁷⁵ Acting in this way is in line with the client’s expectations of their lawyer being their “gladiator”; locking lawyers into a competitive mind-set with little option but to “fight exhausting distributive battles”.⁷⁶

Individual negotiation styles, developed through a negotiator’s personality, experience and training, may also play a significant part in their choice of strategies. The research of Siegel and Fouraker demonstrated that the personal characteristics of the

⁷⁰ Lewicki, Hiam and Olander, above n 12, at 66.

⁷¹ Robert H Mnookin, Scott R Peppet and Andrew S Tulumello *Beyond Winning* (Belknap Press of Harvard University Press, Cambridge, (Mass), 2000) at 3.

⁷² At 3.

⁷³ Gifford, above n 3, at 42.

⁷⁴ Schneider, above n 2, at [146-147].

⁷⁵ At 147.

⁷⁶ Mnookin, Peppet and Tulumello, above n 71, at 95.

negotiators were the main determinant of a differential payoff between the parties.⁷⁷ Personal qualities such as “toughness... and related psychological attributes” may be important factors in setting the negotiation outcome.⁷⁸

Harnett, Cummings and Hamner showed that tough negotiators who made infrequent concessions, demands and counter demands obtained higher payoffs than their softer counterparts who made frequent concessions.⁷⁹ Accordingly, the prospect of increased payoffs may motivate negotiators towards the use of competitive or ‘tough’ strategies.

Goodpaster suggested three reasons why parties bargain competitively. Firstly, the negotiator’s perception of a negotiation may be to view it as a zero-sum exercise. Secondly, adversarial bargaining is due to negotiators not trusting one another and seeing the need to withhold information. Thirdly, adversarial tactics can be brought on as a defence or retaliation to competitive moves made against a party.⁸⁰

Competitive strategies however, are useful in circumstances requiring value to be claimed, or in “single deal” negotiations.⁸¹ DB may also be useful for the following: evidentiary rulings in criminal cases, sentencing, constitutional issues, duty of liability, contract interpretation, libel, some environmental issues and procedural rulings.⁸²

The drawbacks of DB are also clear that when used in situations that are more than just zero-sum, negotiators miss opportunities by accepting “less than optimal solution[s]”. By “failing to exploit differences in value” negotiators risk leaving options for greater gain unexplored on the negotiation table.⁸³ Using competitive strategies in the wrong context (such as non-zero-sum negotiations) is as ineffective as hammering a screw.

Juxtaposing this analogy with negotiations, hammering in a screw is doable and eventually achieves the underlying task at hand. However, not only does one waste energy

⁷⁷ Sidney Siegel and Lawrence E Fouraker *Bargaining and group decision making* (Greenwood Press, Westport, Conn, 1977) at 69.

⁷⁸ At 52.

⁷⁹ D Harnett, L Cummings and W Hamner “Personality, bargaining style and payoff in bilateral, monopoly bargaining among European managers” (1973) 36 *Sociometry* 325 at [342-343].

⁸⁰ Goodpaster, above n 7, at [341-342].

⁸¹ Lewicki, Saunders and Barry, above n 51, at 36.

⁸² Menkel-Meadow, above n 1, at 786.

⁸³ At 793.

hammering their positions to their counterpart, the underlying veneer of the relationship ends up cracked, split beneath the joins and the damage is irreversible. In the negotiation's post-mortem, DB may be seen as inefficient or even unprofessional.

Fisher, Ury and Patton suggested that DB strategies are easier than using integrative problem-solving strategies. This is because DB "is universally understood..., and in some contexts it is entrenched and expected."⁸⁴ Lewicki and Hiam suggested that DB is "frequently used by inexperienced or untrained negotiators who believe that competition is the only way to negotiate. These negotiators miss opportunities by automatically selecting competition"⁸⁵ And when negotiators use DB tactics out of context, it can be "counterproductive, costly and may not work".⁸⁶

At the adversarial end of the DB spectrum, competitive or 'tough' negotiators may adopt more combative strategies to psychologically move against their counterpart, through manipulation and intimidation. These tactics may consist of bluffs, exaggerated claims, threatening behaviour, spurious allegations against the counterpart, which reduces their confidence and minimises their expectations of what they can claim in the negotiation. This manufactured tension and pressure may ultimately force the counterpart to submit to the demands of the competitive negotiator.⁸⁷

Competitive negotiators' 'toughness' may also perpetuate tension and mistrust, distort the communication between the parties and result in the breakdown of bargaining.⁸⁸ This may be due to the parties reciprocating the competitive behaviour, hence continuing the cycle of adversity. Parties that capitulate under the pressure, may also be resentful later, away from the negotiation table. Because of this, parties may not follow through on their compromises, which may prompt antagonistic behaviour in future engagements,⁸⁹ creating ineffective negotiations.

⁸⁴ Fisher, Ury and Patton, above n 10, at 153.

⁸⁵ Roy J Lewicki and Alexander Hiam *Mastering Business Negotiation* (2nd ed, Jossey-Bass, San Francisco, 2006) at 88.

⁸⁶ Lewicki, Saunders and Barry, above n 51, at 36.

⁸⁷ Williams, above n 16, at 49.

⁸⁸ At 50.

⁸⁹ Menkel-Meadow, above n 1, at 778.

Ineffective negotiations are also counterintuitive to a lawyer's "superior opportunity to do good" by efficiently assisting people to getting "fair and durable commitments".⁹⁰ A negotiator would be remiss in not exploring strategies to gain more efficient and/or effective solutions outside of the DB model.

Overall, a competitive process may cause parties to miss opportunities as certain information may not be communicated.⁹¹ Zartman and Berman therefore suggested that "[t]he core of the negotiation process is the transformation of zero-sum situations and attitudes into positive-sum solutions and approaches",⁹² such as the ones seen in integrative problem-solving.

2 *Integrative Problem-Solving*

From the late 1970s more academics and legal practitioners found the results of DB to be inefficient or ultimately unsatisfactory. Given that the processes used to achieve these outcomes were perceived to do more harm than good, people began to look at DB alternatives, such as integrative problem-solving ("IPS").⁹³ As described earlier, IPS moves away from limited resource-based bargaining to a more collaborative approach, focusing on the quality of the agreement and the efficiencies in reaching this.

IPS is based on a positive-sum perspective, in which gains are not achieved at the expense of the other party. Accordingly, "self-interested manoeuvres" and covert motives used by negotiators to "stake out favourable positions", and contend for advantage,⁹⁴ are not characteristics of an IPS model. The aim of IPS is not necessarily to claim all the value of the negotiation, or defeat one's counterpart, but to collaboratively satisfy their underlying interests.

Gulliver looked at shifting the orientation of negotiators in their interactions, from 'separate' and 'antagonistic' to 'coordinated' and 'mutually cooperative'. The shift may be gradual as the parties narrow their differences and understand more about their dispute and

⁹⁰ Mnookin, Peppet and Tulumello, above n 71, at 3.

⁹¹ Menkel-Meadow, above n 1, at [775-776].

⁹² Zartman and Berman, above n 6, at 12.

⁹³ Gifford, above n 3, at 42; Schneider, above n 2, at [145-146]; Menkel-Meadow, Carrie, above n 49, at 936.

⁹⁴ Lax and Sebenius, above n 8, at 10-11.

the other party. In doing so, the negotiation moves from being a positional conflict to being an outcomes-based forum.⁹⁵

It was through the first publication of the seminal book of Fisher, Ury and Patton, *Getting to YES*⁹⁶ in 1981, that IPS had found its vehicle to achieving “widespread attention”.⁹⁷ This thesis acknowledges that *Getting to YES* advocates for a principled variant of IPS. In this research, IPS is referred to as being inclusive of the principled variant’s methodology.

In IPS negotiations, people and their personalities are separated from the problem, and situations are reframed to focus on underlying interests rather than on the parties’ positions. Once the parties are able to focus on the interests at issue, both parties can work together to generate a variety of options and possibilities for mutual gain and based on an “objective standard”.⁹⁸

Bartos stated that “negotiations proceed smoothly only as long as they are guided by the collectivistic desire for fairness”.⁹⁹ This aligns with the idea that negotiations should have objective standards of fairness, as “**principled negotiation produces wise agreements**” that are “consistent with precedents” and “less vulnerable to attacks”.¹⁰⁰

Independent standards are also important to multi-party negotiations, particularly with coalitions which have firm positions. The more parties have invested in a position, the harder it is for them to shift. Hence an objective criterion assists parties to shift perspectives from positional bargaining to talk about “possible standards and solutions”.¹⁰¹

In order for IPS to achieve optimal outcomes, “both” parties have to buy into the idea of collaboration.¹⁰² Osgood indicated that a non-competitive strategy is less effective

⁹⁵ PH Gulliver *Disputes and Negotiations: A Cross-Cultural Perspective* (Academic Press Inc, Orlando, Florida, 1979) at 141.

⁹⁶ Fisher, Ury and Patton, above n 10.

⁹⁷ Gifford, above n 3, at 54.

⁹⁸ Fisher, Ury and Patton, above n 10, at [11-14].

⁹⁹ Otomar J Bartos “Simple Model of Negotiation: A Sociological Point of View” in I William Zartman (ed) *The Negotiation Process: Theories and Applications* (Sage Publications, Beverly Hills, Calif, 1978) at 13.

¹⁰⁰ Fisher, Ury and Patton, above n 10, at 84.

¹⁰¹ At 84.

¹⁰² Lewicki, Hiam and Olander, above n 12, at 65.

if the other party chooses a competitive model.¹⁰³ Having only one party attempt to collaborate, would make them “vulnerable to exploitation” from a counterpart that employed competitive tactics.¹⁰⁴ This would also throw the efficiency of the negotiation ‘out of sync’, similar to rowing a row boat with only one oar:¹⁰⁵

To achieve forward motion and move ahead in your journey, each must row in synchronization, and with equal effort. If you do this, the rowboat will glide forward through the water. If, however, there is an imbalance between the rowers, the boat will move in a circle, rather than making true progress.

Therefore, to get both parties working in unison may initially be challenging and hard work, but if mutual cooperation is established and maintained, the joint decision made would be highly rewarding.

In the context of nuclear disarmament, Osgood advised that “success in negotiation requires awareness of the greater threat, a trust in the essential humanity of the enemy, and hence a willingness to compromise”.¹⁰⁶ Focusing on the latter two, a psychological block to successful negotiations may relate to “the distrust in agreements”.¹⁰⁷ Therefore, parties must engage in trust, openness and cooperation, particularly to focus on common objectives to engage in mutually supportive behaviour to achieve their objectives. In contrast to DB, this means that information should be shared through open and accurate communication.¹⁰⁸

An integrative outcome requires “a degree of coordination and trust between the parties”, and if successful, produces coordination and reduces “competitive rivalry” between the parties.¹⁰⁹ Fisher, Ury and Patton discussed the importance of parties getting

¹⁰³ Charles E Osgood *An Alternative to War and Surrender* (University of Illinois Press, Urbana, Illinois, 1962) at [82-84].

¹⁰⁴ Gifford, above n 3, at 59.

¹⁰⁵ John Mark Green “Rowing A Boat With One Oar” (20 April 2016) Thought Catalog <<https://thoughtcatalog.com/john-mark-green/2016/04/rowing-a-boat-with-one-oar/>>.

¹⁰⁶ Osgood, above n 103, at 76.

¹⁰⁷ At 82.

¹⁰⁸ Lewicki, Hiam and Olander, above n 12, at 65.

¹⁰⁹ Gulliver, above n 95, at [150-151].

past their positions to explore their underlying interests. Interests define the problems, which in turn reveals “each side’s needs, desires, concerns, and fears”.¹¹⁰

The purpose of uncovering everyone’s interests is to reveal not only conflicting interests but also “**shared and compatible**” ones. This enables both parties to work with more details to craft solutions that may be acceptable to all parties,¹¹¹ especially to explore possible options for mutual gains. This allows more quality agreements and shifts the negotiation away from merely splitting the difference.

Despite IPS’s advantages, Gifford questioned IPS’s universal applicability,¹¹² contrary to the thoughts of Fisher, Ury and Patton on how widely IPS can be applied.¹¹³ Also, following the first publication of *Getting to YES*,¹¹⁴ certain academics¹¹⁵ raised questions about the supremacy of its methodology, especially about how realistic its applicability was in all cases, the way how it neglects DB issues and over simplifies the inherent problems in respect of power.¹¹⁶

Fisher accepted that there are differences between various negotiation processes, and confirmed that *Getting to YES*, was “looking for common concepts and a common structure that apply across the board”.¹¹⁷ The approach of that book was not meant to provide a perfect theory to resolve all negotiation issues. Menkel-Meadow also stated that although problem-solving has its own limitations, and although it will not solve all negotiation dilemmas, problem-solving still offers “a potentially more systematic and effective way of thinking about negotiations.”¹¹⁸

When deciding whether to choose the IPS model, Gifford suggested that the negotiator should consider the “[n]ature of the [n]egotiation”, and whether there are

¹¹⁰ Fisher, Ury and Patton, above n 10, at 42.

¹¹¹ At [44-45].

¹¹² Gifford, above n 3, at [56-57].

¹¹³ Fisher, Ury and Patton, above n 10, at xxvii.

¹¹⁴ Fisher, Ury and Patton, above n 10.

¹¹⁵ Russell Korobkin “Essay: Against Integrative Bargaining” (2008) 58 Case W Res L Rev 1323; William McCarthy “The Role of Power and Principle in Getting to Yes” (1985) 1 Negot J 59; James J White “The Pros and Cons of Getting to YES” [1984] 34 J Legal Educ.

¹¹⁶ McCarthy, above n 115, at [63-66].

¹¹⁷ Roger Fisher “Beyond Yes” (1985) 1 Negot J 67 at [69-70].

¹¹⁸ Menkel-Meadow, above n 1, at 830.

positive-sum aspects in the negotiation to draw upon. For example, if the context is a zero-sum situation and the surrounding factors are also suggestive of non-competitive strategies, then a CC bargaining approach may be more appropriate than a collaborative or a competitive one.¹¹⁹

Lowenthal noted that the more issues contained in the negotiation agenda, the greater the opportunity for collaboration. Having more issues of relative value to each party, enables further possibilities for exchanges or trades between the parties; these types of trades are referred to as “log rolling”.¹²⁰

As well as being able to log roll issues, there must also be a motivation to maximise joint benefits for all the parties. The motivation to undertake IPS can be gauged from certain factors, which may be discovered in the negotiation preparation and/or throughout the course of the negotiation discussions. Accordingly, IPS is recommended when:

- (1) the bottom lines and levels of aspiration (the parties' goals) in a negotiation are both high;
- (2) all parties have a high-level of power and can inflict harm on one another; and
- (3) there is a lack of pressure/deadlock, in which the parties have more time to explore possibilities.¹²¹

Due to IPS's effectiveness, parties may choose it over DB. The study of Schneider provides further insight into the effectiveness of problem-solving versus adversarial approaches.¹²² Schneider's study updated Williams' 1976 research on the perception of the effectiveness of negotiating lawyers. Williams focused specifically on whether lawyers adopted competitive or cooperative approaches and their perceived effectiveness.¹²³

¹¹⁹ Gifford, above n 3, at [69-70].

¹²⁰ Lowenthal, above n 9, at [96-97].

¹²¹ Gifford, above n 3, at [70-71].

¹²² Schneider, above n 2.

¹²³ Gerald R Williams “Style and Effectiveness in Negotiation” in Lavinia Hall (ed) *Negotiation Strategies for Mutual Gain: The Basic Seminar of the Program on Negotiation at Harvard Law School* (Sage, Newbury Park, Cal, 1993) 151 at [155-157].

Williams' research used the descriptor of "cooperative" as a catchall for compromising and collaborative strategies; this was contrasted against "competitive" lawyers. In 2002, Schneider redefined this as the dichotomy between "adversarial" and "problem-solving" strategies. This was an attempt to correct the "label confusion" that was becoming apparent in the growing negotiation literature. Schneider appears to attribute the origin of the label confusion to Williams' study.¹²⁴

Despite there being a greater number of sample lawyers categorised as more cooperative than competitive, Williams found that there was little difference in effectiveness between competitive and cooperative practitioners, and a person's strategy was more dependent on their personality and experience.¹²⁵ Effective negotiators who used either a competitive or cooperative approach were:

- prepared on the facts and law;
- observed customs and courtesies of the bar;
- took satisfaction in using legal skills; and
- effective trial attorneys and self-controlled.¹²⁶

A quarter century later, Schneider's study noted a shift from Williams' observations. Schneider found that the gap between the effectiveness of problem-solving and adversarial approaches had widened. Adversarial lawyers appeared to have grown "more extreme and more negative" and found to be more irrational, stubborn and unethical, and as a result were less effective.¹²⁷

Alternatively, problem-solving negotiators were perceived as more effective,¹²⁸ particularly when looking at those labelled as true problem-solvers who were seen to be more empathetic (communicative, accommodating, perceptive and helpful), personable (agreeable and poised), prepared (fair minded, realistic and astute about the law) and able to generate more options (adaptable and flexible).¹²⁹ Overall, two-thirds of lawyers

¹²⁴ Schneider, above n 2, at [150-152].

¹²⁵ Williams, above n 16, at 41.

¹²⁶ Williams, above n 123, at 159.

¹²⁷ Schneider, above n 2, at 196.

¹²⁸ At 196.

¹²⁹ At 175.

engaged in non-adversarial communication, and were perceived as highly effective by their peers.¹³⁰

Lax and Sebenius surmised that negotiations are likely to be more successful when they are more “integrative”.¹³¹ However, obtaining a fully integrative relationship between the parties may be challenging, especially when the parties retain the perception of negotiations being zero-sum debates as opposed to collaborative workshops. This begs the question whether it would be possible to meet half way with the DB and IPS models? Can negotiators maintain some respectful competitiveness (with less stubborn and unethical adversarial traits), as well as adopting a problem-solving approach?

3 *Integrating DB and IPS*

In the principled approach¹³² of Fisher, Ury and Patton, competition does not appear to play a part in problem-solving, particularly where collaborative parties work together to reach an amicable agreement. Some academics¹³³ however, still consider IPS as a type of bargaining strategy, rather than its own independent negotiation model. For example, Karrass identified problem-solving as one of five negotiation processes, in which the remaining four revolved around bargaining.¹³⁴

Pruitt explained that negotiations eventually and progressively transition from a competitive stage to a coordinative one. After both parties attempt to establish their positions, they must work together if they are to move beyond any deadlock. Ambitions are mutually reduced as realism sets in, and trust is also produced as parties recognise that expectations have been lowered. Here, the negotiation would have likely reached a critical juncture, one in which the parties signal their interest in coordination and mutual collaboration.¹³⁵ Gifford stated that at this stage, parties are psychologically ready to trade

¹³⁰ At 186.

¹³¹ Lax and Sebenius, above n 8, at 115.

¹³² Fisher, Ury and Patton, above n 10, at [11-15].

¹³³ Gifford, above n 3; Pruitt, above n 14; Walton and McKersie, above n 15.

¹³⁴ Chester L Karrass *The Negotiating Game* (revised edition ed, Harper Collins Publishers, Inc, New York, 1992) at 128.

¹³⁵ Pruitt, above n 14, at [133-134].

concessions or engage in problem-solving.¹³⁶ Accordingly, there appears to be some benefit in the bargaining process, and therefore value in competitive strategies.

Although the general utility of competition will be explored later in this chapter, it may be worth noting the specific value of competition earlier on in a negotiation. Competition is important at this early stage of the negotiation, as information about values and priorities underlying the initial demands is obtained from the bargainers.¹³⁷ Pruitt suggested five functions of early competition:

- (1) gives the appearance of a negotiator working vigorously on their client's behalf, offsetting any impression of disloyalty by participating in a coordinative approach;
- (2) clarifies the parties' goals;
- (3) shows the extent of the other party's willingness for concessions (an agreement is unlikely to conclude until such testing has been done, as parties may wonder whether more could have been achieved through competitive posturing);
- (4) demonstrates the firmness of major goals, and the parties will remain in the competitive stance until it seems unlikely there are any further unilateral concessions; and
- (5) narrows the range of possible outcomes to the point where large (perceived) divergences of interest do not exist between the parties.¹³⁸

Gulliver suggested that in order for parties to produce integrative outcomes, it is not necessary to subtract competitiveness from the equation. However, as parties begin to minimise their differences, they come to control themselves more carefully as to not upset or halt the reorientation towards a collaborative agreement.¹³⁹ However, IPS may be subject to competitive moves at a later stage where there may be a need to claim value after it is created.¹⁴⁰

¹³⁶ Gifford, above n 3, at 58.

¹³⁷ Pruitt, above n 14, at 135.

¹³⁸ At 135.

¹³⁹ Gulliver, above n 95, at 151.

¹⁴⁰ Walton and McKersie, above n 15, at [165-167].

The dilemma is that “[n]o matter how much creative problem solving enlarges the pie, it must still be divided; value that has been created must be claimed.”¹⁴¹ Therefore there is an “inescapable tension” between the parties undertaking joint ventures in expanding the value, and the competitive move to assert ownership of it. As this affects the parties’ decisions, they have a responsibility to manage this tension.¹⁴² A problem with the bargainer shifting from creating value to claiming it is that “precisely what one has revealed in discussing the item in order to establish the greatest joint gain can weaken his position in bargaining over the shares of that gain.”¹⁴³

Competitive tactics can also impede the forming of new value, especially as excessive use of competitive strategies diminish trust between the parties. The exaggeration of values and concealment of information prevents the flow of relevant data for discovering beneficial trade-offs for agreement. Consequently, “[m]oves to claim value thus tend to drive out moves to create it”.¹⁴⁴

Walton and McKersie labelled the use of DB and IPS together as “mixed bargaining”, and stated that the cooperative elements in a mixed situation needed more care than in pure IPS situations, as there is still a level of competition. They doubted whether a negotiator could shift easily from IPS to DB. It would be easier for negotiators instead to maintain a consistent orientation throughout the negotiation, where at least they can gain a minimum level of satisfaction in DB.¹⁴⁵

However, similar to Pruitt, Gulliver saw the procedural dynamics of negotiations as a natural progress between competitive and mutually cooperative strategies. In a negotiation, there appears to be “a general trend in which antagonism diminishes, without necessarily disappearing, coordination grows without becoming perfect.”¹⁴⁶ Gulliver’s idea is useful when factoring in both competitive and collaborative stages into the assembly-line framework of the thesis. Having established the general context of the negotiation models for the NAL, the thesis now considers ideas of power dynamics in negotiations.

¹⁴¹ Lax and Sebenius, above n 8, at 33.

¹⁴² At 30.

¹⁴³ Walton and McKersie, above n 15, at 166.

¹⁴⁴ Lax and Sebenius, above n 8, at [34-35].

¹⁴⁵ Walton and McKersie, above n 15, at 167.

¹⁴⁶ Gulliver, above n 95, at 182.

B Power

1 What is negotiation power?

Negotiation power (“power”) can be perceived as negotiators imposing their strength on one another, however, viewing power as being purely coercive is too limited to be helpful.¹⁴⁷ In the broadest sense, power refers to “the capabilities negotiators can assemble to give themselves an advantage or increase the probability of achieving their objectives”.¹⁴⁸ Paring this down, power is also “*the ability of a negotiator to influence the behaviour of an opponent*”.¹⁴⁹

Fisher, Ury and Patton saw power as “the ability to persuade someone to do something”; this would depend “on whom you are trying to persuade and what you want them to do.”¹⁵⁰ However, given the vastness of the power concept, it is difficult to generate a general description to properly encapsulate its qualities in every situation. Therefore, a useful discussion of power should look at the propositions about the specific forms of power.¹⁵¹

Power can be seen as “objective”¹⁵² or “absolute”¹⁵³. It can be related it to the environmental advantages or the characteristic of the parties, such as possessing superior skill, authority or more advantageous resources. Having these attributes however, does not necessarily guarantee power as other factors may diminish or negate the perceived advantages.¹⁵⁴ Therefore, it is too restrictive to treat power as “an absolute, abstract entity”¹⁵⁵ relating to the attributes of a person or a group¹⁵⁶. When one party has power, one has to ask ‘over whom?’ and ‘why?’. On this basis, Emerson suggested that power is

¹⁴⁷ Lewicki, Saunders and Barry, above n 51, at 258.

¹⁴⁸ At 256.

¹⁴⁹ Bellow and Moulton, above n 29, at 22; Pruitt, above n 14, at 87.

¹⁵⁰ Fisher, Ury and Patton, above n 10, at 182.

¹⁵¹ Pruitt, above n 14, at 87.

¹⁵² Bacharach and Lawler, above n 28, at [48-52].

¹⁵³ At 65.

¹⁵⁴ Lax and Sebenius, above n 8, at 249.

¹⁵⁵ At [249-250].

¹⁵⁶ Emerson, above n 30, at 31.

linked to social relations.¹⁵⁷ This link reflects the importance of the negotiator's perception of these relations.

Bellow and Moulton saw power as “subjective”¹⁵⁸ as it could be formed by the interplay and balancing of factors such as rewards, punishments, legitimacy, commitment, knowledge, competition, uncertainty and courage, time and effort, and bargaining skill.¹⁵⁹ For Fisher, the “categories of power” included the abovementioned factors of skill and knowledge, legitimacy, and commitment. Fisher also added as power categories: “a good relationship”; “a good alternative to negotiating”; and having “an elegant solution”.¹⁶⁰

During the course of a negotiation, power does not remain static as it is perpetual¹⁶¹ and therefore can be “relational” in accordance with the parties' dependence on each other.¹⁶² The malleability of the “perception of power”¹⁶³ is a useful construct, especially for the assembly-line idea of the thesis.

Power is also “self-fulfilling”,¹⁶⁴ as a party has power if their counterpart perceives that party as having power. The projection of the “impression of power” may be as important, if not more important, than the actual advantage that a party may have.¹⁶⁵ Parties therefore, attempt to shape and control each other's perceptions of their power, which sparks a need to carefully manage that perception or impression.

Impression management can be either sincere in which parties attempt to inform the other of their actual power, or it can be manipulative, where a party seeks to mislead the other about their BATNAs.¹⁶⁶ By managing impressions parties can use uncertainties and ambiguities to their advantage,¹⁶⁷ however, this may lead to an artificial power imbalance.

¹⁵⁷ At 32.

¹⁵⁸ Bacharach and Lawler, above n 28, at [48-52].

¹⁵⁹ Bellow and Moulton, above n 29, at [22-25].

¹⁶⁰ Roger Fisher “Negotiating power: Getting and Using Influence” (1983) 27 Am Behav Sci 149 at 153.

¹⁶¹ Bellow and Moulton, above n 29, at [78-79].

¹⁶² Goodpaster, above n 7, at 335.

¹⁶³ Pruitt, above n 14, at 89.

¹⁶⁴ Lewicki, Saunders and Barry, above n 51, at 261.

¹⁶⁵ Bacharach and Lawler, above n 28, at 51.

¹⁶⁶ Goodpaster, above n 7, at 336.

¹⁶⁷ Bacharach and Lawler, above n 28, at 51.

The “dependence relationship”¹⁶⁸ between negotiating parties is an important aspect of power, and sees power being derived from social relations which “commonly entails ties of *mutual dependence* between the parties”.¹⁶⁹ The degree to which parties are willing to depend on one another to reach their goals is important.¹⁷⁰ Therefore, negotiations arise through “[t]he joint desirability of convergence”,¹⁷¹ where there is also an expectation that the negotiators’ interests would be better served by a joint decision than by their individual BATNAs.¹⁷²

Implicit in the parties’ mutual dependence, is a zone of possible agreement. Within this zone however, there is also the prospect of conflict, strategic manoeuvring or opportunistic interaction.¹⁷³ It is the ongoing task for parties to establish where the balance of power lies¹⁷⁴ and how their differences affect their collective circumstances.¹⁷⁵

Dependency between negotiators is often ambiguous, and this perception of dependency can be manipulated during a negotiation.¹⁷⁶ Accordingly, power is relative to the balance of the dependence and interdependence of the parties. Power can be switched between parties by having an alternative way of getting what one wants without the other.¹⁷⁷ This highlights the paradox that the less a party needs agreement, the more likely they are to get agreement on their own terms and therefore wield more power.¹⁷⁸

Fisher, Ury and Patton stated that the better a party’s BATNAs, the greater their power.¹⁷⁹ As BATNAs are prone to shrink and grow through the course of the negotiation, it is important for parties to closely scrutinise not just their own BATNAs,¹⁸⁰ but also to

¹⁶⁸ At 59.

¹⁶⁹ Emerson, above n 30, at 32.

¹⁷⁰ Goodpaster, above n 7, at [334-335].

¹⁷¹ Lax and Sebenius, above n 8, at 23.

¹⁷² At 243.

¹⁷³ At 23.

¹⁷⁴ Goodpaster, above n 7, at 334.

¹⁷⁵ Bellow and Moulton, above n 29, at 78.

¹⁷⁶ Bacharach and Lawler, above n 28, at 59.

¹⁷⁷ At 63.

¹⁷⁸ Bellow and Moulton, above n 29, at 78.

¹⁷⁹ Fisher, Ury and Patton, above n 10, at 104.

¹⁸⁰ At [101-103].

deduce their counterpart's BATNAs as well.¹⁸¹ Moreover, a negotiator may be uncertain about their counterpart's commitments to their BATNAs, the cost(s) of acting upon them, or the criteria under which they may have been assessed. This uncertainty adds to the parties' overall lack of understanding of each other's actual dependency on one another.¹⁸²

Bacharach and Lawler cautioned however, not to treat power exclusively in relative terms, as it neglects the importance of 'absolute' and 'total' power as separate constructs. This leads to a failure to distinguish 'relative' power from the total power of the parties' relationship and relative power from the absolute power of a given party.¹⁸³ This then results in a negotiator perceiving power as zero-sum, similar to DB being zero-sum in its perceptions of gains and losses.

Taking a step back, absolute power, is the power of an individual party irrespective of the other's power; and is determined by the other's dependency on them, therefore their BATNA and commitment to it is important. Total power "is the sum of the parties' dependence on one another". While relative power "is the dependence of one party compared to the dependence of the other party".¹⁸⁴

These concepts are important when looking at power being either zero-sum or variable-sum (also known as positive-sum¹⁸⁵). A zero-sum approach highlights that "an increase in one party's absolute power automatically produces a decrease in the other party's absolute power". The zero-sum approach promotes a competitive concept of power manipulation to improve one's "respective power positions".¹⁸⁶

With a variable-sum approach, an increase in power in one party does not necessarily equate to an imbalance of power to the other, which may suggest a change in total power but not in relative power. Accordingly, both parties can increase their

¹⁸¹ At 107.

¹⁸² Goodpaster, above n 7, at 336.

¹⁸³ Bacharach and Lawler, above n 28, at [64-65].

¹⁸⁴ At 65.

¹⁸⁵ James H Read "Is power zero-sum or variable-sum? Old arguments and new beginnings" (2012) 5 Journal of Political Power 5 at 6.

¹⁸⁶ Bacharach and Lawler, above n 28, at 67.

own/absolute power without necessarily decreasing each other's power, as total power is not fixed.¹⁸⁷

A variable-sum approach offers negotiators the prospect that power can be equalised, and to some extent shared. This is particularly important as it feeds into the goal of the thesis, to balance power rather than swapping it between negotiators. As the weaker party's increase of power or concession toughness does not necessarily deplete the stronger party's absolute power, this perception may also lower the prospect of the stronger party feeling threatened by the weaker party trying to stabilise an otherwise unequal playing field.

2 *Asymmetrical power*

Zartman and Berman suggested that who is labelled "weak" and "strong" may be subject to the "shifting fortunes of the moment", and further stated:¹⁸⁸

One of the eternal paradoxes of negotiation is that it allows the weak to confront the strong and still come away with something which should not be possible if weakness and strength were all that mattered.

Generally, negotiators who have "access to a potent set of competitive tactics" and see themselves as strong, will make fewer concessions and expect larger ones from their counterpart.¹⁸⁹ It follows that unless negotiators have a prior working relationship, weaker parties are likely to mistrust stronger ones and expect them to take advantage of their absolute power. The flow-on effect motivates weaker parties to develop their alternatives, which may also drive stronger parties to cultivate their alternatives.¹⁹⁰ Fisher, Ury and Patton warned however, that in these power imbalances, parties should not turn the negotiation into a "gunfight".¹⁹¹

¹⁸⁷ At [67 and 92].

¹⁸⁸ Zartman and Berman, above n 6, at 204.

¹⁸⁹ Pruitt, above n 14, at 22.

¹⁹⁰ Lewicki, Hiam and Olander, above n 12, at 168.

¹⁹¹ Fisher, Ury and Patton, above n 10, at 107.

Deutsch highlighted that weaker parties could utilise a “persuasion” strategy through their communication to attempt to change the stronger party’s attitude. The weaker party works on the basis that “the process of persuasion involves obtaining the other’s *attention, comprehension* and *acceptance* of the message that one is communicating”, as set out by Hovland, Janis and Kelly.¹⁹² In particular, “persuasive communication” focuses on:

- (1) the stronger party’s “attention to the verbal content” of what is being communicated;
- (2) their “comprehension of the message” presented; and
- (3) “acceptance of the conclusions” found in the message.¹⁹³

Weaker parties may also be able to gauge their counterpart’s desire to competitively use their power, through defensive cooperativeness, fractioning concessions, or contingent cooperativeness. This is where one party tests the other before deciding to collaborate, by offering small concessions to see whether it is reciprocated in kind, to warrant further trust and larger concessions.¹⁹⁴ Tjosvold and Okun stated that “[p]ersons of low power typically have much to gain from the powerful person’s cooperative use of power and can be expected to reciprocate cooperative actions”.¹⁹⁵

Using the three “normative arguments”¹⁹⁶ of Bacharach and Lawler, Goodpaster suggested that firstly, stronger parties are likely to rely on an equity argument to seek gains. An “equity norm” is where parties should benefit in accordance with their contribution. Secondly, when all parties have equal power, the equality argument maintains an even distribution of available gains. With an “equality norm”, parties should receive pay outs regardless of their contributions.¹⁹⁷

¹⁹² Morton Deutsch “Conflicts: Productive and Destructive” (1969) 25 J Soc Sci 7 at 33.

¹⁹³ Carl I Hovland, Irving L Janis and Harold H Kelley *Communication and Persuasion* (Yale University Press, New Haven and London, 1963) at 59.

¹⁹⁴ Goodpaster, above n 7, at [372-374].

¹⁹⁵ Tjosvold and Okun, above n 38, at 239.

¹⁹⁶ Bacharach and Lawler, above n 28, at 175.

¹⁹⁷ Goodpaster, above n 7, at 339.

Lastly, the responsibility norm of the stronger party, is the argument to assist a weaker party by appealing to the stronger party's sense of responsibility. A responsibility norm suggests that the 'needs' and moral obligation should be the basis of distributing benefits. The intention is to "cast the opponent in the role of helper and portray the needy party as unfortunate and desperately needing more concessions from the opponent".¹⁹⁸

Stronger negotiators may decide not to use all their power, which could be to their benefit as empowering the weaker party to participate more may improve their working relationship together.¹⁹⁹ This is in line with the idea that when a party is excluded from the process of constructing the solutions proposed by the other party, the initial party would unlikely approve of such solutions.²⁰⁰ As well as the disapproving party not being committed to implementing the proposed solution, they may also become an obstacle to its instigation.

The results from the study of Tjosvold and Okun showed that negotiations between unequal parties were more likely to resolve through the cooperation of both parties working together than through their competitiveness. However, this depends on whether the stronger party is willing to collaborate, which may prove difficult in certain situations.²⁰¹

There may be some general reservation that problem-solving cannot work where one party is so powerful that they would not agree to mutually cooperate in the interest of mutual gains. However, Menkel-Meadow believed that it would not necessarily be an ineffective step for weaker negotiators to attempt to problem-solve with the more powerful party;²⁰² especially as "[b]alancing power requires courage and creativity" from everyone.²⁰³ With the weaker party and problem-solving in mind, the thesis will now consider theories about eliciting and maintaining mutual cooperation.

¹⁹⁸ Bacharach and Lawler, above n 28, at 177.

¹⁹⁹ Joyce L Hocker and William W Wilmot *Interpersonal Conflict* (10th ed, McGraw-Hill Education, New York, 2018) at [136-137].

²⁰⁰ Fisher, Ury and Patton, above n 10, at 29.

²⁰¹ Tjosvold and Okun, above n 38, at 242.

²⁰² Menkel-Meadow, above n 1, at 833.

²⁰³ Hocker and Wilmot, above n 199, at 150.

C Mutual Cooperation

1 Relationship patterns and attitudinal changes

Deutsch stated that “a *mutually* cooperative orientation is likely to be the most productive orientation for resolving conflict”.²⁰⁴ This may mean moving away from adversarial models where parties are more distrusting of one another. For negotiators to begin to collaborate there must be cooperation between them with some level of trust. A party may be able to attain trust if they appear “nonmanipulative”²⁰⁵ and not adversarial.

If however, a negotiator is perceived as a manipulator and is suspected of having exploitative intentions, the counterpart will compete to defend against this. This competitive behaviour leads to a spiral of further competition.²⁰⁶ When building trust in a negotiation, it is important for parties to work towards an “attitudinal change”. An attitudinal change can enable a shift between the parties’ patterns of relationship, in which they share a set of reciprocal attitudes which guides their interactions.²⁰⁷

The two main patterns of a collaborative-oriented relationship are “cooperation” and “collusion”. With cooperation, there is complete acceptance of the legitimacy of the other party in which negotiators are willing to consider mutual concerns beyond familiar matters. This is coloured by full respect and mutual trust, or “extended trust” and a friendly attitude between the parties. On a higher level of collaboration there is collusion. This is where both parties go beyond recognising each other’s legitimacy to the point where they pursue common ends. This pattern, labelled “a sweetheart relationship”, is characterised by complete trust as it is based on symmetrical blackmail possibilities.²⁰⁸

Trust can be an indication that parties have abandoned competitive initiatives and are ready to collaborate;²⁰⁹ this also demonstrates a shift of attitudinal dimensions, as well as a change to the relationship pattern of the negotiators. Therefore, trust and respect play

²⁰⁴ Deutsch, above n 192, at 29.

²⁰⁵ Sverre Lindskold and RJ Herstein “Trust development, the GRIT proposal, and the effects of conciliatory acts on conflict and cooperation” (1978) 85 Psychol Bull 772 at 773.

²⁰⁶ At 772.

²⁰⁷ Walton and McKersie, above n 15, at 185.

²⁰⁸ At 188.

²⁰⁹ Pruitt, above n 14, at [124-125].

an important role in shifting negotiation patterns from an adversarial orientation to a collaborative one.

2 *Trust and Respect*

Trust is an important basis for mutual cooperation.²¹⁰ Zartman and Berman advised that trust is “one of the cardinal underlying characteristics of a fruitful negotiation”, and it is the basis on which cooperative problem-solving is built. Trust is necessary in a negotiation as most agreements involve future action and circumstances that would likely rely on the continued engagement of the parties.²¹¹

Salacuse described trust as the confidence to engage with another without harming one's interests. Risks and expectations are carefully evaluated as trusting a person risks exposing one's self to potential harm.²¹² The desire to trust comes from the prospect of whether a party's actions will advance the other's interests,²¹³ as negotiators will expect a return on their trust.²¹⁴ Trusting someone is tantamount to making an investment in them, where the risk of betrayal has to be balanced with the potential gains.²¹⁵

To forge trust as a negotiation tool it must first be negotiated. Trust cannot be compelled.²¹⁶ For a party to be the first to be trusting, opens them to the prospect of being exploited.²¹⁷ Walton and McKersie suggested that even if negotiators are motivated by an important problem and have the relevant information and necessary language skills, they will not engage in collaborative problem-solving if they do not feel safe.²¹⁸

De Dreu, Giebels and Van De Vliert established that “cooperative motives lead to higher levels of trust, which in turn facilitates information exchange and the development

²¹⁰ Lindsfold and Hernstein, above n 205, at 772.

²¹¹ Zartman and Berman, above n 6, at [27-28].

²¹² Salacuse, above n 41, at 173.

²¹³ At 184.

²¹⁴ At 175.

²¹⁵ At 174.

²¹⁶ At 175.

²¹⁷ At 180.

²¹⁸ Walton and McKersie, above n 15, at 159.

of integrative agreements.”²¹⁹ This is in line with Deutsch’s statement that “[m]utual trust is most likely to occur when people are positively oriented to each other’s welfare”.²²⁰ Negotiators may have to invest time in gaining a good understanding of each other’s specific interests to genuinely form the necessary trust to cooperate.²²¹ This is consistent with Pruitt’s suggestion that as time passes trust tends to become stronger.²²²

Trust has to be created and developed incrementally over the course of the negotiation as part of the process of coming to an agreement.²²³ In doing this, mutual knowledge about the parties is built up. This is important as no party can really trust another until they know something about the other,²²⁴ such as their capabilities, intentions and values.²²⁵ At the same time however, negotiators have to feel comfortable that by being forthcoming with information it will not be used against them.²²⁶

A party’s behaviour in one negotiation may provide insight into its future ones.²²⁷ Therefore, a party’s reputation and credentials may assist to gauge the likelihood of its fairness and inclination to reach an agreement. Moreover, integrity and reputation are also vital to trust. Establishing both is a matter of assessing a party’s credibility in respect of both past and future events.²²⁸

Finding out more about a negotiating party feeds into the predictability of that party’s future actions to perform the promised tasks.²²⁹ The future prospect of dealing with a party requires the building of a relationship between the parties.²³⁰ However, the trust

²¹⁹ Carsten KW De Dreu, Ellen Giebels and Evert Van De Vliet “Social Motives and Trust in Integrative Negotiation: The Disruptive Effects of Punitive Capability” (1998) 83 J Appl Psychol 408 at 418.

²²⁰ Morton Deutsch “Trust and suspicion” (1958) 2 J Confl Resolut 265 at [278-279].

²²¹ Salacuse, above n 41, at 175.

²²² Pruitt, above n 14, at 134.

²²³ Zartman and Berman, above n 6, at 32.

²²⁴ Salacuse, above n 41, at 175.

²²⁵ At 177.

²²⁶ Walton and McKersie, above n 15, at 159.

²²⁷ Luuk Molthof “Germany, the Greek debt crisis and Brexit” (12 February 2018) Delano <<http://delano.lu/d/detail/news/germany-greek-debt-crisis-and-brexit/169669>>.

²²⁸ Zartman and Berman, above n 6, at 29.

²²⁹ Salacuse, above n 41, at 177.

²³⁰ At 175.

that has been established for these relationships is never fixed²³¹ and must be regularly stoked to keep a cooperative relationship going, like any well-burning fire. Also, “[o]penness not only helps to create trust; it also facilitates maintaining it.”²³²

Negotiators have to be cautious with their newly cultivated relationships, as a party's openness can be abused. If an adversarial party induces a state of trustworthiness in the other side, it enables them to bargain and bluff on that trust. However, just as there is a temptation for negotiators to abuse the established trust through deception, at the same time, no negotiation is devoid of trust, otherwise agreements would be impossible.²³³

It is for negotiators to manage this tension and take the risk to trust one another to surmount any deadlock. However, even if one party wishes to risk trusting the other, cooperation may not be mutual. Deutsch suggested there is a tendency to orientate towards mutual competition rather than mutual collaboration, as a party can attack the other without requiring consent.²³⁴ Menkel-Meadow noted that better solutions can be had with two problem-solvers, and even if both parties do not share the same negotiation model, problem-solving need not be abandoned.²³⁵

The emphasis should not necessarily be on changing the competitive nature of a negotiator but on altering the focus of the problem.²³⁶ Trust and mutual respect can be useful to assist in refocusing the problem. The concept of mutual respect, brings with it the idea of equality.²³⁷ Respecting the other party through listening and recognising their autonomy opens negotiations “to creative, value-enhancing solutions”. Also, truthfulness “can lead the other side to accept assertions or commitments”, more than if it were absent.²³⁸

²³¹ At 176.

²³² At 179.

²³³ Zartman and Berman, above n 6, at 28.

²³⁴ Deutsch, above n 192, at [29-30].

²³⁵ Menkel-Meadow, above n 1, at 838.

²³⁶ Menkel-Meadow, Carrie, above n 49, at 837.

²³⁷ Jonathan R Cohen “When people are the means: Negotiating with Respect” (2001) 14 Geo J Legal Ethics 739 at [761-762].

²³⁸ At 777.

Therefore, it is for negotiators to move away from treating one another as mere objects (means to an end)²³⁹ but more so as equals by treating them with respect. Respect, however, is not just automatically bequeathed to those who expect it, and similar with trust, “[v]olition is a key ingredient of respect”;²⁴⁰ parties have to freely give it rather than it being demanded from them.

In the quest for respect and equality, a negotiator has to have a “voice and autonomy” and ‘the will’ (making them more than just mere objects).²⁴¹ It then follows, that respect could be earned through a weaker party evidencing their worth to the negotiation. This feeds into one of the points of the thesis, that a weaker party’s demonstration of competency increases its stronger counterpart’s respect for it to enable collaboration on a more balanced footing.

The goodwill from mutual trust and respect can be seen as the oil that helps lubricate the gears of a negotiation to allow parties to shift out of their adversarial orientation. Without this goodwill, the parties’ interaction can be grating like the rubbing of raw metal, eventually wearing out the parties. With the absence of trust “it is harder to reconcile divergent interests, interpersonal relationships are less likely to be harmonious, and general need satisfaction suffers”.²⁴²

It may also be difficult for a negotiator to decide whether to express goodwill first through offering information and/or concessions. This opens them to the risk of being exploited, as their counterpart may not reciprocate in kind. Having respect added to the “goodwill” formula, allows negotiators to move beyond mere formalities of politeness and courtesy, to voluntarily emulating the other’s behaviours.²⁴³ In general, respect is symmetrical, as its initial offer is reciprocated by the other party;²⁴⁴ similarly, trust can also be elicited when the other party reciprocates the other’s cooperative moves.²⁴⁵

²³⁹ Jonathan R Cohen “The Ethics of Respect in Negotiation” (2002) 18 *Negot J* 115 at [115-116].

²⁴⁰ Cohen, above n 237, at 756.

²⁴¹ At 762.

²⁴² Pruitt, above n 14, at 152.

²⁴³ Cohen, above n 237, at 753.

²⁴⁴ At 761.

²⁴⁵ Pruitt, above n 14, at 125.

3 *Reciprocity*

Reciprocity can refer to the mutual exchange of either positive or negative behaviour. Negative reciprocation relates to the tendency of negotiators to “return unfavourable treatment as an appropriate response”.²⁴⁶ If perpetuated, the negotiation may escalate into a “conflict spiral” where parties are locked into an exchange of adversarial tactics. A suggestion for breaking this spiral is for parties not to reciprocate the adversarial action of the other.²⁴⁷

In the context of mutual cooperation, positive reciprocity (“reciprocity”) is a social norm in which a party pays back another’s initial gesture or favour towards them.²⁴⁸ Gouldner proposed that the reciprocity norm is universal in most human cultures²⁴⁹ and as a norm it makes two simple demands - people should: 1. help; and 2. not injure those who helped them.²⁵⁰

Cialdini suggested that “a sense of future obligation” was important to reciprocation as it guaranteed a return on the provision of goods or services. Accordingly, to receive a favour or a gesture may have obligatory strings attached, by which people feel indebted to the offering party.²⁵¹ Raven, Schwarzwald and Koslowsky found that reciprocity was a form of legitimate power, and stated that “creating a sense of obligation to reciprocate is a method for acquiring and maintaining power”.²⁵²

²⁴⁶ Nicole S Harth and Tobias Regner “The spiral of distrust: (Non)cooperation in a repeated trust game is predicted by anger and individual differences in negative reciprocity orientation” (2017) 52 Int J Psychol 18 at 19.

²⁴⁷ Anne Lytle, Jeanne Brett and Debra Shapiro “The Strategic Use of Interests, Rights, and Power to Resolve Disputes” (1999) 15 Negot J 31 at 43.

²⁴⁸ Lewicki, Saunders and Barry, above n 51, at 307.

²⁴⁹ Alvin W Gouldner “The Norm of Reciprocity: A Preliminary Statement” (1960) 25 Am Sociol Rev 161 at [161-162].

²⁵⁰ At 171.

²⁵¹ Robert C Cialdini *Influence: Science and Practice* (5th ed, Pearson Education Inc, Boston, 2009) at [19-20].

²⁵² Bertram H Raven, Joseph Schwarzwald and Meni Koslowsky “Conceptualizing and Measuring a Power/Interaction Model of Interpersonal Influence” (1998) 28 J Appl Soc Psychol 307 at 310.

The power of reciprocation, can be used to obtain the other party's compliance, especially as it can have an overpowering influence over other factors such as a dislike for the other party.²⁵³ Axelrod referred to reciprocation in World War I trench warfare between British and German combatants on the Western Front. These enemies faced each other across 100 to 400 yards of 'no-man's land', where both sides engaged in the "Live-and-Let-Live System".²⁵⁴

Each soldier had the option to either shoot to kill or deliberately shoot to avoid causing harm. It was found that the British soldiers, contrary to their superior's directives to further the war effort, choose not to harm the other side. This was then reciprocated by the German soldiers, therefore achieving cooperation through mutual restraint. Axelrod highlighted that in the midst of bitter warfare, friendship is hardly necessary for mutual cooperation if there is reciprocation, and under suitable circumstances can be developed between antagonists.²⁵⁵

Reciprocity is important in negotiation, as concessions are offered from one party and are expected to be returned by the other party. The size of the concessions need not necessarily match.²⁵⁶ The research of Chen, Chen and Portnoy also indicated that in light of "favourable inequitable treatments", reciprocation was "less affected by the existing relationship (or lack of)".²⁵⁷

In their research on interpersonal communications in marketing negotiations, Alexander, Schul and Backus found that "both buyers and sellers responded in a reciprocal manner to the other parties' integrative cuing behaviors".²⁵⁸ Therefore, "when one party used an integrative tactic, the other tended to respond with an integrative tactic".²⁵⁹

²⁵³ Cialdini, above n 251, at 23.

²⁵⁴ Robert M Axelrod *The Evolution of Cooperation* (revised ed, Basic Books, 2006) at [73-75].

²⁵⁵ At [75-87].

²⁵⁶ Lewicki, Saunders and Barry, above n 51, at 307.

²⁵⁷ Ya-Ru Chen, Xiao-Ping Chen and Rebecca Portnoy "To whom do positive norm and negative norm of reciprocity apply? Effects of inequitable offer, relationship, and relational-self orientation" (2009) 45 J Exp Soc Psychol 24 at 33.

²⁵⁸ Joe Alexander, Patrick Schul and Emin Babakus "Analyzing interpersonal communications in industrial marketing negotiations" (1991) 19 J Acad Mark Sci 129 at 137.

²⁵⁹ Lewicki, Saunders and Barry, above n 51, at [234-235].

Moreover, the use of the reciprocity norm is essentially an interdependent trade in gratitude. The essence of this is captured a scene in the 1993 film *Schindler's List*²⁶⁰ between the characters, Amon Goeth and Oskar Schindler:²⁶¹

Amon Goeth: Scherner told me something else about you.

Oskar

Schindler: Yeah, what's that?

Amon Goeth: That you know the meaning of the word 'gratitude'. That it's not some vague thing with you like it is with others. You want to stay where you are. You've got things going on the side, things are good. You don't want anybody telling you what to do. I can understand all that. You know, I know you... What you want is your own sub-camp. Do you have any idea what's involved? The paperwork alone? Forget you've got to build the fucking thing, getting the fucking permits is enough to drive you crazy. Then the engineers show up. They stand around, they argue about drainage, foundations, codes, exact specifications, parallel fences four kilometers long, six thousand kilograms of electrified fences... I'm telling you, you'll want to shoot somebody. I've been through it, you know, I know.

Oskar

Schindler: Well, you know, you've been through it. You could make things easier for me. I'd be grateful.

Similar to Schindler's endeavours to utilise a string of favours to setup and maintain an enamelware factory as a Jewish sanctuary in World War II, one can see how traded

²⁶⁰ *Schindler's List* is based on the historic account of the endeavours of a German industrialist and Nazi party member, Oskar Schindler, who was credited in saved the lives of 1200 Jewish people from the Holocaust between 1939 -1945.

²⁶¹ Steven Spielberg *Schindler's List* (Universal Pictures, 1993)
<<https://www.imdb.com/title/tt0108052/quotes>>.

concessions inevitably build up to a negotiation's end-game. The giving and reciprocation of fair and reasonable concessions are more or less the foundations of a well-founded negotiated settlement.

Williams attributed to Osgood, the risky idea that cooperative negotiators could proactively make unilateral concessions to elicit a moral obligation on the other, through a show of good faith, to reciprocate concessions.²⁶² Osgood suggested however, that the "biased perception of the equitable" obstructed a negotiation. This is when human behaviour is easily influenced by past experience, existing attitudes and dominate motives. These biases dictate how parties perceive ideas in a new situation. In particular, these tensions may stop parties from accepting new ideas and make negotiators less likely to reciprocate.²⁶³

In any event, the Prisoner's Dilemma ("PD") provides insight into a possible way of inducing reciprocation. PD is a theoretical game based on a scenario with two prisoners. Unable to communicate with one another, each prisoner has to make a blind decision to either cooperate with their counterpart or give up the other to the authorities as the guilty party (to defect).

The best outcome for a prisoner is if they defected and while their counterpart cooperates (refer to scenarios B and C in the table below), hence the sole defector would gain the most. The cooperating prisoner (in scenarios B and C) thereby loses out, as they would be given up by the defecting prisoner, which would be the worst possible outcome for the cooperating prisoner. However, the prisoners would be rewarded if they both cooperated to get minor penalties (scenario A). And finally, both would be punished with mutual defection (Scenario D). PD has also been adapted as the Negotiator's Dilemma, in the variant of Lax and Sebenius, where claiming value equates to defecting and creating value equates to cooperating.²⁶⁴

²⁶² Williams, above n 16, at 53.

²⁶³ Osgood, above n 103, at 76–77.

²⁶⁴ Lax and Sebenius, above n 8, at 157.

		Choices of player Omega (Ω)	
		Cooperate (Create)	Defect (Claim)
Choices of player Psi (Ψ)	Cooperate (Create)	Scenario A Player Ω : 3 points (good) Player Ψ : 3 points (good) <i>Reward for mutual cooperation</i> <i>(Good outcome for all)</i>	Scenario B Player Ω : 5 points (T) Player Ψ : 0 points (S) <i>T: Temptation to defect</i> <i>for Ω (great outcome)</i> <i>S: Sucker's payoff for Ψ (terrible outcome)</i>
	Defect (Claim)	Scenario C Player Ω : 0 points (S) Player Ψ : 5 points (T) <i>S: Sucker's payoff for Ω (terrible outcome)</i> <i>T: Temptation to defect for Ψ (great outcome)</i>	Scenario D Player Ω : 1 point (mediocre) Player Ψ : 1 point (mediocre) <i>Punishment for mutual defection</i> <i>(Mediocre outcome for all)</i>

This table is adapted from an amalgamation of PD tables²⁶⁵

Axelrod ran two computer competitions of PD with repeated rounds, in which he had people submit the best strategy for getting the most points. It was found that the “TIT-FOR-TAT” (“TFT”) strategy submitted by Professor Anatol Rapoport, was the simplest strategy and scored the most consistent points. With this TFT approach, the strategist would start with a cooperative decision in the first move, and then for the following moves, change the choice to whatever their counterpart did in the last turn, hence tit-for-tat.²⁶⁶ Lax and Sebenius, and Thompson, highlighted the following from Axelrod’s work²⁶⁷ that specifically related to negotiation:²⁶⁸

- (1) TFT is nice as it sought to cooperate first.
- (2) TFT is “provocable”²⁶⁹ (and therefore tough), in which it punished defective behaviour by defecting on the next turn.
- (3) TFT is forgiving, in that if the defecting party then began to cooperate, that cooperation would be returned in the next round.

²⁶⁵ Axelrod, above n 254, at 8; Lax and Sebenius, above n 8, at 157; Leigh L Thompson *The Mind and Heart of the Negotiator* (5th ed, Pearson, Boston, 2012) at 288.

²⁶⁶ Axelrod, above n 254, at 31.

²⁶⁷ At [55-69].

²⁶⁸ Lax and Sebenius, above n 8, at 160; Thompson, above n 265, at [291-292].

²⁶⁹ Lax and Sebenius, above n 8, at 159.

- (4) TFT is clear and not complicated, which not only elicited cooperation, but also managed to “avoid gross exploitation”. Lax and Sebenius labelled this elicitation of continued cooperation as “conditionally open”. A player’s payoffs for being conditionally open were sufficient “to offset the costs of occasional defections”.²⁷⁰
- (5) TFT is not a strategy that aims to beat its negotiator’s counterpart. It instead aims to maximise the player’s own gain in the long run.

Accordingly, a negotiation could be divided into a number of smaller steps, similar to the rounds in a repeated PD game. The negotiator, could start with being conditionally open by seeking mutual cooperation and is then prepared to claim value (or “defect”) when their counterpart does, but is also readily able to forgive overt claiming behaviour by creating value (“cooperate”).²⁷¹ TFT negotiators are conditionally open but also fair as they are serious in their response to adversarial behaviour and forgiving at the same time. Most importantly their simple yet consistent approach indicates that they can be trusted in future actions; hence an offer would likely be reciprocated and not left unreturned.

Lax and Sebenius noted two aspects of PD that did not compare to real-life negotiations such as players could not communicate with each other, nor could they make binding commitments to a particular decision. If, however, players could communicate future intention it was thought that cooperation could be more certain.²⁷² This highlights the importance of PD’s missing factors for negotiators to improve collaboration in real negotiations. Despite this, it was suggested that TFT could be applied in negotiations to reduce the tension of value creation and claiming.

To provide further insight into the collaborative elements of reciprocity, the thesis now turns to the ideas behind dovetailing different interests to generate mutual gain.

²⁷⁰ At [159-160].

²⁷¹ At 160.

²⁷² At 163.

4 *Dovetailing interests*

Lax and Sebenius advised that parties can create “common value”, which can be shared simultaneously between them to meet their needs.²⁷³ It is in this realm of common value that mutual gain for both parties can be achieved. Common value and mutual gain come from “exploiting differences” and with this “it is the parties’ differential perception and assessment of situations that leads to trade-offs”.²⁷⁴

Homans theorised that “[t]he open secret of human exchange is to give the other man behavior that is more valuable to him than it is costly to you and to get from him behavior that is more valuable to you than it is costly to him”.²⁷⁵ Zartman and Bergman saw Homans’ theory as the key to shifting the parties away from a zero-sum negotiation. This is done by refocusing values as “variable values” in which each parties’ evaluation of the perceived value in an issue can be changed through “persuasion, inducement, alternatives, and reorganization of ideas”.²⁷⁶

Accordingly, rather than trying to persuade parties to change their basic view, one should “use persuasion to arrange the components of these views into a common decision”.²⁷⁷ Homans’ idea also appears to be an ancestor of the idea of Fisher, Ury and Patton, to get the parties to look for possible options for mutual gain,²⁷⁸ which ties into the idea of reciprocating the gains for each party.²⁷⁹

One way of accomplishing Homans’ “open secret”, could be to use the suggestion of Bartos “that each negotiator should search for a proposal that is favourable to him but barely acceptable to the opponent”.²⁸⁰ Each party’s proposal of this nature, could then be paired to see if they provide options for mutual gain. This in effect, is a “bridging solution”

²⁷³ At 89.

²⁷⁴ Gary Goodpaster “Rational decision-making in problem-solving negotiation: compromise, interest-valuation, and cognitive error” (1993) 8 Ohio St J on Disp Resol 299 at 307.

²⁷⁵ George Caspar Homans *Social behaviour* (Harcourt, Brace, New York, 1961) at 62.

²⁷⁶ Zartman and Berman, above n 6, at 14.

²⁷⁷ At [13-14].

²⁷⁸ Fisher, Ury and Patton, above n 10, at [58-81].

²⁷⁹ At [75-77].

²⁸⁰ Bartos, above n 99, at 24.

for parties to advance their interests simultaneously. Goodpaster refers to the “Ugli Orange Exercise” to demonstrate a “bridging solution”.²⁸¹

In the Ugli Orange Exercise two parties have to work together to come to an agreement to share rare oranges, rather than each outrightly claiming these oranges for themselves. The exercise is to get the parties to realise that their individual usages of the oranges are mutually compatible. For example, one party wants the orange pulp while the other desires the skin for different reasons. A collaboration with mutual gain is therefore achievable in sharing out the oranges so that each party gets what they want.²⁸²

By parties examining their interests and beliefs together opens the possibility to coordinate what one finds valuable and what the other is willing to forfeit. The parties must accept the differences and de-personalise conflict to enable clear communication, movement of information and the realisation of the opportunities before them.²⁸³

Negotiation interests can be compared to jigsaw puzzle pieces. The individual pieces are unique and interlock with one another, similar to the parties' negotiation interests. In the beginning, the patterns of connectedness between all the pieces may not be obvious, especially with the random arrangement of the pieces.

During the course of the negotiation, once parties develop a better understanding of the information, negotiators can see how certain interests interlock with one another and have a particular place on the board. The different negotiation interests are similar to the ‘tabs’ and ‘blanks’ of jigsaw puzzle pieces which dovetail together. The intention is to match the pieces and place the right tabs in the right blanks.

Similar to a jigsaw puzzle, the appropriate differences between certain negotiated interests have to fit together. To complete a jigsaw puzzle, the pieces have to be differentiated and sorted to find their interconnectedness and their place on the board. In a negotiation, the desires and sacrifices of a party have to be compatible with their counterpart's goals and what they are willing to forfeit.

²⁸¹ Goodpaster, above n 274, at 309.

²⁸² The Center for Conflict Resolution *A Manual for Group Facilitators* (The Center for Conflict Resolution, Wisconsin, 1977) at [81-85].

²⁸³ Goodpaster, above n 274, at 308.

5 *Reducing differences and future dependency*

Negotiators are more likely to work collaboratively once they have set out their complementary interests between each other.²⁸⁴ And if the parties feel that they share a common bond, they may act faster in making concessions.²⁸⁵ Having an affinity with their counterpart may influence the trust of the negotiator, bringing forth the notion that they are 'birds of feather' who ought to 'flock together'.

A party speaking the other party's language demonstrates that the speaking party cares about the other's needs and wants to build a future relationship.²⁸⁶ This feeds into "identification-based trust", where the compatibility between the parties is used to establish trust. This type of trust is based on a mutual understanding and appreciation of each party's desires, and is heavily dependent on both parties being committed to similar interests, the same objectives, and shared values.²⁸⁷

Emphasising the possible rewards that can be gained from cooperation, helps to improve the parties' attitudes towards one another and inevitably achieves coordination between them.²⁸⁸ An example of trust built from commonalities can be seen in the trench warfare example. The German and British soldiers who fought each other in hellish conditions valued survival above each other's destruction. Hence, both parties were in similar predicaments for which they trusted each other not to shoot to kill.²⁸⁹

Pruitt hypothesised that parties with stronger needs will eventually make faster concessions as they have more to lose if an agreement is not reached, than those with weaker needs.²⁹⁰ Implicit in this is the pressure of time, which can be used to alleviate a deadlock situation by producing an interest for the parties to coordinate at a prompt pace.²⁹¹

Although commonality assists in establishing mutual cooperation, to maintain this collaborative momentum requires something more. What makes it possible for

²⁸⁴ Goodpaster, above n 7, at 329.

²⁸⁵ Pruitt, above n 14, at 39.

²⁸⁶ Malhotra and Bazerman, above n 23, at [96-97].

²⁸⁷ Lewicki, Saunders and Barry, above n 51, at [332-334].

²⁸⁸ Pruitt, above n 14, at 206.

²⁸⁹ Axelrod, above n 254, at [73-87].

²⁹⁰ Pruitt, above n 14, at [30-31].

²⁹¹ At 205.

collaboration to be continued is the possibility that the parties might negotiate in the future. Although future considerations are always second billing to present ones, Axelrod stated that “[t]he future can therefore cast a shadow back upon the present and thereby affect the current strategic situation.”²⁹² Given the significant possibility to meet again, negotiators ought to evolve their current collaboration as an investment for their future interactions.²⁹³ Accordingly, collaboration established on the basis of reciprocity prevents “invasion by less collaborative strategies”.²⁹⁴

The abovementioned ideas emphasise the importance of mutual cooperation and collaboration in negotiations. As a counterbalance to this, the thesis will further explore the general utility of competition.

6 *The general utility of competition*

With all its negativities, Distributive Bargaining (“DB”) can be typecast as a dated approach, particularly given its adversarial perception. The stigma that attaches with competition may come from the possible resultant conflict. However, Deutsch clarifies that conflict can occur in a collaborative context.²⁹⁵

In fact, competition and conflict may be able to take a productive course; this “creat[es] a case where mutual competition between parties may ultimately lead to cooperation”.²⁹⁶ Competitive bargaining is not in and of itself a negative engagement. It is how a party approaches competition that defines whether its actions are amicable or adversarial.

If negotiators can park their personalities and focus on their collective interests,²⁹⁷ then bargaining could be complementary to mutual cooperation and problem-solving. Subject to their perceptions of power,²⁹⁸ the competing negotiators’ goals may be able to be reshaped as to not necessarily harm one another in order for the parties to benefit. The

²⁹² Axelrod, above n 254, at 12.

²⁹³ At 20; Gifford, above n 3, at 65.

²⁹⁴ Axelrod, above n 254, at 21.

²⁹⁵ Deutsch, above n 192, at 8.

²⁹⁶ Goodpaster, above n 7, at 342.

²⁹⁷ Fisher, Ury and Patton, above n 10, at [19-24, 40-45].

²⁹⁸ Bacharach and Lawler, above n 28, at 51.

parties may make concessions on certain issues once thought to be non-negotiable, by moving away from complacent ideas of what the issues should be.

Measured conflict (competition reined in by mutual trust and respect between the parties) may provide “an optimal level of motivation”,²⁹⁹ to start problem-solving. Taking this further, to generate different and effective ideas in a negotiation may require a shock/conflict to the system to disrupt the status quo, similar to one’s recovery after a traumatic brain injury.

For a person with a brain injury, subject to its severity, the trauma may result in the death of brain cells and the severing of synapses.³⁰⁰ This may lead to the loss of certain motor functions as the neurons are unable to convey messages to certain muscles. Given the limitation of the brain cells to regenerate, the nervous tissue instead adapts through a process of “neural plasticity” to make up for the current deficiency of ability.³⁰¹ In particular, Pekna and Pekny stated:³⁰²

Brain injury leads to increased neural plasticity in the spared regions. This allows the neurons in these regions to take over the sensory or motor functions that had been performed by the damaged areas. This remapping of function (indeed similar to drawing a new map) is critical in the recovery of function.

Having to deal with the stress of competition may motivate negotiators to form new connections to ideas in unexplored areas. Competition may displace complacent ideas to shift negotiators past ‘easy’ concessions where value may be left on the negotiating table. By “remapping” negotiation ideas and applicable intelligence through more challenging routes negotiators may be able to look at the matter from an alternative and unique perspective.

²⁹⁹ Deutsch, above n 192, at 21.

³⁰⁰ Synapses are the connection points for neurons, which send messages to the other parts of the body from the brain, such as the motor commands to the muscles.

³⁰¹ Marcela Pekna and Milos Pekny “The Neurobiology of Brain Injury” (30 July 2012) <http://dana.org/Cerebrum/2012/The_Neurobiology_of_Brain_Injury/>.

³⁰² Pekna and Pekny, above n 301.

Taleb stated that “[u]ndercompensation from the absence of a stressor, inverse hormesis, absence of challenge, degrades the best of the best.”³⁰³ Therefore, too little challenge may weaken the quality of a negotiation’s outcome, especially if negotiators are too agreeable and default to options of compromise to appease one another.

Moreover, there may even be “an element of sport or dance in the activities of the bargainers”.³⁰⁴ The satisfaction of the gains earned by being competitive would also coincide with the negotiator acting in the best interest of the client. However, to preserve the benefits of competition, parties ought to reduce any adversarial engagement to obstruct one another’s goals, which may overshadow their relationship.

It is similar to how good friends can engage in a competition or how siblings can have an argument without losing respect for each other. Alternatively, if combatants in a savage war can find mutual cooperation, it would stand to reason that negotiators with less deadly intent towards each other can also follow suit.³⁰⁵

Competition may also lead to negotiators demonstrating their worth, particularly if applicable information can be bartered through reciprocation, a positive side effect of this may be the propagation of trust and respect. This may result in a shift in the perception of power, especially if a viable relationship of dependence on the weaker party can be created.

Here, relational power, in respect of who needs whom, is important.³⁰⁶ Without this reliance, the parties’ BATNAs would prevail and there would be no need for a negotiation. Understanding a party’s “added value” to the negotiation and future relationship,³⁰⁷ feeds the necessity to negotiate. If the weaker party becomes the stronger party’s ally, it would be easier for the stronger party to take up a social responsibility³⁰⁸ to align their interests towards that of the weaker party.

Therefore, everything has its time and place in a negotiation. If negotiating parties, without an established relationship were to reveal information too early, this may create suspicion, stifling the flow of information. As indicated earlier, the parties go through a

³⁰³ Nassim Nicholas Taleb *Antifragile* (Random House, New York, 2012) at 43.

³⁰⁴ Pruitt, above n 14, at 134.

³⁰⁵ Axelrod, above n 254, at [73-87].

³⁰⁶ Goodpaster, above n 7, at 335; Bacharach and Lawler, above n 28, at 63.

³⁰⁷ Adam Brandenburger and Barry Nalebuff *Co-opetition* (Doubleday, New York, 1996) at [45-51].

³⁰⁸ Bacharach and Lawler, above n 28, at 177.

‘courtship’ process of competition to gain an understanding of each other. This is where the parties take time to get to know who they are dealing with before committing to any level of meaningful collaboration. Given the various ideas established in this part of the thesis, below is a summary of the key points of how mutual cooperation can be established and maintained in a negotiation.

7 *Summary*

A weaker party may be able to get the stronger party to collaborate by:

- (1) Dispelling the myth of negotiations and power being zero-sum by:
 - (a) showing that the current negotiation is not zero-sum (if that is the case); and
 - (b) shifting from zero-sum by evolving the perceptions of perceived values.
- (2) Building trust and mutual respect through:
 - (a) emphasising the commonalities and similarities between the parties, especially relatable traits;
 - (b) displays of initiatives and intelligence to reflect the weaker party as a credible player;
 - (c) reciprocating information and perspective and options; and
 - (d) developing and adopting objective criteria (as seen in IPS).
- (3) Using the information to realistically frame an agreed outcome between the parties that is a better option than not negotiating at all.
- (4) Looking for options and initiatives that warrant an ongoing relationship between the parties.
- (5) Reciprocation of concessions and value.
- (6) Harnessing the potential of respectful competition to motivate and generate ideas in the early stages of the negotiation.

Having touched on certain theoretical ideas behind negotiation models, power and mutual cooperation, this chapter now ends on the topic of information which is pertinent to this thesis.

D Information

If trust and respect lubricate the machinery of a negotiation, then information can be seen as the fuel that is fed into its engine, igniting the discussions to propel the negotiation forward. Similar to a car's tank of petrol, the parties will only go as far as they can if there is sufficient information made available. The more information is shared, the more distance can be covered to get to the parties' desired destination.

Information is one of the most important negotiation resources, as it can be used to construct arguments and to counter the other party's arguments.³⁰⁹ This also highlights one of the key purposes of negotiation, that it is "a process of discovery". This discovery leads to some "degree of reorganization and adjustment of understanding, expectations, and behaviour".³¹⁰ Not only is information functional, it is power,³¹¹ and can be "a major source of leverage in negotiation".³¹²

Power from information may come in different forms. French and Raven referred to "expert power",³¹³ Fisher labelled it the power of "knowledge",³¹⁴ and Lewicki, Saunders and Barry called it "informational power".³¹⁵ Notwithstanding its inherent importance, information in and of itself per se is not necessarily power. It is arguable that information can be forged as a tool for gaining power, this depends on the type and quality of information that can be obtained, and how it is used.

Accordingly, negotiators must have access to information, authorisation to use it, and the skills to be able to exchange it.³¹⁶ Lewicki, Saunders and Barry described informational power as either:³¹⁷

³⁰⁹ Lewicki, Hiam and Olander, above n 12, at 17.

³¹⁰ Gulliver, above n 95, at 70.

³¹¹ Latz, above n 23, at 25; Gerard I Nierenberg and Henry H Calero *The New Art of Negotiating* (Square One Publishers, New York, 2009) at 101.

³¹² Lewicki, Saunders and Barry, above n 51, at 166.

³¹³ John RP French and Bertram H Raven "The Bases of Social Power" in Dorwin Cartwright (ed) *Studies in Social Power* (The University of Michigan, Michigan, 1959) 150 at [163-164].

³¹⁴ Fisher, above n 160, at 154.

³¹⁵ Lewicki, Saunders and Barry, above n 51, at [263-265].

³¹⁶ Walton and McKersie, above n 15, at 140.

³¹⁷ Lewicki, Saunders and Barry, above n 51, at 263.

- (1) information - “the accumulation and presentation of data intended to change the other person’s point of view or position on an issue”; or
- (2) expertise - “an acknowledged accumulation of information, or mastery of a body of information, on a particular problem or issue”.

Information is a versatile ingredient for the negotiator as it can inform and reassess one’s BATNAs, redefine the problem, and identify prospects in creating new options. Similar to raw ingredients in cooking, a chef has to be sure these are not spoilt, otherwise, they run the risk of contaminating the rest of the recipe. The same is true of incorrect information ruining the whole negotiation. Given the impact that information can have on a negotiation, its accuracy is paramount.

1 Accuracy

Negotiations become problematic when negotiators base their decisions on incomplete information. Negotiators sometimes get a glimpse of the true nature of the information and are left to estimate the missing pieces of the big picture, such as the parties’ resources, their level of dependence on each other, their commitment to the issues and the likelihood of using power in other ways.³¹⁸

This is contrary to the nature of negotiation, which is a “rational activity” between “wholly rational information-processing entities” who utilise the exchange of data, logic and facts, to shape their persuasive arguments. Therefore, the information in a negotiation has to be accurate and truthful.³¹⁹

Bacharach and Lawler stated that “[a] party that transmits more of the right kind of information and less of the wrong kind of information will do better in the negotiations”.³²⁰ The lack of sharing messages between the parties through reciprocation may also relay its own message. An issue with messages is that either party may edit them in favour of their own interests. Messages may exaggerate advantageous features of a party, or minimise

³¹⁸ Bacharach and Lawler, above n 28, at 50.

³¹⁹ Lewicki, Saunders and Barry, above n 51, at 166.

³²⁰ Bacharach and Lawler, above n 28, at 82.

disadvantageous parts of the truth. The flow of information may be distorted as messages are misinterpreted, resulting in the wrong information being received.³²¹

The receiver of the information may also presume erroneous facts, as they fall victim to their “self-serving biases”. A negotiator may “overestimate the casual role of personal or internal factors and underestimate the causal role of situational or external factors”.³²² The tendency to overestimate personal factors (by blaming problems on the internal qualities of a person) as opposed to situational factors, is known as “fundamental attribution error”³²³ or “attributional distortion”³²⁴ which may lead to “distortions in the evaluation of information”.³²⁵ Negotiators need to scrutinise newly acquired information and be cautious not to take it at face value, no matter the attractiveness of its presentation.³²⁶

If the information is wrong it stands to reason that the premises that are built upon that information are also wrong. Therefore, accurate information is important to tailor possible options to the needs of the party. Parties learn about each other, themselves, and the limitations and possibilities of the negotiation situation all through the information received.³²⁷ However, even if a party does not have complete information, the data they have accumulated on their counterpart is still relevant to their bargaining power.³²⁸

Low grade information can result in an inadequate definition of the problem, fewer generated options, a lack of exploration of their consequences, and the overall solutions being low grade. Under conditions where motivation is low and information is not forthcoming, parties are less likely to give adequate time and effort to search for alternative options and solutions. Accordingly, it is worth noting that “[b]ecause information is crucial to problem solving, there is relatively great emphasis on fact-finding processes”.³²⁹

³²¹ Gulliver, above n 95, at [84-86].

³²² Lewicki, Saunders and Barry, above n 51, at 213.

³²³ Ross Lee “The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process” (1977) 10 Adv Exp Soc Psychol 173 at [184-187].

³²⁴ Dean G Pruitt and Sung Hee Kim *Social conflict* (3rd ed, McGraw-Hill, Boston, 2004) at 159.

³²⁵ Lewicki, Saunders and Barry, above n 51, at 214.

³²⁶ Lewicki, Hiam and Olander, above n 12, at 148.

³²⁷ Gulliver, above n 95, at 70.

³²⁸ Bacharach and Lawler, above n 28, at 208.

³²⁹ Walton and McKersie, above n 15, at 140.

2 *Fact-finding*

During the parties' interactions, information is exchanged directly and indirectly from each other through either verbal or non-verbal means, by the evidence provided, arguments expressed and the level of concessions undertaken.³³⁰ Accordingly, weaker parties ought to "[a]nticipate the information that would be most compelling or persuasive to the other side" and by doing so arrange it so that it is readily accessible and the effects are able to be maximised.³³¹

The corroboration of information through different sources, may assist negotiators to triangulate the accuracy and importance of that information.³³² The use of comparative sources enables negotiators to look at the consistency and the possible incongruent nature of the data offered by the other side. This coincides with the value of ensuring that "parties receive a wide variety of different perspectives about the task and different sources of information".³³³

Although a negotiator can glean a lot from their counterpart during the negotiation discussions, the majority of the information comes beforehand in the preparation stages through careful research.³³⁴ Karrass goes so far as to state that "[f]act-finding is the mother's milk of negotiation".³³⁵ In a negotiation between companies, fact-finding may entail looking at information about the other party; such as: their business history, previous negotiations, financial data through reports and published records and asking questions of people who have dealt with them. Essentially, there is great value in "well-coordinated fact-finding".³³⁶

Fact-finding not only assists parties to avoid being manipulated, but if the other party has seen that the legwork has been done, their willingness to deceive decreases, and

³³⁰ Gulliver, above n 95, at 70 and 79.

³³¹ Lewicki, Saunders and Barry, above n 51, at 282.

³³² Mnookin, Peppet and Tulumello, above n 71, at 288.

³³³ Lewicki, Saunders and Barry, above n 51, at 420.

³³⁴ Karrass, above n 134, at 156.

³³⁵ At 157.

³³⁶ At [157-158].

the likelihood of treating the studious party seriously increases,³³⁷ thereby engendering a level of respect for them.

3 *Questions and information exchange*³³⁸

The type of questions negotiators ask has important consequences for the amount and types of information revealed.³³⁹ Karrass stated that “[t]he art of answering questions in negotiation lies in knowing what to answer and what not to”. Negotiators are not obligated to accommodate one another by having to answer every question posed to them.³⁴⁰ Some negotiators may strategically hold back certain information as it may expose a point of leverage against them.

When gathering information, a party may have an issue of “selective information processing”. For instance, if the party has a negative impression of their counterpart, they may have a tendency to side-line the rational gathering and processing of data. Instead, the party may focus the search for information towards supporting negative preconceptions of their counterpart and result in escalating the conflict between the parties.³⁴¹

Coupled with “[t]he *“Discovery” of Confirming Evidence*”, negotiators may direct information-gathering towards confirming their own hypothesis of the situation.³⁴² In doing so, questions seeking evidence disconfirming or auditing one’s own hypothesis, are avoided. Negotiators would therefore, only search for information that support the narrative that they are trying to prove rather than opening the matter to new ideas or issues. This squanders the true potential of fact-finding as it sets up an incorrect hypothesis as the basis of the subsequent strategies that may prove to be inadequate for the negotiator’s needs.³⁴³

³³⁷ Malhotra and Bazerman, above n 23, at 38.

³³⁸ The thesis will discuss more about the topic of fact-finding in the ‘Analytical investigator’ segment of the next chapter.

³³⁹ Carsten KW De Dreu and Gerben A Van Kleef “The influence of power on the information search, impression formation, and demands in negotiation” (2004) 40 J Exp Soc Psychol 303 at 303.

³⁴⁰ Karrass, above n 134, at [193-194].

³⁴¹ Pruitt and Kim, above n 324, at 156.

³⁴² At [157-158].

³⁴³ De Dreu and Van Kleef, above n 339, at 303.

There is also value in “diagnostic questions”³⁴⁴ as they assist negotiators to form more accurate impressions of the other party than if they relied on leading questions. Weaker negotiators tend to ask more diagnostic questions than leading ones and show more willingness to cooperate.³⁴⁵ The thesis explores questions further in the subsequent chapters, including open-questions in the ‘Analytical investigator’ segment.

Despite the quality of the questions, the issue remains around the degree to which parties are willing to share information. This information exchange (or lack of) is played out in a negotiation’s information game.

4 Information game

In the early stages of their discussions, the parties may play the negotiation competitively and start an information game, especially if they are not familiar with one another.³⁴⁶ A naturally collaborative negotiator can be drawn into the information game, as they may have little choice but to play. In doing so, negotiators will have to protect their client’s interests by strategically bartering for information, while the negotiation transitions beyond this competitive gaming stage.

Given that “the party with the most accurate information wins”, at this time, it may be the parties’ shared intention to get as much information as possible without giving much away in return. This includes the negotiator controlling the perception of their counterpart, as to what the counterpart understands about the negotiator’s position. This approach has the potential to manipulate the counterpart’s available choices.³⁴⁷

Depending on the intensity of the game, the parties may not reveal what they really desire, as they cloak their real preferences through the use of exaggerated claims or strawman arguments.³⁴⁸ These competitive tactics may result in misdirecting the understanding about each other’s underlying interest. This mutual obfuscation of interests

³⁴⁴ Diagnostic questions, can “provide direct evidence for or against a belief or hypothesis” through a yes/no answer. In contrast to this, a leading question tends to result in only answers that seem consistent with the belief or hypothesis.

³⁴⁵ De Dreu and Van Kleef, above n 339, at [304-305 and 308].

³⁴⁶ Goodpaster, above n 7, at 342.

³⁴⁷ At 346.

³⁴⁸ Strawman arguments are used to build up peripheral interests in order to sacrifice them to get agreement on the actual important interests.

is intended to prevent a negotiator from having an unfair advantage by knowing what the other is truly wanting and exploiting this knowledge.³⁴⁹ This may however, lead to inefficient outcomes as any potential solution arising from this situation may be based on inaccurate information.

It is assumed that most negotiating parties are working from a partially blind position in which their understanding of the negotiation scenario is being built up gradually as further information comes to light. As evidence is often unclear, parties are left to draw their own conclusions to fill the gaps and make particular concessions. The interpretation of the evidence is formed from constant assessments of the negotiation.³⁵⁰ Accordingly, the exchange of information is at the heart of concession making.³⁵¹

Following from the work of Siegel and Fouraker,³⁵² Bacharach and Lawler suggested that if negotiator Ψ is left to infer from negotiator Ω 's concessions, Ω 's aspiration, Ψ is then able to react to the concession in a tough or soft way. Accordingly, if Ω presents few or no concessions, Ψ will attribute a high aspiration and tough image to Ω , for which Ψ may lower its aspiration and make more concessions.³⁵³

Accordingly, negotiators have to be alert to what information can be gleaned from indirect sources, such as the underlying meaning of the concessions themselves. An important objective of the information game is for each party to determine the other's bottom line through whatever clue is available.³⁵⁴

This is similar to the board game *Battleships* where the objective is to sink the other player's battleship by deducing, through trial and error, the coordinates of each ship. The Zone of Possible Agreement ("ZOPA"), or the space between the parties' reservation values³⁵⁵ or bottom lines, can also be deduced through the process of elimination, as parties can make micro adjustments to correct their prior actions to a point where a negotiator can home in on the coordinates of their counterpart's battleship (or bottom line).

³⁴⁹ Menkel-Meadow, above n 1, at 780.

³⁵⁰ Goodpaster, above n 7, at [331-332].

³⁵¹ Lewicki, Saunders and Barry, above n 51, at 264.

³⁵² Siegel and Fouraker, above n 77, at [90-95].

³⁵³ Bacharach and Lawler, above n 28, at 82.

³⁵⁴ Goodpaster, above n 7, at [332-333].

³⁵⁵ Malhotra and Bazerman, above n 23, at 23.

Each move or concession becomes crucial as they provide cumulative hints or tell-tale signs as to the price for which each party might be willing to settle. The parties can read the situation from how wide or narrow the concessions are as to whether they are both in a ZOPA or whether the closely guarded respective limits or bottom line is getting closer.

By perpetuating the reciprocation of adversarial conduct in the information game the players may lose opportunities for better solutions.³⁵⁶ Therefore, it is for the parties to see if they can move from manipulating information to sharing it.

5 Sharing information and asymmetrical information

Information sharing is cyclical as it is an ongoing process of communication, “cognition and learning”. The repeated cycles of information sharing leads to: 1. the assessment of that information; 2. the resultant adjustment of expectations and perspectives; and 3. informing the tactical decision to share information again. This process may induce changes in the parties’ strategies or reinforce the importance of certain issues.³⁵⁷

The free flow of enough information determines the success of an integrative solution. Therefore, negotiators ought to encourage an environment to openly discuss the issues and concerns important to them.³⁵⁸ As a tactic, parties may wish to proactively disclose certain information to encourage some in return.³⁵⁹ Sharing information also induces an understanding of the other party to generate solutions, however this has to be balanced with how much information one gives.³⁶⁰

If one discloses too little, it may bring about a belief by the other party, that the withholding of a certain information may be a part of an attempt to manipulate the negotiation.³⁶¹ However, as explained above, information should not be carelessly divulged as it may enable exploitation by an adversarial party. Accordingly, negotiators are

³⁵⁶ Menkel-Meadow, above n 1, at [780-781].

³⁵⁷ Gulliver, above n 95, at 83.

³⁵⁸ Lewicki, Saunders and Barry, above n 51, at 77.

³⁵⁹ Malhotra and Bazerman, above n 23, at 99.

³⁶⁰ Lewicki, Hiam and Olander, above n 12, at 226.

³⁶¹ At 226.

encouraged to share information about “*relative* priorities without minimizing the *absolute* importance of any one issue”.³⁶²

The sharing of information also assists to equalise the asymmetry of information between the parties, as “[i]n most negotiations, each party has at least some material information that the other party doesn’t have”.³⁶³ Pinkley highlighted that “asymmetric information” between the parties increases the rate of impasse between them.³⁶⁴

Khan and Kohls indicated that the lack of “relevant information” about the situation and the other party was one of the predetermining factors of negotiations being more competitive.³⁶⁵ Negotiators with insufficient information tend to compensate with increased tough approaches. Therefore, an ill-prepared or inexperienced negotiator may default to a competitive strategy to maximise their own interest in a limited information situation, especially as it is an easier strategy to adopt.³⁶⁶ A negotiator may also use competitive bargaining to guard against revealing too much information prematurely, especially if they feel that they are blind to their counterpart’s intentions.

Accordingly, a low level of trust makes it risky to freely exchange information,³⁶⁷ which creates a dilemma. Without the necessary information a party using a collaborative strategy may be left open to the other party’s competitive tactics; and, if neither party has complete information, then both are susceptible to bluffing, deception and manipulative tactics.³⁶⁸ Not only can a party manipulate information that their counterpart obtains about them, but that manipulating party can also influence their counterpart’s view of where the party stands regarding certain issues,³⁶⁹ and negatively shape the counterpart’s “self-perceptions”.³⁷⁰

³⁶² Malhotra and Bazerman, above n 23, at 99.

³⁶³ Mnookin, Peppet and Tulumello, above n 71, at 21.

³⁶⁴ Robin L Pinkley “Impact of Knowledge Regarding Alternatives to Settlement in Dyadic Negotiations: Whose Knowledge Counts?” (1995) 80 J Appl Psychol 403 at 410.

³⁶⁵ Arnold Kahn and John Kohls “Determinants of Toughness in Dyadic Bargaining” (1972) 35 Sociometry 305 at [311-315].

³⁶⁶ Fisher, Ury and Patton, above n 10, at 153.

³⁶⁷ Pruitt, above n 14, at 119.

³⁶⁸ Bacharach and Lawler, above n 28, at 208.

³⁶⁹ Lewicki, Hiam and Olander, above n 12, at 96.

³⁷⁰ Goodpaster, above n 7, at 341.

Competitive tactics such as, presenting selective information, omitting non-favourable data and feigning anger or disappointment, increases the 'fog index' of a negotiation by not letting the other party know which are the important issues. Although distorting vital information can manipulate the negotiation's outcome to favour the adversarial party, it may bring about unintended results.³⁷¹ The negotiation may become protracted through a spiral of competitiveness that continues the information game, making the interaction between the parties less effective than it could be if they were collaborating.

Unethical behaviour could be addressed by asking direct questions to test the other party's willingness to respond directly, and verify critical and material information wherever possible. Crafting agreements in a way that seeks written representation about the facts can be used to 'smoke out' unethical behaviour. However, this may promote further distrust between the parties. If a party is caught out in a lie or with misleading behaviour, and collaboration is still desired, then the party discovering the impropriety could give the other party a way to save face to permit both sides to continue working together.³⁷²

No matter how much a manipulative party emphasises the weaknesses of an innocent or unskilled party, that innocent party ought to remain focused on the objective information rather than their weaknesses. Buying into this perception of weakness may enforce unfounded assumptions of the other side's negotiation strength. Instead, an innocent party could consider that the other party's presentation of strength may in fact be masking a weakness. Accordingly, the innocent party should seek more objective information that assesses the real strength of the manipulative party.³⁷³

To recap, from the initial stages of a negotiation, the parties are likely to have incomplete information and lack a true understanding about each other's desires and dependencies. A vital aspect of a negotiation is to establish this missing information, which is then added to what the parties already know about the matter. This helps to inform their assessment of their mutual dependence and/or their relative bargaining power.³⁷⁴

³⁷¹ Lewicki, Hiam and Olander, above n 12, at [96-97].

³⁷² Mnookin, Peppet and Tulumello, above n 71, at [288-290].

³⁷³ Goodpaster, above n 7, at 341.

³⁷⁴ At 336.

This chapter has reviewed literature from various academic disciplines to form a foundation for the remaining thesis chapters. The intention of pooling these ideas together is to support an ethical way of negotiating with a direct focus on effective preparation. The reader will now be taken through the ‘assembly line’ for which negotiators can use to better manage information.

III The Negotiator's Assembly Line

The Negotiator's Assembly Line ("NAL") is structured around its function to gather, process and utilise relevant information. The aim of managing information through these three phases is to improve the negotiator's mastery over the relevant information and place that negotiator in a better position to compete and to problem-solve.

This chapter will consider how tasks from the three phases can be personified as three 'professionals': the analytical investigator, the innovative inventor and the diplomatic salesperson. These 'professionals' have their individual workstations ("stations") to undertake their work to action the three phases. This approach to compartmentalise mind-sets is seen in the works of Ancona and Caldwell³⁷⁵ and de Bono³⁷⁶.

De Bono said that "[t]he biggest enemy of thinking is complexity".³⁷⁷ To avoid a confusion of thought processes, there was an "absolute psychological need to separate out the types of thinking" and deal with them separately.³⁷⁸ Certain skills and attributes used in the NAL were chosen from the thesis author's negotiation experience. They are presented below to show the interplay between the three phases of managing information and the three stations of the NAL professionals:

Gathering information (during negotiation preparation and discussions):

- (a) The **investigator** will methodically seek and collate facts, data and opinions before any negotiation discussions with the other party.
- (b) During the negotiation discussion, the **salesperson** and the **investigator** will obtain further information from the other party through inquiries.

Processing information (outside the negotiation discussion):

- (a) The **investigator** will assess the information to validate certain premises and reframe the perspectives and the hypothesis of the negotiation, which will assist to critically refine information into applicable 'intelligence'.

³⁷⁵ Ancona and Caldwell, above n 47.

³⁷⁶ de Bono, above n 48.

³⁷⁷ At 176.

³⁷⁸ At [11-12].

- (b) The **inventor** will then further process the intelligence, connecting various strands of information together to create potential options geared towards mutual gain between the negotiators.

Using information (during the negotiation discussion):

- (a) The **salesperson** through their persuasive communication will barter intelligence with the other party to acquire more information and to persuade them to collaborate.
- (b) The **salesperson** and the **inventor** will work through the potential options with the other party refining or developing new options to finalise the negotiation.

Although it is not always clear whether a party is weaker, for the avoidance of doubt in this thesis, the negotiator instigating the NAL is the weaker party. The NAL is a tool to assist weaker negotiators to better harness the power of information to leverage the imbalance between them and stronger negotiators. However, the NAL may also assist any negotiator to move away from using information to manipulate each other through adversarial strategies. In particular, information used to improve the parties' understanding can be used to promote openness and mutual cooperation.

The idea of an assembly line is to compartmentalise the negotiators' thought processes when dealing with different tasks to handle information, as these require different mind-sets to maximise the benefits of their efforts. This gives negotiators the utmost focus on the particular tasks. An individual negotiator requires certain skills from all three professionals to master the control over information. Accordingly, to become a skilful negotiator is essentially to become a more powerful one.³⁷⁹

This thesis advocates that an individual negotiator, for straightforward negotiations, should aim to be a universal negotiator, with a certain level of proficiency over each of the three professional's stations of the NAL. Alternatively, for more complex negotiations, the NAL can be used in a negotiation team setting. Here, a team has the potential to have certain tasks delegated to its individual members, so that the process is not overly taxing

³⁷⁹ Fisher, above n 160, at 154.

on an individual. This thesis looks at how either a talented individual or a team can manage information methodically.

In the midst of the NAL's machinery is the client factor, which is the engine that runs this framework. Without the client buying into the process, the NAL professionals lack authority in their actions. Therefore, the client factor and where it fits within the NAL will be discussed.

The thesis will first go into the individual traits of each of the three NAL professionals. In particular, this chapter will combine the relevant NAL components and describe how they interrelate to promote the flow of information through the competitive and collaborative nature of the negotiation discussion.

A The Professionals' Stations

1 Analytical investigator

Initially, for this section of the thesis, there was to be an analyst professional separate from the investigator. However, to streamline the NAL, it was decided to class the two in the same category. In doing so, the thesis presents two different types of investigator, the information gatherer and the analyst. Therefore, this investigator section is twice the length of the inventor and the salesperson sections in this thesis, as it covers the tasks of the two different investigators.

This investigator station was inspired by the phrase "investigative negotiation" by Malhotra and Bazerman in the third chapter of *Negotiation Genius*.³⁸⁰ "Investigative Negotiation" appears to have been used as a general descriptor. This descriptor is used to characterise a checklist of helpful principles and strategies, consistent with the collaborative problem-solving ideas of Fisher, Ury and Patton, for example:³⁸¹

- uncovering motivations and interests;
- reframing demands as opportunities for resolution;
- not overlooking specific details;

³⁸⁰ Malhotra and Bazerman, above n 23, at [83-102].

³⁸¹ Fisher, Ury and Patton, above n 10.

- building trust; and
- sharing information.

This thesis however, takes the use of “investigation” more literally. A negotiator can evoke the qualities of the investigator-archetype in their approach to gathering and analysing information. An ideal investigator, may be thought of as observant, resourceful, a skilled communicator, impartial, open-minded, intuitive and logical.³⁸² The thesis proposes that having a negotiator with these characteristics increases the probability of acquiring the most accurate and useful information.

The investigator collects substantive facts and opinions,³⁸³ and comprehensively explores relevant negotiation issues. This sets up the other professional stations in the NAL with the right resources to refine the information and effectively engage with the other party. Therefore, as a “fact finder”,³⁸⁴ the investigator has to correctly identify the relevant facts through careful analysis.

Before gathering information, the investigator should first explore their level of awareness of the information, as per the following table adapted from the use of “Johari Window” logic from the work of Tong, Bryant and Horvath.³⁸⁵

Some awareness	Lack of awareness
(1) Information the investigator knows about and knows that they know.	(3) Information the investigator does not know even exists, but others know about it.
(2) Information the investigator does not know, but they know that they do not know.	(4) Information that the investigator thinks they know about, but it is not the case at all.

From the table above, the investigator would start by consolidating what they already know about a scenario (1). They would then begin their endeavours of locating

³⁸² William F Blake “Interviews, interpreters, and Statements” in *Basic Private Investigation: A Guide to Business Organization, Management, and Basic Investigative Skills for the Private Investigator* (Charles C Thomas Publisher Ltd, Springfield Illinois, 2011) at 134.

³⁸³ Latz, above n 23, at 36.

³⁸⁴ Robert J Girod *Logical Investigative Methods* (CRC Press, Boca Raton, Florida, 2015) at 7.

³⁸⁵ Stephen Tong, Robin P Bryant and Miranda AH Horvath *Understanding Criminal Investigation* (John Wiley & Sons Ltd, Chichester, West Sussex, 2009) at 35.

information that they have an inkling about (2). In the process, they may discover more information that they had not factored into their initial assessment (3). However, what is risky for the investigator is to operate on the presumption that all the information is reliable when in fact some is not (4). The re-examination of the information may result in a total change of perspective for the negotiation.

To begin their investigation, the investigator needs a clean palette to accept new information by managing their biases. Although bias was briefly mentioned in the second chapter, the thesis will now elaborate on it further in the context of the investigator station.

(a) Objectivity

Before implementing their plan, the investigator should be open and objective.³⁸⁶ This is so that the search can evolve and is not limited by any inherent bias or “tunnel vision” which may lead to information being ignored³⁸⁷ just to suit a preferred narrative.³⁸⁸ The investigator’s interpretation may develop through a combination of available information and past experiences which form “common sense reasoning” or “heuristics”.³⁸⁹

Having plotted their initial course with their lines of inquiries, the investigator is required to course-correct their actions in order to arrive at the desired destination. Accordingly, the investigator should be agile to “allow their beliefs to change in accordance with th[e] evidence”³⁹⁰, to navigate various information, and to address different narratives dictated by new information. The investigator may examine their client’s own interests first, which may clarify any uncertainty or unveil unanticipated issues before the start of negotiation discussions.

³⁸⁶ At 37; Nierenberg and Calero, above n 311, at [132-134].

³⁸⁷ Brent Snook and Richard M Cullen “Bounded Rationality and Criminal Investigations: Has Tunnel Vision Been Wrongfully Convicted?” in *Criminal Investigative Failures* (Taylor and Francis Group, Boca Raton, Florida, 2009) 71 at 73.

³⁸⁸ Association of Chief Police Officers and National Policing Improvement Agency *ACPO Core Investigative Doctrine* (2nd ed, National Centre for Policing Excellence, London, 2012) at 82; Snook and Cullen, above n 387, at 86.

³⁸⁹ Tong, Bryant and Horvath, above n 385, at 40.

³⁹⁰ Snook and Cullen, above n 387, at 84.

With their self-knowledge, the investigator should focus on the deficiency in their understanding to question what they should know.³⁹¹ It is said that, “[t]o know that we know what we know, and that we do not know what we do not know, that is true knowledge”.³⁹² Using this Confucian adage, the investigator should be receptive to there being more information to be had and not take any information for granted. This is to avoid being caught out with “abstracting”, the process of selecting “some details while completely disregarding others”³⁹³ - particularly given what the investigator thinks they know as per the abovementioned ideas of Tong, Bryant and Horvath.³⁹⁴

Only when the investigator confronts and manages their biases, can they begin to gather knowledge of the negotiation with a clean palate.³⁹⁵ Otherwise, the bias may inadvertently affect their ability to see all the available options or opportunities. This is illustrated in the 2001 movie, *A Beautiful Mind*, in a scene where the mathematician John Nash is talking with his doctor, Dr Rosen, about trying to resolve his schizophrenia himself.³⁹⁶

Dr Rosen: You can't reason your way out of this!

John Nash: Why not? Why can't I?

Dr Rosen: Because your mind is where the problem is in the first place!

Accordingly, Nash fails to accept that the problem relates to the schizophrenia affecting his mind, and therefore, cannot rely on his own judgement to manage the problem.

³⁹¹ D Kim Rossmo *Criminal Investigative Failures* (Taylor & Francis Group, Boca Raton, Florida, 2009) at [26-27].

³⁹² Henry David Thoreau *Walden* (150th Anniversary ed, Princeton University Press, New Jersey, 2004) at 11.

³⁹³ Nierenberg and Calero, above n 311, at 58.

³⁹⁴ Tong, Bryant and Horvath, above n 385, at 35.

³⁹⁵ James W Osterburg and Richard H Ward *Criminal Investigation: A Method for Reconstructing the Past* (7th ed, Anderson Publishing, Waltham, MA, 2014) at [311-312].

³⁹⁶ Ron Howard *A Beautiful Mind* (Universal Pictures, 2001)

<<https://www.imdb.com/title/tt0268978/quotes>>.

This is similar to the investigator's objectivity being limited by their own bias. In both cases the fault lies within the operator's judgement, which cannot be wholly trusted.

The investigator may be able "to clear the mental landscape of all detritus and debris", to ready the scene to erect structured and objective ideas and information. This metaphor is attributed to René Descartes' idea of the "Cartesian hymn", which places emphasis on ascertaining the absolute foundation of all possible knowledge. Descartes proposed that a system of knowledge should be "based on clear and distinct ideas and indubitable and certain first principles".³⁹⁷ In a negotiation, this absolute foundation would be made up of proven facts and data.

The investigator however, should not do away entirely with conjecture and unqualified opinions, but instead quarantine them and treat them cautiously until they can be verified. If the initial information is trustworthy, it can be used to build a framework of a negotiation hypothesis. As more evidence arises, the investigator can remove incongruent narratives to reinvest their efforts to pursue other useful lines of inquiries.

(b) Planning

Given its adaptive and intuitive nature, investigation is an applied art,³⁹⁸ in particular, a somewhat creative or "imaginative process".³⁹⁹ It is necessary however, to craft investigations around a methodical framework that can be applied universally to all situations. This enables the investigator to freely adapt to the individual circumstances of the tasks at hand. The investigator should have a plan with a clear direction or list of objectives to be explored. Given the other NAL professionals' reliance on the information gathered, timeliness is an important factor.

In the planning stage, the investigator should decide the purpose and methodology of the investigation.⁴⁰⁰ The purpose of the investigation is to give the most accurate picture

³⁹⁷ Raymond Ruble *Round Up the Usual Suspects: Criminal Investigation in Law, Order, Cold Case, And CSI* (Praeger Publishers, West Port, 2009) at [1-2].

³⁹⁸ Manley, above n 44, at 132.

³⁹⁹ Charles A Sennewald and John K Tsukayama *The Process of Investigation* (third ed, Butterworth-Heinemann, Oxford, 2006) at 8.

⁴⁰⁰ Naval Justice School *JAGMAN Investigations Handbook* (revised ed, Defense Technical Information Center, Newport Rhode Island, 2016) at III-1.

of the situation regarding all the other parties involved, the topics at issue, the surrounding circumstances affected by potential negotiation outcomes, and the rules and boundaries of the negotiation subject matter. The investigator may also wish to keep their inquiry on track with the terms of reference for their inquiries. This should outline:⁴⁰¹

- the purpose and objectives of the investigation;
- the investigative scope (the types of issues to be explored) and methodology;
- the gaps in knowledge;
- the resources needed; and
- timeframes, milestones of necessary tasks.

With the initial information held, the investigator can utilise a “scientific method” of enquiry to further structure their approach.⁴⁰² Through preliminary observations further questions can be asked of the situation to reveal more information. Little by little as more information is uncovered, the investigator can begin to build their negotiation hypothesis through “incremental improvements”.⁴⁰³

The types of information to be sought is case specific, as shown in the insurance case study in the next chapter. Using the ideas of Greenhalgh⁴⁰⁴ and Lewicki, Saunders and Barry,⁴⁰⁵ the investigator may create a generic shopping-list of information from the mutual negotiation issues, everyone’s interests, goals, limits and BATNAs, and the feasibility of possible settlement.

A firm understanding of the “rules” and limitations of a negotiation can have a major effect of changing the balance of power, even with the smallest “details”.⁴⁰⁶ To have mastery of these rules will enable the actors to comprehend and work together inside and outside a negotiation’s boundaries to reach a final (re)solution. This will be further explored

⁴⁰¹ Association of Chief Police Officers *ACPO Analysis* (National Policing Improvement Agency, Wyboston, 2008) at [18-19].

⁴⁰² Girod, above n 384, at [9-12].

⁴⁰³ Tong, Bryant and Horvath, above n 385, at 40.

⁴⁰⁴ Leonard Greenhalgh *Managing Strategic Relationships* (The Free Press, New York, 2001) at [180-196].

⁴⁰⁵ Lewicki, Saunders and Barry, above n 51, at [126-133].

⁴⁰⁶ Brandenburger and Nalebuff, above n 307, at [52 & 159-160].

in the case study when looking at how an insurance policy bestows certain rights and benefits to the insurer and the insured.

Having established the types of information needed, the investigator then looks at where this information is likely to be found and how best to get it.⁴⁰⁷ Information can be obtained before negotiation discussions (through inquiries and researching documents), and during discussions with the other party to the negotiation. With the different sources at their disposal, the investigator may start with preliminary inquiries to establish a baseline of information.

The client is a good starting point to establish “known facts”, “underlying factors” and “intelligence particular to the case”.⁴⁰⁸ The investigator can then branch out to other sources such reports, records databases (in closed systems), the internet (for publicly assessable information) and people (either with the other negotiator or with employees, previous negotiators and technical experts).⁴⁰⁹

Having established their plan, the investigator’s “flexibility and resourcefulness” is necessary to collect information,⁴¹⁰ whether it is through inquiries or research. As the investigator is a professional researcher and interviewer,⁴¹¹ they ought to be able “to obtain information from various sources”⁴¹² and not overlook any detail.

An investigation strategy will likely contain “a series of actions that have a particular focus”. Investigators may follow a trail or a “line of enquiry”, to find more relevant data.⁴¹³ These trails may enable investigators to make the right connections to lead them to the most relevant information. The timely investigator should persist with their research but not remain fixated on singular lines of enquiry at the cost of other information.

⁴⁰⁷ Naval Justice School, above n 400, at VI–5.

⁴⁰⁸ Manley, above n 44, at 134.

⁴⁰⁹ Rory J McMahon *Practical Handbook for Private Investigators* (2nd ed, Taylor and Francis Group, Boca Raton, Florida, 2007) at 43; Kären M Hess, Christine Hess Orthmann and Henry Lim Cho *Criminal Investigation* (11th ed, Cengage Learning, Boston, 2017) at [191-193].

⁴¹⁰ Naval Justice School, above n 400, at 113.

⁴¹¹ McMahon, above n 409, at 3.

⁴¹² Blake, above n 382, at 133.

⁴¹³ Association of Chief Police Officers *ACPO Murder Investigation Manual* (3rd ed, National Centre for Policing Excellence, Wyboston, 2006) at [59-60].

By being able to tap into various forms of information, the investigator is assumed to be able to communicate well with others.⁴¹⁴ However, before any discussion with the other party takes place, the investigator should perform a stocktake of the information they have and still require. Also, as opposed to having set questions to ask the other party, the investigator should form a list of their information “objectives”.⁴¹⁵ With these objectives the investigator can generate the appropriate questions during the negotiation discussions.⁴¹⁶ In general, various investigative textbooks⁴¹⁷ present a range of interview strategies open to the investigator to acquire information.⁴¹⁸ Before starting, the investigator can:⁴¹⁹

... prepare by noting pertinent facts to be developed to detect and evaluate inconsistencies and discrepancies in the statements of the persons interviewed, and to require clarification of the statements, as necessary.

When asking questions in their inquiry, the investigator should allow the other party to speak first and provide an “uncorrupted version” of events.⁴²⁰ In other words, let the person being questioned tell their story without being interrupted.⁴²¹ This should be followed by asking basic probing and open-ended questions⁴²² beginning with “Who,

⁴¹⁴ Blake, above n 382, at 133.

⁴¹⁵ New Intelligence *Art and Science of Interview: Fundamentals (Workbook)* (Intelligence Proprietary Limited, 2018) at [26-27].

⁴¹⁶ Naval Justice School, above n 400, at 117.

⁴¹⁷ Association of Chief Police Officers, above n 413; Girod, above n 384; McMahon, above n 409; Association of Chief Police Officers and National Policing Improvement Agency, above n 388; Naval Justice School, above n 400; Rossmo, above n 391.

⁴¹⁸ Refer to chapter 2, part D, 3.

⁴¹⁹ McMahon, above n 409, at 46.

⁴²⁰ New Intelligence, above n 415, at [47-48].

⁴²¹ McMahon, above n 409, at 44; New Intelligence, above n 415, at [47-48].

⁴²² New Intelligence, above n 415, at [51-54].

What, When, Where, Why, and ... How”⁴²³. These questions are essential to establishing the facts and are referred to by various investigative resources.⁴²⁴

During the course of the inquiries, the investigator may also uncover “transitive goals”. These are goals not known from the outset by the investigator but which become clear as the negotiation unfolds. Hence, it is important to create and maintain an open line of communication in which “[r]espectful conversation, or genuine dialogue” allows for the discovery of transitive goals.⁴²⁵

Fisher stated that “it is usually worthwhile to gather a great deal of unnecessary information... in order to gather a few highly relevant facts”.⁴²⁶ It is important that the negotiator shift from obtaining data and facts, mere information, to refining and filtering it to relevant negotiation knowledge, applicable intelligence.⁴²⁷ Information can be transmuted into intelligence through an evaluation of that information⁴²⁸ and then an analysis of its value to the negotiation.⁴²⁹ Problems with the intelligence occur not as a result of insufficient information but from insufficient analysis, from which negotiators fail to form a “complete picture”.⁴³⁰

(c) The analyst

The analyst and information gatherer share the same investigative and analytical skills and often work in unison, making them “integral parts of the same team”.⁴³¹ The analyst’s role flows from the investigator’s and becomes the alter ego or the second element, prior to the inventor station.

⁴²³ Manley, above n 44, at 135.

⁴²⁴ Association of Chief Police Officers, above n 401, at [25-26]; Naval Justice School, above n 400, at III-1; Hess, Orthmann and Cho, above n 409, at 44; Manley, above n 44, at 135; Osterburg and Ward, above n 395, at 7; Sennewald and Tsukayama, above n 399, at 126.

⁴²⁵ Hocker and Wilmot, above n 199, at 98.

⁴²⁶ Fisher, above n 160, at 154.

⁴²⁷ Manley, above n 44, at 133.

⁴²⁸ United Nations Office on Drugs and Crime *UNODC Criminal Intelligence: Manual for Analysts* (United Nations, Vienna, 2011) at 1.

⁴²⁹ Hess, Orthmann and Cho, above n 409, at [219-220].

⁴³⁰ Tong, Bryant and Horvath, above n 385, at 36.

⁴³¹ United Nations Office on Drugs and Crime, above n 428, at 7.

Two obstacles of problem-solving need to be addressed through the evaluation and analysis of the collected information. These are “Misinformation” and “Incorrect focus”.⁴³² To manage these obstacles, the investigator ought to verify the raw data and to realign perspectives with the establish intelligence. The purpose of the analysis of the gathered information is to achieve the following:

- (1) to diminish misinformation by distilling the data down to the accurate facts and evidenced opinions to obtain applicable intelligence;
- (2) to have the correct focus on the relevant issues by using the newly obtained intelligence to realign any out of place perspectives and to course correct the initial negotiation hypothesis; and
- (3) with the remainder of what is collected, the investigator can form a better understanding of the underlying issues in the negotiation, and lays the foundation for workable options.

The evaluation of the collected information to verify its accuracy and ascertain its quality to avoid misinformation will now be briefly discussed. This is followed by a concise review of logical reasoning as way to check and realign initial perspectives and the negotiation hypothesis.

(i) Evaluation to address misinformation

The investigator should look to offset the potential costs and risks of working with misinformation.⁴³³ However, given the time constraints, the investigator's account of the situation may still be incomplete as there may be gaps in the information, its interpretation and understanding. Therefore, it may not be possible to perform multiple reviews of the information.⁴³⁴ This means that there is “an inevitable degree of speculation and risk”

⁴³² Scott Witt *How To Be Twice as Smart* (Reward Books, Paramus, New Jersey, 1993) at [76-77].

⁴³³ Refer to chapter 2, part D, 1 and 2 of this thesis.

⁴³⁴ Beth Crandall, Gary Klein and Robert R Hoffman *Working Minds: A practitioner's guide to Cognitive Task Analysis* (The MIT Press, Cambridge, Massachusetts, 2006) at 125.

associated with the interpretation and analysis of information and the resultant intelligence.⁴³⁵

The investigator can attempt to mitigate that risk by maximising the efficiency and thoroughness of the information gathering and the extent of their analysis. However, prior to an analysis of the information it has to be evaluated to establish its reliability and quality. This entails examining the information's source and its content.⁴³⁶

If the information is from open and unfamiliar sources, the information should be subject to a quality control. The investigator should scrutinise not only the credibility and expertise of the source, but also the source's balanced/reasonable treatment of the information.⁴³⁷ Some potential problems faced by the investigator could be:⁴³⁸

- opinions presented as “facts” from people with a vested interest in the matter;
- overrated opinions based on observations from people without adequate training and/or experience to give advice on the subject area;
- hastily prepared data may have far-reaching technical errors;
- superficial reports; and
- preconceived ideas that were incorrect from the start.

The information's age is also important, especially as older data may be superseded with current information. Investigators may be able to follow new information trails with different sources which elaborate on the initial information and identify anomalies through a cross-comparison of the current data with the new data.⁴³⁹

Overall, the investigator should distinguish which facts are indisputable, questionable or missing,⁴⁴⁰ by stress-testing them against verified evidence and corroborating them through other sources. Evaluating the quality of information is also tied

⁴³⁵ United Nations Office on Drugs and Crime, above n 428, at 9.

⁴³⁶ Association of Chief Police Officers, above n 401, at 29.

⁴³⁷ At [30-31].

⁴³⁸ Witt, above n 432, at 79.

⁴³⁹ Association of Chief Police Officers, above n 401, at [30-31].

⁴⁴⁰ Witt, above n 432, at 79.

into analysing how it relates to the negotiation, to enable the investigator to scrutinise what further insights can be gained.

(ii) Analysis to realigning focus, perspectives and hypothesis

An analysis of the information requires the investigator to engage in critical thought. Here, the investigator should be “sceptical without being cynical[,] ... evaluative without being judgemental and forceful without being opinionated”.⁴⁴¹ By exercising this discipline the negotiator, in general, is better placed to clearly and persuasively express their arguments.

A critical analysis includes identifying patterns and certain connections in the information to draw inferences based on what has occurred and is occurring in the negotiation to establish future courses of action.⁴⁴² This involves breaking the information down to gain a better understanding of its moving components and their relationship to the collective whole.⁴⁴³

To have a critical understanding of the big picture and its constituent parts is vital to good decision-making.⁴⁴⁴ This understanding allows negotiators to comprehend how their possible actions may affect the trajectory of their desired outcome, and therefore enables them to plan their approach with more confidence and care. To get to this level of understanding the investigator has to analyse the information, to ascertain:⁴⁴⁵

- (1) the main issues and arguments of all the negotiating parties;
- (2) inconsistency and vagueness in a statement or premise that goes towards making up an argument or an opinion; and
- (3) fallacies or errors of reasoning.

In respect of detecting errors of reasoning, the investigator should be wary of the “confirmation bias”. This is the tendency to interpret new information to be compatible

⁴⁴¹ Girod, above n 384, at 47.

⁴⁴² Association of Chief Police Officers, above n 401, at 10.

⁴⁴³ Crandall, Klein and Hoffman, above n 434, at 3.

⁴⁴⁴ United Nations Office on Drugs and Crime, above n 428, at 4.

⁴⁴⁵ Girod, above n 384, at 46.

with one's hypothesis of the negotiation to the point where one may filter out information that disconfirms the hypothesis.⁴⁴⁶ This relates to situations where negotiators focus their fact-finding towards confirming their own hypothesis of the situation.⁴⁴⁷ Therefore, the investigator should keep a sceptical eye on the information and not accept any details at face value, but also not think narrowly about an issue without taking all the relevant information into account.⁴⁴⁸

Throughout the investigator's analysis, information should be ordered in a way that presents a chronological, clear and concise recitation of all the data and opinion.⁴⁴⁹ From this, an overall picture of the most accurate information can be established to look at it all in context. This enables a critical assessment to sort the information into the applicable intelligence.

As more intelligence is collected, negotiation issues can be further studied and pulled apart to construct a solution. Alternatively, the issue may become less important through this process,⁴⁵⁰ therefore opening the possibility for the negotiation to change directions through the narrowing of issues and possibilities.

"Basic logic theory (reasoning)" can be used to assess the evidential strength of one's arguments. Once certain premises have been established, the investigator can form inferences (statements that go beyond the established premises) as a temporary filler for missing information. By analysing the premises, the investigator can draw conclusions (a type of finalised inferences) about the negotiation in order to make decisions on the approaches needed.⁴⁵¹ The conclusions and their supporting premises form the argument⁴⁵² that can be implemented to justify the importance of the negotiator's interests.

With deductive reasoning, the investigator can deduce a "*specific conclusion*" about the negotiation through a "*general premise*".⁴⁵³ If the premises are correct then the

⁴⁴⁶ Rolf Dobelli *The Art of Thinking Clearly* (Harper Collins Publishers, Inc, London, 2014) at 19.

⁴⁴⁷ Pruitt and Kim, above n 324, at [157-158].

⁴⁴⁸ Girod, above n 384, at [46-47].

⁴⁴⁹ Naval Justice School, above n 400, at III-2.

⁴⁵⁰ Witt, above n 432, at 80.

⁴⁵¹ Association of Chief Police Officers, above n 401, at 80.

⁴⁵² Girod, above n 384, at 52.

⁴⁵³ At 29.

inference is true, confirming what is already known,⁴⁵⁴ hence deductive reasoning is taken from a point of “validity”.⁴⁵⁵ Negotiators can therefore use deductive reasoning to stress-test the premises that their arguments rely on and assess the validity of their counterpart's arguments.

It is ideal for deductions to be based on more complete intelligence. Without this, the investigator is left to make inferences (through inductive reasoning) with behaviours and patterns beyond the available information.⁴⁵⁶ The investigator with limited information may however start their understanding of the matter with their provisional conclusions about the negotiation and formulate their questions of the negotiation to create an overall proposition or “hypothesis” of the matter.⁴⁵⁷ A hypothesis makes generalisations on the probability of the premises, requiring some degree of estimation of the available information.⁴⁵⁸

Through the course of the negotiator's investigation, their hypothesis will be constantly evolving through the discovery of new information. Therefore, every new piece of information should be subjected to a mini-review to see how it affects the hypothesis;⁴⁵⁹ this should assist in course-correcting the investigator's approach.

A hypothesis can be improved by drawing on experts with the requisite knowledge and ability to check aspects of the hypothesis,⁴⁶⁰ this is similar to verifying mental arithmetic with a calculator.⁴⁶¹ The constant testing, development and improvement of a hypothesis is important, given the inductive nature of a hypothesis, for which “there is no logical reason why a generalisation should follow from particular observations”⁴⁶². The investigator should be constantly using the applicable intelligence to reassess and reframe

⁴⁵⁴ Association of Chief Police Officers, above n 401, at 81.

⁴⁵⁵ Girod, above n 384, at 52.

⁴⁵⁶ At [30-32]; Surbhi S “Difference Between Inductive and Deductive Reasoning” (3 January 2017) Key Differences <<https://keydifferences.com/difference-between-inductive-and-deductive-reasoning.html>>.

⁴⁵⁷ Girod, above n 384, at 11.

⁴⁵⁸ At 31; S, above n 456.

⁴⁵⁹ Naval Justice School, above n 400, at [102 and 113].

⁴⁶⁰ Association of Chief Police Officers and National Policing Improvement Agency, above n 388, at [101-102].

⁴⁶¹ In this chapter, the thesis touches on how another NAL actor, the technical deputy, can help the investigator to check the hypothesis.

⁴⁶² Tong, Bryant and Horvath, above n 385, at 39.

the hypothesis when necessary. These frequent reviews develop the hypothesis by stimulating ideas for new areas of inquiry and uncovering other information vital to the negotiation.

The clarity of intelligence is pivotal to the inventor's success. The effectiveness of the investigation will dictate the quality of options to be derived from the intelligence. Given that one only 'gets out what they put in', this holds true when bad information is moved down the NAL to the 'Innovative inventor', resulting in the generation of bad options. Therefore, having accurate intelligence will enable the inventor to forge possible options for the 'salesperson' to wield during the negotiation discussion.

2 Innovative inventor

(a) Creativity

The innovative inventor is a different professional compared to the analytical investigator. With the investigator, information is refined into intelligence through the use of evaluative and analytical tools such as logic and critical thinking. The verified facts and data from this process are cornerstones of the investigator's methodical platform.

In contrast, the inventor takes a more organic approach with creativity and problem-solving (arguably, creativity is "essential for a successful negotiation"⁴⁶³). Through experimentation and lateral thinking, the inventor looks at the problem from different angles especially against the outcome that is being sought. The archetype of the inventor evokes the imagery of a fantastical toil over the alchemist's fire to transmute the lesser into the greater, the raw into the refined, or mundane information into innovative options for mutual gain.

The inventor uses imagination as the key to unlock the problems that have ensnared the parties in the impasse they now face. One of the main priorities of this station is to nurture creativity, affording the inventor an optimal environment free from stress and critical judgement.

⁴⁶³ Elizabeth Ruth Wilson and Leigh L Thompson "Creativity and negotiation research: the integrative potential" (2014) 25 Int J Confl Manag 359 at 360.

Osgood suggested that “stereotyped thinking ... puts a lid on creative thinking” and encourages a fatalistic acceptance of the status quo and zero-game options as a tolerable alternative.⁴⁶⁴ This coincides with the assertion of Fisher, Ury and Patton that most parties are blocked from solutions as they are “looking from the outset for the single best answer” as there is an “assumption of a fixed pie”,⁴⁶⁵ therefore locking themselves in a zero-sum perspective.

Accordingly, Osgood indicated that emotional tension and stereotyped behaviour reduces the capacity of negotiators “for selecting among alternatives” and reduces the “capability to solve problems”.⁴⁶⁶ Sally and O'Connor suggested that “[c]reativity is threatened when negotiators feel stressed”.⁴⁶⁷ Dyer, Gregersen and Christensen also advised that a “[s]afe [p]lace” is needed for new thoughts. A place that is away from distractions and promotes “a relaxed state”. This is especially as “[innovation] rarely happen[s] during a meeting when [people are] in a focused, convergent thinking mode”.⁴⁶⁸

Therefore, the inventor's station provides refuge against this stress by compartmentalising or sectioning-off the invention task into its own component. By segmenting the invention station away from the other stations involving critical analysis, or the selling of ideas, leaves the inventor in peace to focus on forming creative innovations. This also supports the importance of segmenting teams into their individual professional stations.

Moreover, negotiators should be wary of ‘nipping the bud’ of new innovative ideas too early. De Bono stated that “vertical thinking” (logical thinking) was ineffective in generating new ideas and also inhibited it.⁴⁶⁹ In line with this, Fisher, Ury and Patton stated that “[j]udgment hinders imagination” in the sense that premature criticism and judgement “pounce on the drawbacks of any new ideas”. This then leads to the “premature closure”

⁴⁶⁴ Osgood, above n 103, at 64.

⁴⁶⁵ Fisher, Ury and Patton, above n 10, at [60-61].

⁴⁶⁶ Osgood, above n 103, at [31-32].

⁴⁶⁷ David F Sally and Kathleen M O'Connor “Negotiating in Teams” in *The Negotiator's Fieldbook* (American Bar Association, Washington DC, 2006) 547 at 550.

⁴⁶⁸ Jeff Dyer, Hal Gregersen and Clayton M Christensen *The Innovator's DNA: Mastering the Five Skills of Disruptive Innovators* (Harvard Business Review Press, Boston, Massachusetts, 2011) at [57-58].

⁴⁶⁹ Edward de Bono *The Use of Lateral Thinking* (Penguin Books Ltd, Harmondsworth, 1979) at 82.

of an idea,⁴⁷⁰ which threatens to snuff the alchemist's spark before the magic can even begin.

Before the inventor begins to draw the pieces together to formulate their solution to the problem, one approach to maximise creativity is to first “problem-find” as opposed to problem-solve.⁴⁷¹ Therefore, locating the right problem to focus on should be the starting point of the inventor. “Problem identification” can be seen as a top-ranked ability⁴⁷² for a negotiator to have. Accordingly, inventors should check with the investigator whether they have the correctly identified the interests of all the parties to locate issues and/or problems connected to these interests.

The way problems are defined will greatly affect how they are solved. The issues can also be redefined as the problem-solving process continues, particularly as new information indicates a connection with other problems not initially considered.⁴⁷³ Walton and McKersie distilled problem-solving down to three particular steps: the first, which has been discussed above, is to identify and define the problem; then to search for alternative solutions and understand their consequences; and finally to preference order the solutions and then to select a course of action.⁴⁷⁴ The latter two will be discussed below.

Once the inventor is able to screen out premature critical thinking and arrive at what they consider is the actual problem(s) to address, they have at their disposal lateral thinking to ‘trouble shoot’ and problem-solve.

(b) Lateral thinking

Lateral thinking is unconventional as it goes against the “status quo”. The inventor draws inspiration and ideas from outside the norm and applies them to the matter at hand.⁴⁷⁵ This is particularly apt, as this thesis attempts to forge a negotiation framework from a motley

⁴⁷⁰ Fisher, Ury and Patton, above n 10, at [59-61].

⁴⁷¹ Daniel H Pink *To Sell is Human: The Surprising Truth About Moving Others* (Riverhead Books, New York, 2012) at 125.

⁴⁷² At 130.

⁴⁷³ Walton and McKersie, above n 15, at [137-139].

⁴⁷⁴ At 137.

⁴⁷⁵ Anja Foerster and Peter Kreuz *Different Thinking: Creative strategies for developing the innovative business* (Kogan Page, London, 2007) at [14-15].

array of investigative logic, lateral thinking ideas and crisis negotiation strategies. The aim of working with extraordinary ideas is to inspire a different way of thinking especially as conventional ideas, up to this point in time, may not have led to resolving the issues being negotiated. The unconventionality of lateral thinking also coincides with the generic definition of creativity from Bills and Genasi:⁴⁷⁶

The capacity to challenge the existing order of things, by deliberately forcing ourselves out of our usual way of thinking, to see the status quo from a new and enlightening perspective, to form new ideas and find practical ways to implement change in the light of fresh insights.

Potential alternative solutions may not be clear from the outset and may have to be derived from a full analysis of all the available facts. The inventor has to be imaginative in conceptualising the range of possible solutions. Importantly, invention and creativity are necessary to arrive at appropriate arrangements for addressing the problems at issue.⁴⁷⁷

An answer to a problem may also be under the inventor's nose the whole time, and with the powers of one's observation may provide a solution that could not have been anything else. For example, as he was uncapping his fountain pen, New Zealand inventor, Colin Murdoch, was inspired in 1952 to invent the plastic disposable syringe that superseded the less hygienic glass syringe model used at that time; Murdoch's lifesaving design is still used today. Murdoch stated:⁴⁷⁸

...I unscrewed the cap off the pen ... I suddenly got the bright idea that a syringe that was disposable but which utilised a cap to protect the needle to keep the needle and the contents of the syringe sterile.

⁴⁷⁶ Tim Bills and Chris Genasi *Creative Business: Achieving Your Goals Through Creative Thinking and Action* (Palgrave Macmillan, Houndsmills, 2003) at 1.

⁴⁷⁷ Walton and McKersie, above n 15, at 139.

⁴⁷⁸ *A Very Bright Idea* (Radio New Zealand, 11 July 2019)
<https://www.rnz.co.nz/audio/player?audio_id=2018703337>.

Again, from observation comes the spark of creativity to make the connection between an unconventional idea and the problem at issue. There is no reason why this cannot be applied to negotiations, as creativity is a negotiation resource.⁴⁷⁹ Dyer, Gregersen and Christensen found that the most creative and successful innovative entrepreneurs utilised a set of “discovery skills”, which differentiated them from other entrepreneurs. This set includes behavioural skills such as: “questioning”, “observing”, “networking” and “experimenting”. However, the backbone of this set is the cognitive skill of associating or “associational thinking”.⁴⁸⁰

Associational thinking is about “connecting the unconnected”; taking apparent unrelated ideas and relating them together to answer a question or solve a problem. The understanding of the matter, obtained through the use of the abovementioned behavioural skills, may help to draw out the relevant connections.⁴⁸¹ Certain ideas may be cross-pollinated to link together out of context ideas to form “odd combinations” and create innovation that can address the questions or problems at issue.⁴⁸²

An example of associational thinking can be seen in the 1985 American TV show *MacGyver*, where the title character, used everyday objects out of their regular context to assist in troubleshooting outrageous problems. For example, in one episode, MacGyver used a paper map and duct tape to seal the bullet holes in a hot air balloon to secure his escape out of a desert.⁴⁸³

Although an inventor need not take such extreme measures, the principle of using an idea outside its regular context to trouble-shoot a problem is an important tool. With it, an inventor is able to turn “an impossible situation into an extremely advantageous one”.⁴⁸⁴ Real-life lateral thinking solutions are often found in medical science.

“Maggot therapy” was adopted to clean out the rotting tissue of a wound. The idea stemmed from understanding that certain maggots of the right quantity would consume

⁴⁷⁹ Lewicki, Hiam and Olander, above n 12, at 17.

⁴⁸⁰ Dyer, Gregersen and Christensen, above n 468, at [22-27].

⁴⁸¹ At 41.

⁴⁸² At [45 and 51].

⁴⁸³ “The Gauntlet” MacGyver Wiki <http://macgyver.wikia.com/wiki/The_Gauntlet>.

⁴⁸⁴ de Bono, above n 469, at 11.

necrotic flesh, hence stopping the necrosis from spreading to damage the living tissue.⁴⁸⁵ In respect of the heart, the use of the explosive substance, nitro-glycerine, when ingested in the appropriate amounts has an effect of widening the blood vessels, and is used to treat angina.⁴⁸⁶ Or more recently, the Zika virus that creates malformations in human foetuses, has now shown promising results in treating Glioblastoma, an aggressive brain cancer.⁴⁸⁷

Given the abstractness of lateral thinking, to provide clear and methodical instructions on how to think creatively to make connections between out of context ideas to negotiation issues would be counter-intuitive. In any event, the inventor may be able to set the scene for themselves in preparation for an innovative spark. This may be done by utilising the abovementioned behavioural skills outlined by Dyer, Gregersen and Christensen. The use of “questioning”, “observing”, “networking” and “experimenting” skills, may assist the inventor to play with the applicable intelligence to help clarify the details of the negotiation. In turn, it gives the inventor a better understanding of the problems at issue to help prompt associational thinking. This also begs the question of what else can be done to transmute negotiators into inventors.

Aside from putting logical and critical thinking to one side, the inventor should be willing to shift perspectives. To move away from convenient, dominant and obvious ideas may require “no more than a shift of emphasis”.⁴⁸⁸ Although searching for alternatives ways is not natural, a change in the way one looks at a situation can have a profound effect.⁴⁸⁹ To do so allows the imagination to play with concepts out of context to suggest ‘what if...’. Also, with lateral thinking the inventor should look:

- (1) To take stock of what is on hand, and what else might be needed; this may prompt a new search for information for the investigator.

⁴⁸⁵ RA Sherman, MJR Hall and S Thomas “Medicinal Maggots: An Ancient Remedy for Some Contemporary Afflictions” (2000) 45 *Annu Rev Entomol* 55 at [56-62].

⁴⁸⁶ W Bruce Fye “Profiles in Cardiology: William Murrell” (1995) 18 *Clin Cardiol* 426 at [426-427].

⁴⁸⁷ Z Zhu and others “Zika virus has oncolytic activity against glioblastoma stem cells” (2017) 214 *J Exp Med* 2843 at 2843.

⁴⁸⁸ de Bono, above n 469, at [68-70].

⁴⁸⁹ At 79.

- (2) To understand the inherent and transferable properties of the unconventional idea that one is seeking to apply to the current situation. In doing so, one may be able to seek connections with ideas to situations that otherwise would not have been connected (refer to the above medical science examples).
- (3) Following from (2) the inventor can break down ideas into their constituent parts to see how they work or fit together to be reconstructed in other ways.
- (4) To comprehend the real issues that are at the core of the negotiations, to ensure that these are not taken from “an erroneous point of view”.⁴⁹⁰
- (5) To think on a different level (to have “divergent thoughts”), looking at alternatives and the bigger themes rather than purely focusing on the mechanics of how the solution should be implemented.⁴⁹¹
- (6) To ground the ideas at the end of the creative thinking to the realities of the negotiation (though the help of the investigator’s later critical assessment).
- (7) Be open to chance events (that do not occur out of design) in generating new ideas.⁴⁹² These new ideas could be due to unexpected inspiration from a random thought or toying with an idea.

Any “out-of-the-box” thinking should incorporate a good understanding of the other party’s interests. Negotiators who are more successful in “win-win” situations tend to have a more accurate understating of everyone’s underlying interests.⁴⁹³ Similar to how a carpenter shapes and fits together pieces of wood to make a box, the inventor also shapes and dovetails the negotiating parties’ interests. And, as the carpenter knows about the different qualities of wood to effectively tool it, the inventor also has to have a good comprehension of the qualities of the different negotiation interests and how they may be shaped with compromises.

The inventor also has to understand the “big picture” of the negotiation to see where everything fits and how the moving parts engage with one another. It is about evolving the

⁴⁹⁰ Bills and Genasi, above n 476, at [53-54].

⁴⁹¹ At 58.

⁴⁹² de Bono, above n 469, at [94-106].

⁴⁹³ Thompson, above n 265, at 185.

process adopted from the investigators' work, where the inventor has to connect certain strands of information to allow for a flow of understanding. Potential patterns may emerge where, an element of one issue may allow one party to accept another issue, which might in turn lead to making further concessions for other things.

Seeing, exploring and acting on these patterns assist the inventor to shape each interest to fit them together. Therefore, the inventor has to consider whether the parties' interests align. If the pieces do not come together in a natural or comfortable way, the inventor has to bridge any disparities through compromises. Therefore, part of the innovation stage of a negotiation is the need for interaction and collaboration between the parties.⁴⁹⁴

An example of the benefit of collaboration can be drawn from the nuclear research of Nazi Germany in World War II, with its quest to engineer an atomic bomb. Researchers were divided into three competing teams that ran their own separate series of experiments. Due to "fierce competition over finite resources, bitter interpersonal rivalries, and ineffectual scientific management" the very competition thought to drive innovation resulted in constraining it. Therefore, "if the Germans had pooled rather than divided their resources, they would have been significantly closer to creating a working reactor before the end of the war."⁴⁹⁵

Although competition may play a role, particularly at the beginning of a negotiation, the innovation stage should be where mutual cooperation flourishes, devoid of adversarial engagement. Otherwise, according to Deutsch, the "intensification of conflict may induce stress and tension beyond a moderate optimal level". This also leads to shifting the focus from over-all consequences to immediate ones, and reduces the possible range of options.⁴⁹⁶

Accordingly, the innovation process, not only involves adapting one's mind-set to using 'out of context ideas', but also the transformation of (potential) conflict into collaboration. Conflict transformation "refers to the 'ah-ha' moments" according to

⁴⁹⁴ Bills and Genasi, above n 476, at [9-11].

⁴⁹⁵ Timothy Koeth and Miriam Hiebert "Tracking the journey of a uranium cube" (2019) 72 *Physics Today* 36 at [38-39].

⁴⁹⁶ Deutsch, above n 192, at 15.

Putnam.⁴⁹⁷ Putnam indicated that there is an illumination of the negotiation circumstances where new understandings and alternate viewpoints are gained that otherwise would not have existed prior to the negotiation. Through the process of communication, new communication patterns form which result in new understanding and changes in relationship and inevitably shifts a “negotiated conflict”.⁴⁹⁸

After generating possible solutions or prototype options, the negotiator should preference them to find the most appropriate one(s) to meet the parties’ interests. In order to sort through each solution, the negotiator has to assess the value they bring to the negotiation table. During the negotiation discussions, the parties have to be clear on the value they require of each solution as a viable option. To assist, parties should not have preconceived ideas about the duration of the search to arrive at the appropriate solution, nor what should be the minimal acceptable solution.⁴⁹⁹

Negotiators should engage in comparisons among the possible options generated. Whether the parties accept the best solution generated to date or continue to search further, is subject to the aspirations and needs of the parties. Moreover, in a joint problem-solving endeavour between initially opposing negotiators, there may be a lack of coordination. Therefore, the effectiveness of this task is dependent on “motivation, language and information, and trust and a supportive climate”.⁵⁰⁰

To convince the other party to buy into the collaborative venture is left to the talents of the diplomatic salesperson. It is hoped that by using the prototype options from the inventor and the intelligence from investigator, the salesperson will be able to engage the cooperation of the other party to participate in the further development of the prospective options.

⁴⁹⁷ Linda L Putnam “Communication as Changing the Negotiation Game” (2010) 38 J Appl Commun Res 325 at 325.

⁴⁹⁸ At [325-326].

⁴⁹⁹ Walton and McKersie, above n 15, at 139.

⁵⁰⁰ At 139.

3 *Diplomatic salesperson*

The imagery of the salesperson is perfect for the third NAL professional. Pink characterised most people today as salespeople, given that:⁵⁰¹

People are now spending about 40 percent of their time at work engaged in non-sales selling – persuading, influencing, and convincing others in ways that don't involve anyone making a purchase.

The salesperson will also look to provide leadership by setting the tone of the negotiation sessions. When put on the spot, the salesperson has to be thoughtful and calm, but also resourceful and assertive. Their role is to open the lines of communication as well as maintain and advance discussions. They are a diplomat, by keeping the peace when hostilities flare by using their ingenuity and guile to de-escalate conflict. At the same time, they are an opportunist trying to sell the idea of how their client's interest coincides with the interests of their counterpart's client.⁵⁰²

Ambassador Charlene Barshefsky, former United States Trade Representative under the Clinton administration, is a good example of a diplomatic salesperson. Barshefsky's negotiation acumen is illustrated in one of the intellectual property rights (IPR) talks of the 1990s between the USA and China. One particular noteworthy moment, is described in the following extract:⁵⁰³

During one particularly arduous negotiating session, the Chinese insisted they had gone as far as they could go on an important IPR market access issue. In making this point, the Chinese negotiator became very aggressive. Menacingly, he leaned far forward across the table towards Barshefsky and said flatly, "it's take it or leave it." Barshefsky, taken aback by his harsh tone, surprised her counterpart by sitting quietly. She waited 30-40 seconds—an eternity given the intensity of the negotiation, especially for an American—and came back with a measured reply: "If the choice is

⁵⁰¹ Pink, above n 471, at 21.

⁵⁰² Dale Carnegie *How to win friends and influence people* (Pocket Books, New York, 1998) at [89-93].

⁵⁰³ James K Sebenius and Rebecca Hulse "Charlene Barshefsky (B)" [2001] Harvard Business School Case 801-422 at [10-11].

take it or leave it, of course I'll leave it. But I can't imagine that's what you meant. I think what you meant is that you'd like me to think over your last offer and that we can continue tomorrow. I hope you understand that what you're putting on the table is inadequate, but I am going to be thinking more carefully tonight about what you suggested." The Chinese negotiator was shocked that Barshefsky had not met his fire with fire of her own. Her unexpected response gave her counterpart a face-saving escape hatch and changed the tone entirely. When the two sides met the following morning, compromise ensued.

Here, not only does Barshefsky demonstrate a salesperson's steadfastness in not being coerced into the other party's demands, but she keeps the negotiation alive while doing so. Having this type of individual for the salesperson in mind, the thesis will now touch on their two key tasks, being a power broker and a crisis negotiator.

(a) The power broker

The salesperson fronts the negotiation discussion between the parties for their client, and has to manage the discussion's power dynamics. Given that it is to the advantage of a weaker party to collaborate with the stronger party,⁵⁰⁴ it is for the salesperson to advocate that there are mutual gains to be had, and to sell the notion of collaboration. If the other party's mind-set is one of Distributive Bargaining ("DB"), they will likely be at odds with what the salesperson is trying to achieve. This may mean that the salesperson has to address the issue of power.

As discussed previously, negotiation power comes from social relations, especially the mutual dependence between the parties,⁵⁰⁵ the salesperson has to promote interdependence between the parties. A starting point may be to consider why the parties have agreed to negotiate in the first instance.

Understanding what has prompted this 'foot in the door' for the weaker party, enables that party to open the door wider, to usher in a real opportunity to work with its counterpart. Building on that rationale serves to highlight and grow any perceived

⁵⁰⁴ Tjosvold and Okun, above n 38, at 239.

⁵⁰⁵ Goodpaster, above n 7, at 335.

dependence the stronger party may have for the weaker party. Ideally, this should allow more scope for the weaker party to promote their interests.

To bargain for collaboration, the salesperson has to sell the weaker party's worth, to make the stronger parties' BATNA less desirable. It is for the weaker party to show that they can 'hold their own', to gain a level of respect in the eyes of the stronger party. In particular, the weaker party has to be seen to be worthy of being treated as an equal through their contribution to the negotiation. If the salesperson maintains the right pitch, they can sell to their counterpart that there are benefits in working together.

To assist with this, the salesperson has to tap into their management of the negotiation intelligence and effective mastery over it. This mastery should allow the salesperson "to give themselves an advantage or increase the probability of achieving their objectives".⁵⁰⁶ In effect, the mastery of the intelligence, gives the weaker party a bargaining chip. This would be the power of skill and knowledge from "the categories of power"⁵⁰⁷ referred to by Fisher.

The salesperson may decide to use certain aspects of the applicable intelligence to barter for cooperation from the other party to aid the investigator's inquiries in the session. The trading of information and gratitude for other concessions to build trust and response, may be fine if the other side is willing, however, if their actions appear irrational and/or overly adversarial, what then?

(b) The crisis negotiator

A skilful salesperson not only has to manage and to master information, but must also address and transform conflict.⁵⁰⁸ Accordingly, a number of persuasion tactics and strategies are open to the salesperson to influence or persuade their counterpart(s) in the most difficult situations.

Part of the salesperson's tools of persuasion is the ability to build genuine trust and rapport. In particular, the "face-to-face" engagement between the parties in the negotiation

⁵⁰⁶ Lewicki, Saunders and Barry, above n 51, at 256.

⁵⁰⁷ Fisher, above n 160, at 153.

⁵⁰⁸ Jane Seminare Docherty "Negotiation, One Tool Among Many" in *The Negotiator's Fieldbook* (American Bar Association, Washington DC, 2006) 565 at [565-566].

decision is vital for rapport building, as it strengthens the integration between the parties.⁵⁰⁹ In terms of building rapport and being persuasive, Carnegie advised to “[t]alk in terms of the other person’s interests”⁵¹⁰ which demonstrates an understanding of these interests to bring them to fruition.

The salesperson may also encounter a situation where the other party exhibits less rationality and more emotion in their communications. Osgood stated that “anything that overloads the input to a human decision-maker reduces his rationality. He begins to miss certain bits and overemphasize others, or he may even freeze mentally.”⁵¹¹ Accordingly, unreasonableness may result in obstructive behaviour which places the parties in conflict, more specifically, personal or relationship-based conflict. The detriment of this is that “relationship conflicts interfere with task-related effort because members focus on reducing threats, increasing power, and attempting to build cohesion rather than working on the task.”⁵¹²

Relationship conflict differs from task conflict (a disagreement in the formulation and implementation of plans). In contrast to relationship conflict, “Task conflict can improve decision-making outcomes and group productivity by increasing decision quality through incorporating devil's advocacy roles and constructive criticism”.⁵¹³ Given these two conflict types, Thompson suggested that negotiators should transform relationship conflict into task conflict.⁵¹⁴ A salesperson should be able to refocus negotiation issues, side-lined by personal attacks, back to the task at hand by concentrating on the factual details of the matter. This approach relates to the suggestion of Fisher, Ury and Patton to separate the people from the problem.⁵¹⁵

Conflict occurs when there is “*interference from others in achieving their goals*”⁵¹⁶ which can be handled either constructively or destructively. The matter escalates to a crisis

⁵⁰⁹ Thompson, above n 265, at 325.

⁵¹⁰ Carnegie, above n 502, at [89-93].

⁵¹¹ Osgood, above n 103, at 58.

⁵¹² Karen A Jehn “A Qualitative Analysis of Conflict Types and Dimensions in Organizational Groups” (1997) 42 Adm Sci Q 530 at 531.

⁵¹³ At 532.

⁵¹⁴ Thompson, above n 265, at 132.

⁵¹⁵ Fisher, Ury and Patton, above n 10, at [21-23].

⁵¹⁶ Hocker and Wilmot, above n 199, at 3.

when the conflict has worsened. A “crisis is any situation in which a person’s ability to cope is exceeded”,⁵¹⁷ and in a crisis state, people are controlled by emotion or stress and not reason.⁵¹⁸

Accordingly, conflict situations should be dealt with very carefully. The purpose of any intervention in these circumstances is to return an individual to their “normal functioning level”, to move them out of their emotional state.⁵¹⁹ In a negotiation situation, the unreasonable or obstructing party’s decisions or actions may be controlled by a heightened level of emotion rather than reason. This may ensnare the negotiation in a conflict situation and initiate a continual spiral of the parties blocking each other’s goals.⁵²⁰ It is the task of the salesperson to encourage their counterpart’s reasonableness.

Similar to a crisis or hostage negotiation, the salesperson should aim to establish communication, defusing intense emotions, buy time and gain intelligence.⁵²¹ To achieve these goals, the salesperson might consider using the “Behavioral Influence Stairway model” (“the BISM”). The BISM was designed to assist crisis negotiators to move the obstructing party forward and unblock the negotiation path.⁵²²

Starting with no previous relationship with their counterpart, the salesperson can work their way through the stages of empathy, rapport and influence to create a relationship with behaviour changes. This is done through various active listening techniques, enabling the salesperson to engage in a meaningful way with their counterpart.⁵²³ The sequence of these stages is important; it would be difficult to begin having rapport without gaining trust through empathy, nor would it be wise to move to the stage of trying to influence one’s counterpart without first having rapport.

⁵¹⁷ Frederick J Lanceley *On-Scene Guide for Crisis Negotiators* (2nd ed, CRC Press, Boca Raton, Florida, 2003) at 13.

⁵¹⁸ At [14-15].

⁵¹⁹ At 17.

⁵²⁰ Hocker and Wilmot, above n 199, at [3-5].

⁵²¹ Gregory M Vecchi “Conflict & crisis communication: A Methodology for Influencing and Persuading Behavioral Change” (2009) 12:1 *Ann Am Psychother Assoc* 34 at 39.

⁵²² Gregory M Vecchi “Conflict & Crisis Communication” *The Behavioral Influence Stairway Model and Suicide Intervention* (2009) 12:2 *Ann Am Psychother Assoc* 32 at [34-36].

⁵²³ At 34.

A process like the BISM highlights that negotiations in general have a certain rhythm that can be upset by the “wrong” timing.⁵²⁴ All the stages must be worked through consecutively and given adequate time. This is similar to mediation, where the parties have to address their concerns (as an almost cathartic step) before they can work out their differences to move past them towards an amenable outcome. Accordingly, the contours of the problem must be established to everyone’s satisfaction before the parties are to progress.⁵²⁵

In the midst of the counterpart’s adversarial engagement, the salesperson should resist the urge to immediately attack even when goaded to do so. Instead, the salesperson may be able to turn the attacker’s motions against them. This relates to the idea of “negotiation jujitsu”, for which the defending negotiator uses the force of their counterpart’s attack, to feed in on itself inevitably counteracting the counterpart’s own argument.⁵²⁶ In particular, an adversarial party may attack a principled party by either asserting their position or criticising the other party and or their ideas. In response, the principled party can use negotiation jujitsu to redirect the attack on the problem by using strategic questions and breaks in the discussions.⁵²⁷

An adversarial party’s obstruction may be removed through the force of their own actions going against them, and the underestimation of the salesperson’s abilities. This was the case in the abovementioned Barshefsky example. Barshefsky surprised the Chinese delegate by not being goaded into forcefully retaliating against him. Instead, Barshefsky assertively addressed the attack and, in the process, made a suggestion that allowed:

- (1) her counterpart to save face and stand down from his position; and
- (2) the parties to move away from the stalemate position.

By defusing an otherwise tense situation enables room for rational discussion and collaboration. Therefore, it is the challenging role of the diplomatic salesperson to stay

⁵²⁴ Fowler, above n 42, at 171.

⁵²⁵ At 171.

⁵²⁶ Fisher, Ury and Patton, above n 10, at 110.

⁵²⁷ At [110-114].

calm and focused under fire while having to progress matters. The salesperson cannot afford to get overly emotional. Rather than react, the salesperson ought to first observe, reflect and think.⁵²⁸ Given that communication and conflict are inextricably linked,⁵²⁹ how the salesperson communicates has an effect on how the conflict is played out. Accordingly, part of conflict management entails the salesperson having emotional intelligence.

Lastly, as a default approach the weaker negotiator should utilise “[t]he Power of Calm Persistence” for which change comes “from careful thinking and from planning for small, manageable moves based on a solid understanding of the problem”.⁵³⁰ The salesperson should be able to use the tit-for-tat approach (refined for negotiations),⁵³¹ to assist with channelling the conflict into healthy competition. A salesperson equipped with these tools should have a strong bottom-line strategy to handle conflict and promote the client’s interests.

Everything rides on the salesperson’s actions, as they are the conduit for the efforts of the investigator and the inventor. Next, the thesis will look further into how the various interactions between the NAL professionals work with the flow of information.

B Incorporating the Components

Having introduced the NAL professionals, the thesis now examines the mechanics of the NAL through several different lenses. Firstly, the NAL will be briefly considered in the context of design thinking, highlighting the similar direction of both processes. The second lens explores the implementation of the professionals as a negotiation team. The third lens focuses on processing information and the flow and feedback of applicable intelligence through the individual stations of the NAL. At the same time, how the NAL integrates competitiveness and collaboration will be considered.

1 Design thinking

Design thinking (“DT”), is a thinking process conceived in the area of design. It is “a hands-on, user-centric approach to problem solving can lead to innovation, and innovation can

⁵²⁸ Hocker and Wilmot, above n 199, at 145.

⁵²⁹ At 4.

⁵³⁰ At 145.

⁵³¹ Chapter 2 section C3.

lead to differentiation and a competitive advantage.” DT’s main stages are as follows: 1. to understand; 2 to explore; and 3 to materialise; each stage has smaller components which are described below.⁵³² Although their components differ, in a rough sense the main purposive framework of DT and the NAL are comparable.

In the first stage, understanding, the designer gathers information about the client’s needs through research and observations in order to empathise with the client’s perspective. The designer then defines the problem(s) at issue with the collated information.⁵³³ The NAL’s investigator station performs the function of the first part of DT. It looks into information gathering and establishes the issues through critical analysis. The result is a greater understanding of all the parties’ interests.

In the second stage, exploration, the designer aims to “ideate”, which is to brainstorm, and generate a range of nonconventional and creative ideas to address the client’s needs. From this, the designer moves into prototyping, where they build tangible representations for the ideas to see what works and what does not.⁵³⁴ The NAL’s inventor station, covers the conceptualising of ideas. In terms of building the prototype options the inventor can put together some preliminary mock-ups of how the ideas can be actualised through options, which can then be provided to the salesperson to present at the negotiation discussion. And then if “buy in” from the other party is achieved, both parties can collaborate to build on the prototype options.

In the final stage of DT, the ideas are materialised. This is where the idea/prototype is tested with the client and feedback is sought to see if it meets their needs. The product is then implemented where the vision is finally put into effect as it “touches the lives of [the] end users”.⁵³⁵ In the NAL’s salesperson station, this would be with the co-effort of all the parties involved to seek the feedback of their clients and affected third parties.

⁵³² Sarah Gibbons “Design Thinking 101” (31 July 2016) Nielsen Norman Group <<https://www.nngroup.com/articles/design-thinking/>>.

⁵³³ Gibbons, above n 532.

⁵³⁴ Gibbons, above n 532.

⁵³⁵ Gibbons, above n 532.

This concise comparison highlights the same creative problem solving and client focus shared in the mechanics of the NAL and DT. The thesis will now discuss the mechanics of the team that drives the NAL.

2 *The dream team*

(a) The blue print

Depending on their level of skill, available time and the negotiation's complexity, an individual negotiator may not be able to proficiently take on all the tasks of the abovementioned professionals. The responsibility on the individual actor to compartmentalise all the different stations of the 'professionals' themselves is onerous. Therefore, if resources permit, a client may be able to enlist the assistance of a team of professionals to undertake the NAL tasks.

In general, group decisions have the advantage of being unwavering but they can be slow to reach.⁵³⁶ Having a team allows for a better division of labour and functional diversity,⁵³⁷ as well as reducing the stress on individual actors to compartmentalise all the different stations. Team members can add extra computing power with their "extra memory capacity ... to handle issues and interests that would overwhelm and "crash" a solo negotiator".⁵³⁸

Given the heterogeneous nature of each NAL professional, each member must understand their role and their overall purpose to the negotiation objectives. The idea is to have a negotiation team where each person (with their specific skillsets) is delegated a role of the abovementioned archetypes.

The size of a team is also an important consideration. Muller indicated that with larger teams, although there is better group level performance, there is more of a negative effect on individual level performance through "relational loss". Relational loss is where

⁵³⁶ Zartman and Berman, above n 6, at 205.

⁵³⁷ Sally and O'Connor, above n 467, at 548.

⁵³⁸ At 549.

team members perceive that “support is less available within the team”, especially as the team size grows.⁵³⁹

The situation may feel more controllable to members of smaller teams as they know what resources are available and feel that they could seek help with problems. Members in larger teams may feel lost as they may not know the other members well enough to seek help.⁵⁴⁰ Accordingly, “larger teams diminish perceptions of available support which would otherwise buffer stressful experiences and promote performance.”⁵⁴¹

Karrass suggested that a negotiation team have at least three members. Although a three-member team took longer to plan and close a negotiation than a single person or a couple, it performed a better job.⁵⁴² Therefore, by having one person per NAL professional, the team has a minimum of three members. However, to secure the robustness of the team, there should be built in redundancies (by having more members), similar to having a spare tire in a car. However, if the size of the team were to expand, Thompson suggested that “coordination problems” and “conformity pressures” would also increase.⁵⁴³

The thesis suggests that the NAL team incorporate no more than five members for the core group (including the leader) to reduce ‘relational loss’. This would also be in line with Gabriel, as he stated:⁵⁴⁴

Management principles suggest that a leader operating in dramatic and changeable conditions - such as those in the negotiations - can effectively control only 3-4 people. If the team leader should lead the negotiations and at the same time to lead a team of 6-7 people, then one will not be able to cope with both tasks properly.

⁵³⁹ Jennifer S Mueller “Why individuals in larger teams perform worse” [2012] 117 *Organ Behav Hum Decis Process* 111 at 121.

⁵⁴⁰ Knowledge@Wharton “The Unexpected Costs of Collaboration” (19 January 2012) TIME <<http://business.time.com/2012/01/19/the-unexpected-costs-of-collaboration/>>.

⁵⁴¹ Mueller, above n 539, at 111.

⁵⁴² Chester L Karrass “The Size of Team Impacts Negotiation” (29 November 2012) <<https://www.karrass.com/en/blog/the-size-of-team-impacts-negotiation/>>.

⁵⁴³ Thompson, above n 265, at 241.

⁵⁴⁴ Dragoş Gabriel “Negotiation team – a brief technical overview” [2014] 10 *Revista Română de Statistică Supliment* 163 at 165.

To assist the engagement between the professionals, the coordination and management of tasks is imperative for a well-running team.⁵⁴⁵ Therefore, a coordinator, is required to lead the NAL professionals. This person has the overall vision and is able to communicate an understanding of that vision to each NAL professional, to maintain a unity and drive towards the common purpose.

Moreover, this coordinator is the mouthpiece of the team to combine the thoughts of each member so the team can “speak with one voice”.⁵⁴⁶ Concentrating the communication through one person also reduces the possibility of accidentally revealing information to the other party. The other members can carefully listen to the other party and observe how they react to what is being said by the coordinator.⁵⁴⁷ Given their abovementioned qualities, it is proposed that the salesperson be the coordinator to lead the team and facilitate and negotiation discussion. This is consistent with the suggestion that a negotiator is a manager.⁵⁴⁸

It is also suggested, that the salesperson have a deputy coordinator, who is a technical expert of the particular topics that are currently being negotiated. As they would be brought into the team only for specific negotiations that require their specialist knowledge, the technical deputy is therefore a temporary position. This temporary deputy is the second in command, and has oversight of the investigator and inventor stations. By assisting the whole NAL team with their technical knowledge, the deputy is able to gain a good overview of the negotiation's mechanics to then provide technical support to the salesperson in the discussion stages.

It is also proposed that there are two investigators, one focusing on information gathering and the other on analysis. The investigators can assist each other and could potentially swap roles to avoid fatigue in performing either of their tasks when information is fed back through them. In respect of the inventor, the NAL would only have one

⁵⁴⁵ Sally and O'Connor, above n 467, at 551.

⁵⁴⁶ Zartman and Berman, above n 6, at 206.

⁵⁴⁷ Lewicki, Saunders and Barry, above n 51, at 47.

⁵⁴⁸ Nierenberg and Calero, above n 311, at [60-61].

exceptionally innovative person designated in this role. The study of Hill supported the notion that:⁵⁴⁹

the performance of one exceptional individual can be superior to that of a committee... especially if the committee is trying to solve a complex problem and if the committee contains a number of low-ability members.

Although the other members of the NAL are not of “low-ability”, they are of different mind-sets such as critical thinking and persuasive communication. It is questionable whether the proactive actions of the other members would help or hinder the inventor in the initial stages of their thought processes, especially, as critical thinking interferes with the initial creative problem-solving.⁵⁵⁰ However, the inventor can seek assistance if they require it. Accordingly, the deputy is on standby to field any queries that the inventor has on the technical data.

As the deputy is not necessarily a constant member of the NAL team, the deputy's role would be a rotating one. This provides flexibility for a new specialist to step into this position in future negotiations requiring different technical knowledge. This is similar to the idea of having a different guest host on a TV show each week, thereby working in the confines of the show's framework with a fresh dynamic for each show.

This can be seen in television variety shows in the USA with *Saturday Night Live*⁵⁵¹ and in the UK with *The Sunday Night Project*⁵⁵². In both, new guest hosts take charge of their own shows each week. In the NAL, the technical deputy would be the guest host, with final oversight by the salesperson who would be the regular host, coupled with the support from the regular cast of the two investigators and the inventor.

⁵⁴⁹ Gayle W Hill “Group Versus Individual Performance: Are TV + 1 Heads Better Than One?” (1982) 91 Psychol Bull 517 at 535.

⁵⁵⁰ Fisher, Ury and Patton, above n 10, at [59-60].

⁵⁵¹“Saturday Night Live: American television program” Encyclopedia Britannica <<https://www.britannica.com/topic/Saturday-Night-Live>>.

⁵⁵² TVcom “The Sunday Night Project” TV.com <<http://www.tv.com/shows/the-sunday-night-project/>>.

(b) Professional support

If one were to assign the subject areas of power, mutual cooperation and information to the three main NAL stations and the phases of information, it would be as follows:

NAL Stations	Phases of information	NAL components
Investigators	Gathering and processing info	Information
Inventor	Processing and utilising info	Information and mutual cooperation
Salesperson and Deputy	Gathering, processing and utilising info	Information, power and mutual cooperation

The interplay of the subject areas and the corresponding actors, can be seen below when discussing who supports whom and with what. The thesis acknowledges that the following expositions of how the professional actors interact and develop (and, also later with how information flows through the NAL) are done in a simple idealised way to show how the theory could work. However, empirically testing this framework, which is outside the scope of this thesis, may help to identify issues in implementing the NAL in reality.

In the investigator station, the two investigators can work with the deputy, to get ideas on where information may be found and also to check the intelligence and hypothesis generated. The inventor is then reliant on the investigators to provide applicable intelligence and the negotiation hypothesis to generate prototype options. The investigators can also act as the inventor's research assistants to gather more material during the invention process and fill any gaps in their knowledge. The inventor's last task for the investigator is to critically analyse the prototype options after the inventor has completed significant work on them with the input of the deputy. The deputy can also be used by the inventor to discuss ideas, and get a better understanding of the technical data.

During the negotiation discussion, the NAL team should have three members actively engaged in it. The salesperson and the deputy share the core positions here, with a cameo-appearance from one of the investigators during the acquisition of information in

the discussion. Then later, the investigator is 'subbed out' with the inventor when collaboration has been achieved and the parties work through certain options.

With the investigator/salesperson/deputy troika, these professionals help each other in the session, to cover the topic areas of information and power. In a sense, the salesperson may assist the investigator's fact-finding in the session by 'running interference' against any adversarial behaviour from the other party. In doing so, the salesperson may defuse tensions which serve to obstruct the investigator from acquiring more information.

The investigator then returns the favour through their logical analyst, by providing the salesperson with assistance to examine and challenge the arguments of the other party through deductive or inductive logic with the gathered intelligence. The symbiotic relationship between the investigator and the salesperson could be seen as a dual routine. The investigator is motivated by facts and empirical truths, while the role of the salesperson is the organic peacemaker bringing about a mutual cooperation between the parties.

Once mutual cooperation has been established, the inventor replaces the investigator in the negotiation discussion with the other party to collaborate in developing information into workable options. Given the importance of the NAL professionals, it is also useful to briefly explore how these actors can be professionally developed.

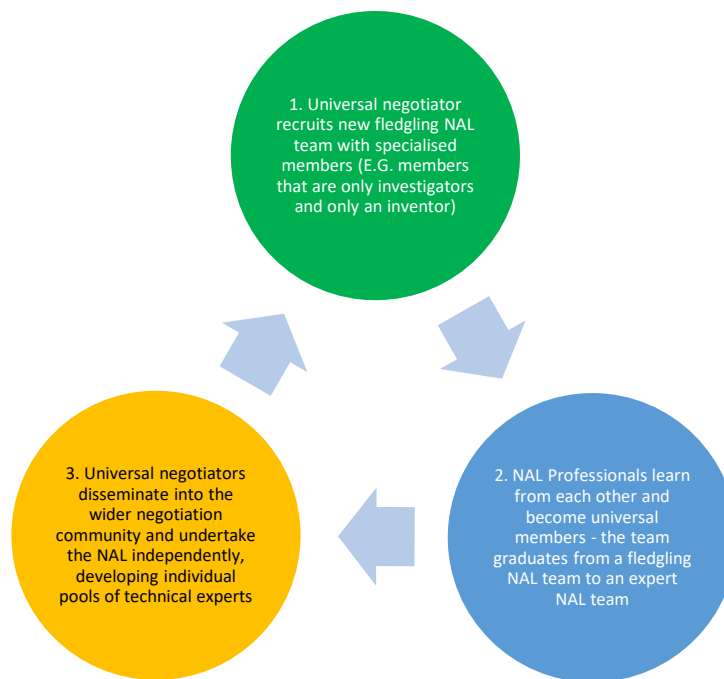
(c) Developing the actors

To protect against fragility, each member should be trained to perform all the NAL roles. This is so each member has a better understanding of all roles and able to integrate better with one another. This is a further backup strategy, if any actor is unable to perform their role. The actors should be given the opportunity to learn the roles from one another to become universal negotiators.

To keep up each negotiator's skill levels and familiarity of each professional's station, the actors should rotate their roles for different negotiations, rather than having the actors constantly performing the same roles. This would allow the actors to grow by providing them opportunities to build their experience in their least confident role(s). Whether the actors rotate their roles or stick to their strengths would be subject to the circumstances (such as timeframes and level of complexity) of a particular negotiation.

The benefit of having these actors in the different roles, is that their skillsets become diverse and strengthened overtime. Each actor would develop into talented individual negotiators who can effectively compartmentalise and perform the NAL roles on their own for straightforward negotiations.

These universal negotiators would recruit their own technical deputies to assist as their second in command. The negotiator may be able to choose from a pool of potential technical specialists that have been recruited over time. As well as recruiting their technical deputies the talented negotiator can look to recruit new negotiators to form and promulgate their own NAL teams. This, thereby increases the scope to proliferate the NAL team framework out to the wider negotiation community. The development of the NAL professionals can be seen as follows:



NAL team development

On the basis of the above, the NAL process should be first developed through a team environment, to then develop individual universal negotiators from each specialised member. Each universal negotiator gradually runs the NAL processes on their own, and/or build their own NAL teams using specialised negotiators. The team members can learn

from each other to become universal negotiators capable of performing one another's tasks. If the situation requires, a set of universal negotiators can mix and match to form their own complex teams for more difficult negotiations.

(d) The client factor

As mentioned earlier, at the centre of the NAL machine, is the client and their interests, and therefore the NAL has to have a client-centred orientation.⁵⁵³ Therefore, the salesperson's frequent communication with the client is vital to maintain a good level of understanding of the client's needs. Accordingly, the client should be ready to give the salesperson their approval or disapproval to any decision in the negotiation. The negotiation process should be an interactive process for the client, in which there is an equal exchange of input with the salesperson when it comes to the instructions given and the setting out of authority and parameters.⁵⁵⁴

In order for the client to be supportive of the problem-solving element in the negotiation, they should be included as part of the team. Mnookin, Peppet and Tulumello suggested some points of consideration regarding clients. Firstly, the salesperson, should work to share control of the negotiation management with the client. As well as this, clients should also share in the learnings gained from the NAL process.⁵⁵⁵

The salesperson should highlight the differences/conflicts and similarities between them and the client to address any potential areas of difficulties which can be managed at an early stage.⁵⁵⁶ By integrating the client into the team structure makes the authorisation to act in the NAL more fluid. By the client being part of the process, they can get a first-hand appreciation of how negotiation information is gathered, processed and used.

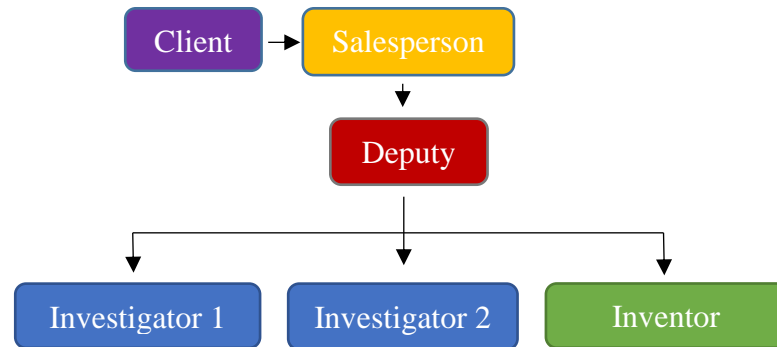
⁵⁵³ above n 71, at 178.

⁵⁵⁴ Fowler, above n 42, at 41.

⁵⁵⁵ Mnookin, Peppet and Tulumello, above n 71, at [178-179].

⁵⁵⁶ At 179.

The NAL's chain of command is as follows:



Having set out the NAL team, the thesis now looks at how information is processed through its framework.

3 *Processing information*

(a) Preparation: acquiring resources

The NAL's application may not necessarily be a linear process. For more complex negotiations, the NAL can be a system of feedback loops between the different professionals and their stations. Information moves through the assembly line to each station and may feed back to the earlier ones for further work. In the NAL feedback loop, ideas can go back through the stations to gather further information that had not been realised earlier. The new information enables the relevant professionals to further influence the original idea which then ripples out to the next stations.⁵⁵⁷ This has been set out in the flow diagram in Appendix 1 at the end of this thesis.

The process starts with the fact-finding investigator, building on the preliminary information obtained from the client and talking with the technical deputy about what information needs to be obtained. This information is built upon through their research and inquiries with their sources. Having gathered various information, the analytical investigator can take these pieces to form a hypothesis of the negotiation, to understand the situation better and to prepare for the next steps.

⁵⁵⁷ Joseph O'Connor and Ian McDermott *The Art of Thinking Systems: Essential Skills for Creativity and Problem Solving* (Thompsons, San Francisco, 1997) at 26.

As raw information is methodically collected, its accuracy is evaluated to weed out as much misinformation as possible.⁵⁵⁸ With the help of the deputy, the analytical investigator can assess the information in respect of its applicability to the negotiation. This information may give clues as to the other parties' goals, interests and BATNAs, mutual negotiation issues and the viability of possible settlement options.⁵⁵⁹ Further information may help to inform the client's BATNAs, and provide the client with a better understanding of their own interests and what they actually want from the negotiation.

After refining the facts and data down to the information most applicable to the negotiation, it becomes applicable intelligence⁵⁶⁰ to be moved along the NAL where it could be used to adjust the hypothesis. The intelligence and the current negotiation hypothesis are then provided to the inventor.

With their focus on the main negotiation issues, the inventor confirms the exact problems to solve.⁵⁶¹ The inventor may obtain insights from the deputy to confirm how certain technical ideas work. Once the main problems are isolated, the inventor can begin to connect certain strands of information and interweave the resolution points from the various issues.

From this, the inventor can tailor possible options to fit the problems initially identified. They may use creativity and lateral thinking to apply out of context ideas to the problem.⁵⁶² The inventor generates prototype options to the potential benefit of all parties. If further information is needed, the inventor can engage the investigator to collect that information. The investigator can take that new information back through their station.

Once new information has gone through the investigator station and refined into intelligence, it can be added to the other components on the inventor's worktable. Options that do not adequately incorporate the interests of the other party are unlikely to attract genuine engagement or investment of that party.⁵⁶³ There may likely be a deficit of information around the other party's interest, which may not be discovered until the

⁵⁵⁸ Refer to chapter 2, part D,1 and 2 of this thesis.

⁵⁵⁹ Lewicki, Saunders and Barry, above n 51, at [132-133].

⁵⁶⁰ Manley, above n 44, at 133.

⁵⁶¹ Pink, above n 471, at 125.

⁵⁶² Dyer, Gregersen and Christensen, above n 468, at 41.

⁵⁶³ Fisher, Ury and Patton, above n 10, at 29.

negotiation discussion. Accordingly, the newly formed options should remain prototypes prior to the discussions between the parties. The options may change with further input from the other party, particularly if it is revealed that the other parties' interests are different from what has been assumed.

Once the inventor has constructed prototype options, they can be critically scrutinised. The investigators and deputy can consider the ramifications of the options for both parties and the likelihood of the other party rejecting these options, and if so, on what basis, and what further work has to be done to adjust the options. Alternatively, the investigator may have to conduct further research to uncover more of the missing information.

If the information is unattainable during the preparation stage the investigator has to try to obtain it in the negotiation discussion with the salesperson, in which case, the options may have to be temporarily set aside. Incomplete options may however, still serve a purpose to the salesperson by weaving them in the discussions as hypothetical ideas to promote further thinking. In any event, the following tools have been forged by the investigator and the inventor for the salesperson:

- the negotiation hypothesis, a rough map to guide the negotiator;
- applicable intelligence, a commodity to trade with the other party for further intelligence and bargain for collaboration; and
- prototype option(s), the vehicle to carry both parties to the (re)solutions of the negotiation.

Each party will have a part of the map/hypothesis of the whole negotiation. Also, each party has a suspicion on the missing portions of their map, as it is pieced together from various information they have collected and analysed. In the negotiation discussion, both parties might disclose more of their portion of the map through the sharing of applicable intelligence, subject to the value that the parties place on that intelligence. The information game may take place where the salesperson together with the investigator engages with the other party in a competitive manner.

(b) The melody of the discussion

As explained earlier, it can be easy to simplify negotiation strategies to be either adversarial through bargaining or collaborative through problem-solving. In reality, a negotiation may oscillate between strategy types. Williams suggested that negotiators “can all shift from one style to another or anywhere in between under sufficient encouragement or provocation”. Effective negotiators “have developed the capability to adopt either style [of collaboration or completion] convincingly”.⁵⁶⁴

It is also suggested that negotiations are often comprised of a combination of strategies rather than just a primary one.⁵⁶⁵ There is usually no best strategy, given that as a negotiation progresses the actions of one party may cause the other to adjust their strategy,⁵⁶⁶ particularly if they decide to adopt a tit-for-tat strategy. Therefore, “the majority of negotiations are a mixture of both problem-solving and distributive bargaining”.⁵⁶⁷ Gulliver highlighted a set of phases in which the dominant disposition of a negotiation can be shifted between a DB approach to an IPS approach (respectively referred to as “antagonism” and “coordination”). The pattern is shown as follows:⁵⁶⁸

<i>Phase</i>	<i>Dominant Disposition</i>
1. Search for arena	From antagonism to coordination
2. Agenda formulation	From antagonism to coordination
3. Exploration of the range of the dispute	Antagonism persists (possibly increases)
4. Narrowing the differences	From coordination to antagonism
5. Preliminaries to final bargaining	From coordination to antagonism to coordination
6. Final bargaining	From antagonism to coordination
7. Ritual confirmation	Coordination remains

⁵⁶⁴ Williams, above n 16, at 41.

⁵⁶⁵ Lewicki, Hiam and Olander, above n 12, at 54.

⁵⁶⁶ At 54.

⁵⁶⁷ Hooper, Spiller and Macduff, above n 18, at 39.

⁵⁶⁸ Gulliver, above n 95, at 183.

Accordingly, a negotiation has a melody in which its tones rise and fall between competition and collaboration. In the negotiation discussions, the salesperson may first participate in competitive activities such as the information game and agenda setting. This is in line with the idea that competition is present at the beginning of a negotiation,⁵⁶⁹ and consistent with the adage that 'sometimes things have to get worse before they get better'. The parties ought to unpack their problems and baggage if they are to understand their current situation and work towards a resolution.

While integrating both competition and collaboration into the NAL, it is also important to clarify that positions also serve a purpose, contrary to the principled approach set out by Fisher, Ury and Patton. The aim would be to get the parties to initially vocalise what they want, and then to expand on this through an exploration of their interests. The NAL's initial use of positions to help uncover interests, is a hybridisation of positional and interest-based negotiation elements; this will be expanded upon below.

The setting of the agenda is not only an ordered negotiation step, it can also be a powerful one as it dictates what issues are open for discussion. Parties can therefore compete to control this step, to have their own interests take centre stage in the discussion. However, controlling the competing interests at an early stage of the discussion is always subject to both parties agreeing on the agenda, before starting the information game.⁵⁷⁰

(i) The information game

As explained earlier, the salesperson, investigator and deputy may have to engage in an information game to acquire the necessary intelligence before collaboration can take root. The information game has to be carefully managed, particularly at the beginning. Prematurely releasing information may place the salesperson in a precarious position, especially if the counterpart takes and uses the information and does not reciprocate.

Also, it is questionable why either party would automatically start trusting the other to accept information on face value, as mutual respect may not yet be established. However, trust between the parties has to begin at some point in time. As a starting point for the

⁵⁶⁹ Pruitt, above n 14, at [134-135].

⁵⁷⁰ Thompson, above n 265, at 157.

information game the salesperson may wish to adopt the tit-for-tat (“TFT”) strategy⁵⁷¹ to convey an open but firm approach with sharing information. In particular, the salesperson begins by being collaborative, particularly as a way of encouraging the counterpart to be open with information. This provides the salesperson the opportunity to assess how the counterpart responds early on in negotiation.

The next moves from the salesperson can reciprocate the counterpart’s last response in accordance with TFT. This also acts as the salesperson’s defence mechanism. If the counterpart does not reciprocate the gesture to provide information, the salesperson acts in kind. It may be to the salesperson’s best interest if the information first offered is not crucial information that gives away bottom lines or motivations. The salesperson may wish to start with providing more contextual details, and build up to providing more important information as trust is established.

The forgiving nature of TFT allows the salesperson to begin to provide further information as soon as the counterpart does. The counterpart may be adversarial and play a competitive information game. However, if the salesperson is just using a TFT strategy this may result in a deadlock between both parties especially if secrecy is being continually reciprocated. Therefore, the salesperson has to reassess the situation and employ different approaches, such as directly, but diplomatically, confronting the counterpart on the matter, as seen in the earlier Barshefsky example.⁵⁷²

During the negotiation discussion, while the salesperson intercepts any obstructive behaviour of the other party, the investigator’s inquiries work to seek out information in the trade of intelligence between the parties. The trading of intelligence allows the parties to go through the confrontational process of framing their positions and intentions and exploring the pertinent issues of the negotiation. The clarification of their goals may enable the parties to see how similar their goals are to narrow the parties’ differences. This allows each party to home in on the location of each other’s battleship, in a positive way.⁵⁷³

By engaging in this exploration of each other’s bottom lines, the parties may feel it necessary to stake out their positions and lay claim to certain resources and rights. Parties

⁵⁷¹ Refer to Chapter 2, C Mutual Cooperation, 3 Reciprocity for information on TFT

⁵⁷² Sebenius and Hulse, above n 503, at [10-11].

⁵⁷³ As per the board game analogy of Battleships in chapter 2 of this thesis.

may also challenge each other's understanding and positions, especially as their differences are narrowed. However, the reciprocation of intelligence may create mutual trust between the parties to enable them to shift into a more collaborative stance. The salesperson may also be able to encourage their counterpart to utilise "objective criteria" to prove their case and reframe matters.⁵⁷⁴ Here, the investigator can assist by using logic to analyse the parties' arguments against the intelligence provided.

If the flow of information in the discussion is blocked by an adversarial party, then the salesperson may have to employ other tactics to break through the impasse. The salesperson may employ negotiation jujitsu together with the BISM to de-escalate a conflict situation in the negotiation. These tactics may be effective in clearing conflict and establishing a foundation to build a relationship on trust and respect. However, the BISM takes time to work and is therefore not a quick solution in respect of changing the other party's behaviour.⁵⁷⁵

The potential to work together is always present in a negotiation, as the parties require something from each other. Otherwise, they would not have agreed to spend the time to negotiate. The salesperson has an opportunity to explore and develop the stronger party's need for the weaker party which is already present. If the salesperson, with the investigator's help, is able to ascertain the underlying interest of the other party, they can then present their interest in the context of the other party's interest.⁵⁷⁶ In doing so, the salesperson is then able to tap into the power of dependency⁵⁷⁷ and emphasise the need to collaborate.

Again, in the preliminary competitive stage of the information game, it may be useful to ascertain the other party's position first, which arguably goes against the suggestion of Fisher, Ury and Patton, to not bargain over positions.⁵⁷⁸ Again, positions can be helpful, so long as they are treated as the starting place and not the end point of the discussion.

⁵⁷⁴ Fisher, Ury and Patton, above n 10, at [82-88].

⁵⁷⁵ Vecchi, above n 522, at 36.

⁵⁷⁶ Carnegie, above n 502, at [89-93].

⁵⁷⁷ Bacharach and Lawler, above n 28, at 63.

⁵⁷⁸ Fisher, Ury and Patton, above n 10, at [3-7].

In effect, knowing what a person's starting position is may act as an anchor point or a baseline to establish an understanding of their goals. From this, the salesperson and investigator can uncover the underlying interest through pursuing a line of inquiry focused on "Why" their counterpart's position is what it is.⁵⁷⁹

Sinek emphasised the importance of finding out why, and states that businesses in general convey to their clients 'the what?' and sometimes 'the how?' of their trade, but often neglect the rationale of why they do what they do.⁵⁸⁰ Having the negotiating parties focused on what something is, keeps them positional by descriptively rehashing the problem over and over again. However, by talking about why something is the way it is, shifts the parties' focus away from their positions to their interests so that they can then grow potential options or 'the how?'. Also, understanding what motivates the other party helps anticipate their future actions or how they will respond to the negotiator's actions.⁵⁸¹

Therefore, the parties' interests should become the new baseline of discussions⁵⁸², which enables more agility for the parties to explore options. If the focus is locked on the fixed positions (the what?), which can be based on limited and irrelevant details, this confines the options (the how?) to the parties' interpretation of what something is. Alternatively, by using the malleability of interests (the why?), it is possible to reach a broader range of options. This fits in with the expression that "[i]f you have your 'why?' in life, you can get along with almost any 'how?'".⁵⁸³

And lastly, as indicated earlier, for the parties to get the most out of the information game they need to openly convey "clear" goals. Clear interests and goals can be altered more easily than vague ones, and are more able to be satisfied.⁵⁸⁴ On this basis, clear interests of all the parties will help inform options to satisfy everyone.

⁵⁷⁹ At 46.

⁵⁸⁰ Simon Sinek *Start with Why: How Great Leaders Inspire Everyone to Take Action* (Portfolio, New York, 2009) at [50-53].

⁵⁸¹ Brandenburger and Nalebuff, above n 307, at 61.

⁵⁸² Fisher, Ury and Patton, above n 10, at [42-45].

⁵⁸³ Judith Norman (translator) Friedrich Nietzsche "Twilight of the Idols" in Aaron Ridley and Judith Norman (eds) *The Anti-Christ, Ecce Homo, Twilight of the Idols and Other Writings* (Cambridge University Press, Cambridge, 2005) 153 at 157.

⁵⁸⁴ Hocker and Wilmot, above n 199, at [102-103].

Having acquired further applicable intelligence from the information game, an investigator can take that intelligence through the evaluation, analysis and invention process. Any new intelligence may further evolve the hypothesis and can be provided to the inventor to fine-tune the prototype options. These adjustments are then fed back to the salesperson to use in their discussions with their counterpart, this is in the attempt to gain 'buy in' from the counterpart's client, which is crucial for the success of the negotiation.⁵⁸⁵

(ii) Collaboration and innovation

Although the parties may pose a "competitive threat" to each other, they may find that they complement each other through the information shared, enabling opportunities for resolution.⁵⁸⁶ If collaboration is genuinely achieved, the salesperson and their counterpart, with their clients' blessing, may combine their portions of the map/hypothesis. At that time, the salesperson may wish to take the other party through the prototype option(s), for which the investigator leaves and the inventor steps into their place at the negotiation table.

The inventor's prototype options are incomplete vehicles, requiring the parties to work together to get them into a fit state. The parties can begin to work through the options to tease out the strengths and weaknesses and weigh them against "objective criteria".⁵⁸⁷ The parties may build on the templates initially set by the inventor or scrap them and start from scratch. Again, by having the other party involved in the process, it is more likely that they will accept the final (re)solution.⁵⁸⁸

During this invention stage, clear interests are fitted together in different ways to find an approach that the parties can use to reach their goals simultaneously. During this process, there might be a resurgence of competition in claiming the value.⁵⁸⁹ This is especially so when prioritising interests or agreeing to when specific actions are to take place, which may affect the other party's interests.

⁵⁸⁵ Zartman and Berman, above n 6, at 212.

⁵⁸⁶ Brandenburger and Nalebuff, above n 307, at [29-32].

⁵⁸⁷ Fisher, Ury and Patton, above n 10, at [82-85].

⁵⁸⁸ At 29.

⁵⁸⁹ Lax and Sebenius, above n 8, at [32-33].

Competition may inspire the parties to think of better ways to address each other's interests and move beyond mere compromises.⁵⁹⁰ It is about logically exploring the strengths and weakness of everyone's interests and devising alternative ways for the parties' objectives to be fulfilled. In doing so, the parties have to monitor whether certain compromises and approaches devalue the overall worth of the intended resolutions. Objective criteria may help to settle any differences, and help to produce a fair agreement between the parties. If the competing interests can realistically be fitted and dovetailed together, it then becomes unnecessary for the parties to compete further.

When discussing the options, negotiators may need to reaffirm their interests to ensure any potential agreement caters to their clients' needs, hence effort may be made to claim any value left on the negotiation table. Alternatively, the clients may express uncertainty and/or dissatisfaction about the proposed (re)solution that may lead the parties back to the 'drawing board'. Here, the salesperson has to walk the parties through the resolution, taking care not to ruin the collaborative work that they have accomplished.

If the parties' clients have further input or raise points for exploration, especially when parties are claiming value, this might prompt another cycle through the assembly line to clarify or establish further intelligence needed. The necessity of more new information, may engage further cycles of information analysis, hypothesis evaluation and option building. At this stage, the aim of the parties would be to have their clients sign off on the proposed (re)solution. Again, the flow diagram in Appendix 1 of this thesis shows how information flows through and back the various stations of the professionals.

4 NAL for all

Although this thesis has looked at the NAL in light of the weaker party, there is no reason why the NAL has to be restricted to their use only. The NAL could be beneficial to the negotiation if both parties decide to use its framework, therefore making it applicable to both weaker and stronger parties. It is questionable whether the effectiveness of the NAL for the weaker party, is cancelled out if the stronger party also uses it. Taking a positive-

⁵⁹⁰ Refer to the brain trauma analogy in chapter 2.

sum approach, it is suggested that it would not, especially if the NAL's framework is not corrupted and both parties maintain the NAL's initial function and intention.

It is important to remember that the intention of the NAL is the methodical management of refined information through an assembly line of professional roles. Secondly, the NAL uses applicable intelligence in the spirit of sharing it between the parties to connect ideas and different information together to generate options for mutual gain. On the spectrum of advantages, it would be more advantageous for a weaker party to have a methodical process of managing information (like the NAL) than not to have one at all. Better yet, if all the negotiation parties undertake the NAL process, this would enable them to pool as much applicable intelligence as possible to their collective advantage.

It is also questionable whether competition ruins the collaboration in the NAL, especially if both parties use this framework. The answer to this depends on the parties' discipline and the proportionality of the competition. Looking at the purpose of competition, it can be used to seek out necessary information and challenge the validity of the preconceived ideas at the beginning of the negotiation.

Moreover, competition can spark ideas or create bursts of energy to keep the momentum of the parties going forward.⁵⁹¹ Harnessing that competitive energy is similar to a car harnessing the power in an engine to move forward. It is the precise amount of combustion, or competition that gets the desired effect; alternatively, too much may be destructive or counterproductive.

Competition should be seen as a motivating factor to get past obstacles when energies are low or ideas stagnate, and is tied into the positive/zero sum perspectives on power. Accordingly, parties can have a positive-sum perspective on power and see it as something that both parties have and can share. Alternatively, parties can take a zero-sum perspective and aim to weaken each other's power in order to improve their own.⁵⁹² Therefore, if each party's NAL framework is based on a positive-sum perspective, there is no reason why the NAL cannot be used by all parties to the benefit of the negotiation as a whole, rather than making each party adversarial and obstructive towards the other.

⁵⁹¹ Sebenius and Hulse, above n 503, at 10.

⁵⁹² Bacharach and Lawler, above n 28, at [67 and 92].

5 NAL station summary

	Investigator	Inventor	Salesperson
Actors	<ul style="list-style-type: none"> Investigator: factfinder Investigator: analyst 	<ul style="list-style-type: none"> Inventor 	<ul style="list-style-type: none"> Salesperson (primary coordinator) Technical deputy
Information Phases	<p>(1) Preliminary prep stage:</p> <p>(a) information gathering, evaluation and analysis</p> <p>(b) critical analysis on options.</p> <p>(2) Negotiation discussion:</p> <p>- information gathering from the other party.</p>	<p>(1) Preliminary prep stage:</p> <p>Processing intelligence and negotiation hypothesis to generate prototype opinions.</p> <p>(2) Negotiation discussion:</p> <p>Working with all the parties on the options.</p>	<p>Negotiation discussion:</p> <p>(1) Trading intelligence to build trust, promote reciprocation and foster collaboration</p> <p>(2) Using intelligence to claim value</p> <p>(3) Using intelligence to inform clients and get approval.</p>
Topic areas specialties to manage	<ul style="list-style-type: none"> Information 	<ul style="list-style-type: none"> Information; and Mutual cooperation 	<ul style="list-style-type: none"> Information, Power and Mutual cooperation
Negotiation Model	<p>Competitive:</p> <p>Finding flaws in arguments and trying to obtain the most applicable information possible</p>	<p>Collaborative:</p> <p>Consideration of everyone's interests and whether there is an option for this to be met.</p>	<p>Competitive and collaborative:</p> <p>(combination of collaborative and complete aspects of previous two stations)</p>
Design thinking equivalent	<p>Understanding of interests of counterpart and client.</p>	<p>Exploration of mutual options and solutions</p>	<p>Materialisation of options with counterpart and client.</p>

IV Case Study

The case study focuses on a negotiation scenario between an insurance company (the insurer) and a weaker party (the customer claimant). The objective is to demonstrate how the careful management of information through the NAL can assist claimants to fairly participate in insurance negotiations to settle problematic claims.

Despite each country's legislation and case law, the topic of insurance has universal legal principles. The thesis will work with these principles, rather than focus on the specific legislation and case law of a particular country. Insurance will be used as a vehicle and not the main subject of the study. This vehicle will take the reader through the flow of applicable intelligence in an insurance claim to demonstrate the application of the NAL process.

Although it is unnecessary to have an intricate understanding of the mechanics of insurance, it is useful to have an overview of its basic principles.

A Insurance Basics

1 What is insurance?

Insurance is an industry of "risk control",⁵⁹³ for which insurers provide cover for certain types of risk from insured perils to indemnify their customers for damage or loss suffered.⁵⁹⁴ Instead of the customers having to bear the risk, uncertainty and full cost of a loss to their property, business, or health and lives (or legal liabilities), this is transferred to insurers under a specific contractual agreement.⁵⁹⁵ This indemnification is usually purchased at a set fee, a premium, which is fixed in accordance with an assessment of the risk.⁵⁹⁶

The insurer's service reduces the uncertainty and unforeseen costs for the customer when they are faced with a loss.⁵⁹⁷ This consequently makes insurance an important tool

⁵⁹³ "Negotiations in the Insurance Industry" (1993) 48 DRJ 13.

⁵⁹⁴ Malcolm A Clarke *The Law of Insurance Contracts* (6th ed, Informa Law, London, 2009) at 4.

⁵⁹⁵ Greg Pynt *Australian Insurance Law: A First Reference* (4th ed, Lexis Nexis Butterworths, Chatswood NSW, 2018) at [5-8].

⁵⁹⁶ Robert Merkin and Chris Nicoll *Colinvaux's Law of Insurance in New Zealand* (second ed, Thompson Reuters New Zealand Ltd, Wellington, 2017) at 5.

⁵⁹⁷ Robert Merkin *Insurance Law, An Introduction* (Informa Law, London, 2007) at 1.

for financial planning⁵⁹⁸ and it is for the customer to decide whether to purchase indemnity against “low-probability, high consequence... events”.⁵⁹⁹

Insurers shoulder the costs incurred by insured perils and are thereby integral to restoring normality in people's lives faster than if they had to pay for the loss themselves. Accordingly, insurance underpins the modern economy through risk management and could be considered a social good.⁶⁰⁰ On this basis, insurers bear a level of moral responsibility through their service to indemnify people for their losses. This is similar to the earlier mentioned “responsibility norm” from the “normative arguments” of Bacharach and Lawler.⁶⁰¹

2 Cover and claiming

Claims are the most relatable aspect of insurance for the lay customer and are the critical test of their relationship with insurers. Claims will often constitute the “moment of truth” to the customer for whether they remain a client of the insurer.⁶⁰² Accordingly, the policy's terms and conditions will dictate how a claim for an incident will be handled.⁶⁰³ The intention of the parties as to what is insured, and to what extent, is taken from the specific policy wording.⁶⁰⁴

When the customer makes a claim, they should first consider the policy's cover which is confirmed through “express statement or necessary implication”. The onus is on the customer to show that the loss claimed comes within the policy's scope of cover.⁶⁰⁵ The insured may start by notifying the insurer of a claim that is, *prima facie*, within the

⁵⁹⁸ Andrew McGee *The Modern Law of Insurance* (3rd ed, Lexis Nexis Butterworths, London, 2011) at 13.

⁵⁹⁹ Howard C Kunreuther and Mark V Pauly “Behavioural economics and insurance” Principles and solutions” in *Research Handbook on the Economics of Insurance Law* (Edward Elgar Publishing, Cheltenham, 2015) at 15, 19–20, and 33–34].

⁶⁰⁰ Paul Michalik and Christopher Boys *Insurance Claims in New Zealand* (LexisNexis NZ Limited, Wellington, 2015) at 1.

⁶⁰¹ Bacharach and Lawler, above n 28, at 177.

⁶⁰² Tony Boobier *Analytics for Insurance: The Real Business of Big Data* (John Wiley & Sons Ltd, Chichester, West Sussex, 2016) at 61.

⁶⁰³ Michalik and Boys, above n 601, at 3.

⁶⁰⁴ John Birds, Ben Lynch and Simon Milnes *MacGillivray on Insurance Law* (12th ed, Sweet & Maxwell, London, 2012) at 301.

⁶⁰⁵ McGee, above n 599, at 153.

scope of the cover. However, if the insurer challenges the claim with contradictory evidence, it would be for the customer to “prove that the loss claimed was caused by an event (peril) covered by the policy.”⁶⁰⁶

If the customer has established a claim, the insurer may check whether any exclusions prohibit cover. Exclusions are underwritten into the policy to define its scope of cover. Policies can therefore be “contractually tailored” by the insurer to exclude certain risks.⁶⁰⁷ If the customer has demonstrated a *prima facie* claim, the onus shifts to the insurer to show that an exclusion is applicable to preclude cover. However, the onus then shifts again to the customer where there is an exception to the exclusion.⁶⁰⁸

3 *Information and good faith*

The insurance industry is an information-intensive service.⁶⁰⁹ Information is vital to not only accepting cover for losses arising from certain risks, but also to accepting claims. The decisions made in the process of assessing and adjusting claims are dependent on the thorough gathering of information.⁶¹⁰ This creates a unique relationship between the customer and the insurer where both have a duty of utmost good faith towards each other in their dealings.⁶¹¹ In fact, the good faith duty is necessary to bridge the inherent information imbalance between the customer and the insurer. In particular:⁶¹²

Where one party seeks to obtain some contractual advantage from another who has little or no information about the undertaking facing him, the duty of good faith has been introduced in order to ensure that the playing field upon which the parties stand is levelled.

⁶⁰⁶ Clarke, above n 595, at 476.

⁶⁰⁷ At 584.

⁶⁰⁸ McGee, above n 599, at 153.

⁶⁰⁹ Uday M Apte, Richard A Cavaliere and Shailesh S Kulkarni “Analysis and Improvement of Information-Intensive Services: Evidence from Insurance Claims Handling Operations” (2010) 19 *Prod Oper Manag* 665 at 666.

⁶¹⁰ At 668.

⁶¹¹ Pynt, above n 596, at 125.

⁶¹² Peter MacDonald Eggers, Simon Picken and Patrick Foss *Good Faith and Insurance Contracts* (2nd ed, Informa Professional, London, 2004) at 71.

Given this duty, a policy is different from other contracts as the parties to the insurance conduct their affairs together “without any dishonesty or deceit and, possibly, making all that is known to them known to the other”.⁶¹³ What is required by the insurer is the disclosure of relevant or material information that would affect whether it offers insurance, and if so, on what terms.⁶¹⁴ The insurer is obliged to deal with the customer fairly and honestly at the inception of the policy and when processing a claim;⁶¹⁵ this duty starts at the policy's inception and lasts until the policy ends.⁶¹⁶

If material information requested by the insurer at the policy's inception is not disclosed, subject to the application and policy, an insurer can have the policy avoid (or void) in *ab initio*.⁶¹⁷ Essentially, the policy is treated as though it never existed, in which case the insurer should refund the customer's premiums.⁶¹⁸ This refund should be offset by any claims paid during the currency of the policy, with the customer paying back the remainder of those past claims (subject to the terms and conditions of the policy).⁶¹⁹ In doing so, the parties are discharged from all their obligations under the policy, such as the insurer having to pay out on the current claim. The “extinction of the contract *ab initio*”⁶²⁰ is commonly referred to as an “avoidance” of the policy.⁶²¹

The duty of utmost good faith should in theory affect the level of adversarial behaviour. For example, if information is more freely available, an information game in a negotiation between the parties becomes redundant. It is clear that information is vital to insurance negotiations, therefore with the underlying duty of good faith, obtaining the information may not necessarily be an obstacle. Attention should instead be placed on knowing what information is needed, in particular identifying and pursuing the most applicable information for each parties' circumstances.

⁶¹³ At [2-3].

⁶¹⁴ Michalik and Boys, above n 601, at 107.

⁶¹⁵ Eggers, Picken and Foss, above n 613, at [6 and 75].

⁶¹⁶ At [49 and 70].

⁶¹⁷ Michalik and Boys, above n 601, at 107.

⁶¹⁸ Merkin, above n 598, at [67-68].

⁶¹⁹ Michalik and Boys, above n 601, at 108.

⁶²⁰ Eggers, Picken and Foss, above n 613, at 437.

⁶²¹ Clarke, above n 595, at [221-222]; Michalik and Boys, above n 601, at [106-108]; Pynt, above n 596, at [160-162].

4 *Power and motivation*

As previously indicated, power can be viewed through different lenses. An insurer could be construed as a stronger party by having more resources in respect of capital, people and technical knowledge. At the same time, power can be viewed through the dependency lens, where the weaker party is the one that needs the other more as the stronger party may have more BATNAs at their disposal.⁶²² A customer turned claimant having suffered a loss, can reasonably be seen as more vulnerable and requires the insurer's assistance, especially as the claimant is dependent on the insurer to pay the claim.

Alternatively, power can be considered in terms of how much one party can obstruct the other from obtaining their goal.⁶²³ In an insurance negotiation the insurer can hold power because it can maintain its refusal to pay the claim. Or, the claimant can evoke some power by controlling the negotiation narrative by being the victim and draw an advantage from the coercive power of "powerlessness". The claimant can use passive aggressive actions and low power moves that act to diminish and eventually destroy the relationship between the parties.⁶²⁴ The result of which unproductively consumes the insurer's time and efforts.

For the purposes of this case study the insurer will be designated as the stronger party, so that the study can demonstrate a basic NAL process from the perspective of the claimant's negotiation party. Van and Headrick suggested that "[a] great insurance negotiator is one who has a process."⁶²⁵ That being said, there is no reason why the NAL cannot be the process used by insurance negotiators.

B NAL and Insurance Claim Negotiation

The following scenario presents a typical insurance claim in New Zealand. The NAL is woven into the narrative of this scenario to demonstrate a viable example of its application.

⁶²² Fisher, Ury and Patton, above n 10, at [104-108].

⁶²³ Lewicki, Saunders and Barry, above n 51, at 256.

⁶²⁴ Hocker and Wilmot, above n 199, at [137-139].

⁶²⁵ Carl Van and Teresa Headrick *Negotiation Skills for the Claims Professional* (International Insurance Institute, Inc, San Bernardino, CA, 2013) at 29.

1 The scenario

The customer claimant is diagnosed with cancer and makes a claim with the insurer. The insurer assesses the claim, first looking at the policy and then the facts of the claim. The policy covers the reimbursement of treatment of “health conditions” and cancer comes within the scope of cover.

The claimant's medical record notes consistent stomach discomfort. In particular, there was a consultation undertaken for minor stomach discomfort six months before the inception of the policy. This consultation was not disclosed in the insurance application. The insurer advises the customer that in accordance with the requirements of the application, the consultation ought to have been disclosed in the initial health declaration. The insurer's chief medical officer believes that the earlier minor stomach discomfort was likely to be linked to the cancer.

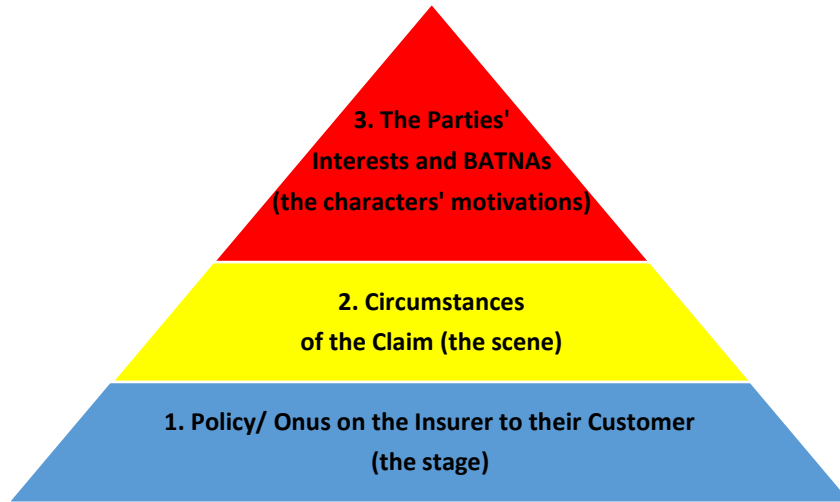
The insurer's underwriters confirm that if the customer had disclosed the consultation for the stomach discomfort, they would have deferred cover for further testing. Further testing may have identified the cancer. Irrespective, the consultation raised a ‘red flag’ of risk for which if this information was available at the time, the insurer said it would not have offered insurance on the terms that it initially had. The insurer decides to avoid the policy and refund the customer's premiums. Fortunately, the customer had not made any other claims on the policy.

As the matter had been ongoing for a while, the claimant had no choice but to pay for the cancer treatment. Therefore, the claim is for the reimbursement of the treatment cost. The claimant, distressed with the insurer's decision, seeks help to negotiate with the insurer about the claim. The claimant goes to the insurance broker for assistance as the broker was partly responsible in the management of the insurance. Through the broker, the insurer agrees to a negotiation discussion. The broker and some legal associates are able to form an ad hoc negotiation team to assist the claimant; in this case, the broker is the technical deputy. Using the NAL, the focus is first on the claimant's investigator.

2 Investigator

The information needed for an insurance claim negotiation can be sorted into three prominent groups of knowledge. These groups can be set out as a pyramid with the policy

or ‘the onus on the insurer to their customer’ at the foundation of the structure, followed by the circumstances of the claim at the core, then capped by the parties’ interest and BATNAs. The narrative that this information presents can be referred to as the Claim Information Narrative or CIN, as follows:



The Claim Information Narrative (“CIN”)

This structure is similar to Abraham Maslow’s hierarchy of human needs. Maslow’s hierarchy, starts with the basic needs comprising of physiological needs and safety needs as the foundation. Moving up the hierarchy are the needs related to social belonging and self-esteem. Once these needs are fulfilled to a certain degree, then enables a person to address self-actualisation, which is the highest need.⁶²⁶ Similar to Maslow’s hierarchy, the lower tiers of the CIN must be satisfied to a certain degree before moving to the upper tiers.⁶²⁷ A firm understanding of the policy enables the claimant to know about the parameters for which the claim can operate, this then sets the platform for the actors to work towards their interests.

The CIN can also be seen through a theatrical lens, where a claimant preparing for a negotiation is like an actor preparing for a play. Negotiators and stage actors both require a full comprehension of the story, the character roles and the dynamics of the terrain through the ‘staging’. In the first tier of the CIN, just as the stage limits and bestows

⁶²⁶ Abraham H Maslow “A Theory of Human Motivation” (1943) 50 Psychol Rev 370 at [372-383].

⁶²⁷ At [370, 383, 388-389].

opportunities to enhance the performance of a play; the policy in turn, allows the circumstances of the claim to operate in a particular insurance context.

The circumstance of the claim is tantamount to the 'scene' of the play, as shown in the second CIN tier. And, just as the scene gives purpose to the characters of the play, the claim grants that purpose to the negotiating parties. With the third CIN tier, like with any good story, the characters must have an exposition of their 'motivations' to lead them through the play to its conclusion, which is similar for the negotiating parties. The crystallisation of each parties' underlying interests and BATNAs will influence the direction of how the claim may be settled. It is the uncovering of these interests that will help shape the negotiation's conclusion.

(a) The policy

The first important step is to ascertain whether there is cover and if so, what it is. Vaccaro suggested focus be given to any coverage problems with the claim.⁶²⁸ Here, the investigator pools together policy documents and examines the coverage of the claim as per these documents. The investigator gathers the most relevant copy of the policy,⁶²⁹ policy summaries, certificate and schedules of insurance, application and declaration, and premium notices.

The policy clauses are carefully perused to establish the relevant terms and conditions for this claim. The information that is considered includes the customer's obligations of disclosing material information at inception and whether there is any relief for the claimant if they fail to meet the policy criteria. The investigator and the technical deputy also look at the relevant legislation and case law.

By establishing the policy's scope of cover early, the investigator is better able to manage the claimant's expectations by disabusing the claimant of any inflated sense of entitlement to the claim. Establishing the claimant's misapprehensions of the policy may enable the claimant to be more open-minded and receptive to considering resolution options.

⁶²⁸ Joseph L Vaccaro *Negotiating with Insurance Companies* (2nd ed, James Publishing, Inc, Costa Mesa, 2014) at [38-40].

⁶²⁹ Michalik and Boys, above n 601, at 13.

The policy may also be used as an objective criterion of the claimant's contractual entitlements to enable a principled approach to the matter.⁶³⁰ As the policy's terms have already been agreed by the contracting parties, the claimant has already bought into the conditions of cover, ideally, making any policy limitations more palatable.

The only factor that would diminish the objective power of the policy would be the subjective interpretation of any ambiguous wording. The technical deputy notes that, subject to the medical evidence, the pre-existing exclusion may act to exclude cover in any event, especially if it appears that the symptoms of the cancer pre-dated the policy.

(b) The claim

Here, the investigator establishes the scene, what happened, and whether the bona fides of the claim and certain disclosure conditions have been met. Given that the claimant has lived the claim, the claimant should have the strongest mastery over the narrative of the events and the surrounding facts of the matter.

Next, the investigator considers the medical information. The claimant was diagnosed with cancer a couple of years into the policy. Prior to the inception of the policy, the claimant had minor discomfort causing the claimant to consult a doctor, however at the time, the symptoms abated and nothing came of the consultation. It is arguable that these discomforts could be symptomatic of the cancer. The majority of the direct symptoms and tests of the cancer occurred in the currency of the policy, leading up to the diagnosis.

However, the claimant's doctor does not believe that there is any definitive evidence to show a connection between the pre-policy discomfort and the cancer. At this stage, it is merely speculation, as a test had not been done at the time and the minor discomfort was thought to be an irritable bowel which eventually abated. The technical deputy postulates that this was probably why the insurer went down the track of the policy avoidance route rather than use the exclusion to refuse the claim. Also, this would get the claimant's risk 'off the books' to have a clean break of the situation for the insurer.

The investigator looks at what the claimant should have reasonably known at the time of the application. It was clear there had been a consultation for discomfort prior to

⁶³⁰ Fisher, Ury and Patton, above n 10, at [83-86].

the policy's inception. However, going back to the application's declaration, it did not ask for consultations, instead it asked for the applicant to disclose any diagnosis, medication or treatment for any particular health conditions or symptoms or conditions.

The investigator presumes that the insurer has linked the consultation at issue with the word 'treatment', to argue that the consultation was material information that should have been declared in the application. The technical deputy communicates with contacts in other insurance companies to ascertain what their underwriters would have done in the circumstances. The general consensus of the other insurers was that their application wording was broader than that of the insurer in question and captured examinations. It was arguable that consultations were not captured in the scope of the application questions relevant to this claim.

Given that the consultation did not indicate the cause of the problem and the symptoms abated not long after, the claimant believed the consultation to be immaterial as it showed nothing of significance at the relevant time. At the time, the claimant forgot about the consultation, being preoccupied with work during this period and thought that the stomach discomfort was due to stress. This rationale gives credence to why the claimant did not disclose the consultation to the insurer at the relevant time.

(c) The parties' motivations

(i) The parties' BATNAs

A potential BATNA for the insurer, is to take its chances with the claimant taking the matter through an alternative dispute resolution service or the courts. The time and effort to engage in these avenues may be undesirable, as there is a level of uncertainty of the outcome leaving the matter to external third parties. This option may also remove an element of agency away from the insurer to proactively settle the matter.

This BATNA would raise similar issues for the claimant. The outcome would depend on a third party's interpretation of the policy documents and the evidence. The cost of the court route may be less appealing to the claimant as he would have less capital and resources to expend on this matter than the insurer, hence negotiation is more cost effective.

Also, a negotiation grants the claimant agency as well, especially having been at the mercy of the cancer and now the insurer's decision.

(ii) The insurer's interests

The technical advisor may also appreciate that this negotiation is an attempt to expedite and conclude a protracted claims process. To the insurer, further staff time and resources spent on defending its claim decision would also eat into its profit margins. Due to the higher insurable risk from the cancer, the insurer may not wish to take on this risk, as it may cost the insurer more in future claims. Moreover, there is the underlying moral risk posed by the claimant, as the failure to disclose material information brings a suspicion of dishonesty which demonstrates how the claimant may choose to interact with the insurer in future claims.

The sanctity of contract is also a consideration for the insurer to handle claims in accordance with the policy. Without this objective criterion, there is no certainty about the extent of the insurer's liability and obligation to pay the claimant. Hence the insurer would want to keep its claims' management consistent. If this case was to be paid outside the terms of the policy it could set a precedent of settlements moving away from the policy.

A major insurer interest would be the wider impact on its reputation. If there is an appearance that this client's claim is not handled fairly and reasonably, the claimant may publicise his dissatisfaction through word of mouth or the media. This may colour the public perception of the insurer's reliability and fairness, and negatively affect current and potential customers, discouraging them from insuring with the insurer. This may lead to a loss of premiums, especially as insurance is a business.⁶³¹ Although this may be a remote possibility, it is a possibility nonetheless.

(iii) The claimant's interests

An obvious interest for the claimant is the reimbursement for the cancer treatment costs. There is also the issue of the policy's avoidance for failing to disclose information which

⁶³¹ McGee, above n 599, at [6-7].

has two ramifications. Firstly, the claimant has no health insurance in place to cover any other medical conditions.

Secondly, the avoidance of the policy puts a blemish on the claimant's insurance record which may have the unintended consequence of affecting future insurance. Most insurance applications ask whether the applicant has had any insurance cancelled, terminated or avoided by any other insurers; this is material information.⁶³² An avoidance for failing to disclose information brings into question the applicant's honesty for potential insurers.

Lastly, time and effort are also large factors for the claimant. Similar to the insurer, the claimant is not wanting a protracted battle, which relates to Sun Tzu's philosophy, that "[t]here is no instance of a country having benefited from prolonged warfare".⁶³³ Therefore, the claimant is seeking the quickest resolution of this matter as soon as reasonably possible through the negotiation.

(d) Information stocktake

On the basis of the above, the NAL team should be able to postulate on the negotiation hypothesis. From the information gathered for this hypothesis, two main issues are apparent: the refusal of the claim and the 'avoidance' of the policy. As a stocktake of the negotiation, the hypothesis map can be summarised as follows:

Factors	Issues	
	Refusal of the claim	Avoidance of the policy
Decision taken by insurer	To not pay.	To avoid from inception.
Rationale for decision	Evidence triggers the policy's exclusion for pre-existing condition.	Failure to disclose material info.
Evidence for decision (this is the backbone for the insurer's position)	Medical history: discomfort predate policy.	Application declaration, has an absence of the consultation in question.

⁶³² Merkin and Nicoll, above n 597, at [226-228].

⁶³³ *Sun Tzu on the Art of War* (Allandale Online Publishing, Leicester, 2000) at 6.

Rebuttal points for decision – aimed at shifting the perspectives of the insurer	Inconclusive whether stomach discomfort related to the cancer at issue or was due to something else. Diagnosis occurred following assessment for stronger pain.	Arguable whether the information was requested via the application.
Underlying interests for the insurer's decisions	(1) Limiting the expenditure of money on a claim not covered by the policy. (2) Protecting the sanctity of the policy by adhering to it.	Limiting the risk, from two factors: (1) Potential dishonesty from the claimant. (2) The cancer.
Ramifications of these decision for the claimant	Left out of pocket for the cost of treatment.	(1) A blemish on the insurance history. (2) Unable to easily get other insurance elsewhere.
Possible ramifications for the insurer	(1) Loss of business/ premiums from the claimant taking business elsewhere. (2) Bad publicity through word of mouth or the media, resulting in a potential loss of business for the insurer.	
Overlapping interests between the parties	(1) To not expend any further time, effort and capital if a negotiated agreement can be reached. (2) If a relationship can be salvaged, the claimant can still be insured and insurer can maintain a loyal customer, who may promote the insurer for more business.	

3 *Inventor*

The inventor's objective is to connect the strands of information pulled from the policy, claim and identified interests of the parties to create prototype options agreeable to both parties. The claimant should be open to prioritising whether to have the claim paid or the policy reinstated. Ideally having both would be perfect, however, the claimant may have to assess which is more important for the sake of a mutually agreeable option.

When asked, the claimant was willing to pay the immediate cost of the treatment. By having the claim and policy explained, the claimant appreciated the negative longer-term effects of an 'avoided' policy on the insurance record, and the prospect of not having

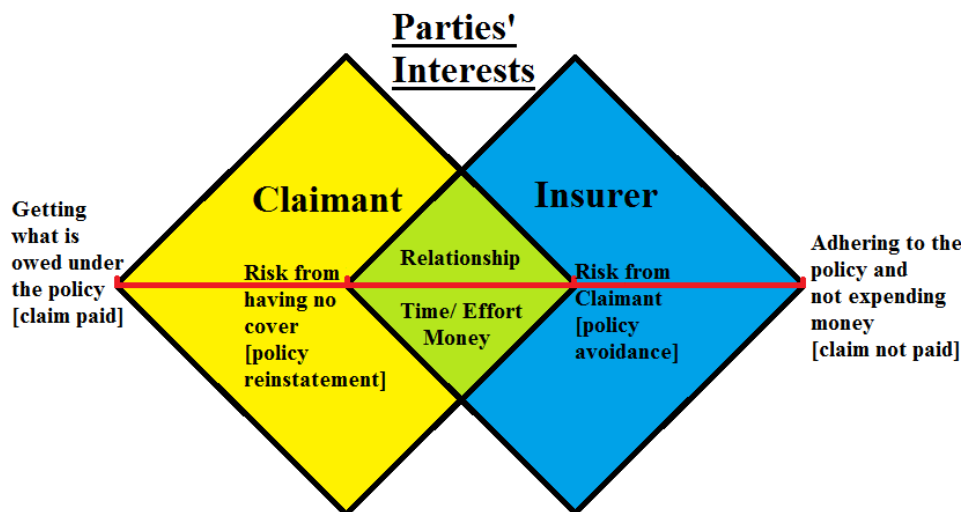
any health cover. Although the evidence may be more in the insurer's favour, regarding the pre-existing condition exclusion negating the claim, the claimant may have a better argument for the reinstatement of the policy.

In respect of working with the presumed interests of the insurer, the inventor would be looking to reduce the perceived risk, especially if the claimant sought a reinstatement of the policy. There would need to be a perspective shift for the insurer. This would be to diminish the risk of having the insurer 'insure a burning building' (or in this case an ill individual), therefore, the insurer would need confirmation of the claimant's health.

In respect of the second risk factor of the claimant's level of honesty, it would be for the salesperson to convince the insurer that it was the claimant's genuine understanding that the pre-policy consultation was not required to be disclosed, and that the claimant was not hiding any material information from the insurer in order to attempt to get a benefit that the claimant was not entitled to get.

On the basis of the above, an option may be for the claimant to forgo the claim in favour of focusing on the reinstatement of the policy and to treat this as the bottom line. There may be hidden costs to the insurer in reinstating the policy, which may create a barrier to not taking this approach, however, this should be ascertained in the negotiation.

The salesperson in the negotiation discussion would have to pull together the overlap of the parties' interests through the abovementioned option. This involves, reconciling the perceived risks, especially to persuade the insurer that the reinstatement of the policy is in its best interest. The dynamics of the interests can be presented as follows:



The above diagram places the parties' interests about the claim pay-out at opposite ends of the spectrum. The investigator and technical deputy assume that the difference in mind-sets between the insurer and the claimant may be too great to easily reconcile the claim issue. However, this would be subject to the further information from the negotiation discussion.

The investigator and technical deputy suspect that with the reinstatement of the policy, the parties may not be as far apart as they might think. Hence in the above diagram, the risks concerning the policy are placed at the outer edge of the green overlapping diamond for the parties' interests. If the parties are able to reconcile their differences to move their interests closer together, then the overlap will encapsulate the policy avoidance issue. This will in turn feed into the desire to maintain a working relationship between the parties. Therefore, the relationship should be a mutual interest point for both parties, along with saving time, effort and money in reaching an agreement.

By talking in the interest of the other party,⁶³⁴ the salesperson would be aiming to promote the reinstatement of the policy as a positive interest for the insurer. Making the interests congruent will enable the parties to bridge their differences.

Therefore, if the parties' interests can be folded together and the risk factors ironed out, then the policy reinstatement option may be a viable vehicle to drive the parties towards an agreed outcome. At this point, a successful resolution to this matter will depend on the communication of the applicable intelligence, the negotiation hypothesis and the prototype option.

4 Salesperson

Given the insurer's attitude prior to the negotiation, the salesperson anticipates that they will have to address the insurer's set position on the claim. It is therefore the role of the salesperson to competitively challenge the insurer's understanding and shift its preconceived ideas. This will then allow room to collaborate on a way forward to achieve an agreement satisfactory to everyone. With the skills and professionalism previously

⁶³⁴ Carnegie, above n 502, at [89-93].

described, the salesperson needs to be ready for this competitive and collaborative melody, to manoeuvre agilely between the realms of claiming and creating value.

(a) Information forum

The information game starts from the agreed agenda set by the parties and leads into the outlining of positions on the matter with each side setting out their supporting rationale. Given that the relationship between the claimant and the insurer is one of utmost good faith, the non-disclosure of negotiation information should not be an issue. Instead, the 'information game' may be more so about what particular issues the parties should be focused on and what specific information they are willing to exchange during their discussion.

The salesperson will unpack the facts and ideas regarding the policy, medical information and underwriter input on the application declaration. During this time, the investigator will also seek further clarification and confirmation on uncertain areas in the NAL team's hypothesis.

The unpacked information can be seen as puzzle pieces, laid out for both parties to examine. Having this array of information on the negotiation table should give everyone a greater perspective of the claim and possibly shift perspectives. The individual pieces may hint to possible outcomes and once connected with other pieces may enable the parties to revise their thoughts on older information. In the context of the bigger picture, these older ideas, once considered to be important, may now be only peripheral.

Staying with the puzzle analogy, the insurer's steadfast position may resemble a 'sliding tile picture puzzle'. Here, the picture tiles are in disarray, distorting the main picture, in this case, the insurer's preconception of the claim. This distortion is held in place with a plastic stopper in the empty square preventing certain ideas and information from being slid into their right place to form an accurate image of the claim. In order for the salesperson to start shifting the tiles of the insurer's ideas (to eventually show the end picture) they have to first address the stopper that is preventing the ideas from being reorganized. In this case, the stopper is the insurer's preconceived perception of the policy, claim and the parties' interests.

(b) The issues

The insurer's argument begins with its understanding of the claim. In particular, the insurer's chief medical officer ("CMO") considers, that on the balance of probabilities, there were symptoms of the cancer that predated the policy. This was evidenced by the consultation in question and appears to be consistent with the rest of the claimant's medical history. To the insurer, this circumstantial evidence supports the position that the claim related to a condition that was pre-existing and therefore excluded by the policy, enabling the insurer to decline the claim on this basis.

The salesperson's rebuttal to the pre-existing condition exclusion, is that the contemporaneous information was not conclusive to show a link, directly or indirectly with the cancer at issue. The claimant's doctor did not believe there was enough information to decide, with any certainty, whether the earlier discomfort experienced by the claimant was linked to the cancer. The insurer disagrees that there has to be a high level of certainty, as it only had to be shown from a civil standard (on the balance of probabilities)⁶³⁵ that it was more likely than not that the cancer existed before the inception of the policy.

As well as having its CMO's opinion, the insurer had also run an anonymised version of the claimant's medical history through several other insurance companies. The consensus of these insurers (through their CMOs) was that they would have deemed the cancer as a pre-existing condition, taking into account the consultation. To the insurer this meant that the evidence met the general industry threshold to support not paying the claim.

Notwithstanding whether or not the application required disclosure of the consultation, the insurer remains insistent on the declinature of the claim through the policy's exclusion. This insistence is based on the objective standard of the other insurers confirming the likelihood of the cancer being a pre-existing condition.

The insurer moves onto the claimant's disclosure responsibility. The insurer highlights the claimant's duty of utmost good faith to disclose all material information, such as the consultation in question, and that the claimant had failed in this duty. Consequently, for the insurer, the claimant poses a risk. The investigator, working with the salesperson, queries this risk. The insurer explains that there is both a claims risk in which

⁶³⁵ Clarke, above n 595, at [476-477].

the insurer had from the outset insured an ill individual and a moral risk because the claimant's honesty has been called into question. By the claimant not disclosing certain information this time, what else might he not disclose in future? This stage, this dialogue is helpful for the salesperson as it serves the purpose of:

- (1) having the insurer articulate its position; and
- (2) having the salesperson unpack the insurance ramifications (for the claimant) to the insurer, and explain why the claimant did not disclose the consultation.

The salesperson elaborates on the claimant's information in support of the policy being reinstated.⁶³⁶ In particular, the salesperson keeps to the facts of the matter in their communication, as Van and Headrick suggested that "[g]reat claims negotiators" argue on the facts rather than on the reasons⁶³⁷ and therefore, by implication, an evidence-based rationale is important for claims. The salesperson uses the disparate facts to highlight any uncertainty in the insurer's rationale in order to introduce some leeway into the insurer's thinking. This in turn diminishes the firmness of its decision and paves a different approach to resolve this matter.

(c) Breaking down barriers

Given that claims knowledge is critical to an insurance negotiation,⁶³⁸ the use of it by the claimant (through the salesperson) may build mutual respect with the insurer. In particular, relaying the claimant's points in the same technical language as the insurer (with the assistance of the technical deputy) may assist the salesperson to get the point across.

Here, the salesperson raises the point that where there has been a failure to disclose material information at inception, the insurer has the discretion under the policy to either avoid the policy from inception or alter its terms. This highlights to the insurer that it is not locked into destroying the value of the whole policy by choosing to avoid it, but instead there is leeway for a different option.

⁶³⁶ Refer to the investigator station in this chapter.

⁶³⁷ Van and Headrick, above n 626, at 84.

⁶³⁸ At 89.

Although the insurer is unmoved on the pre-existing condition issue, the insurer nevertheless acknowledges the claimant's perspective on the policy avoidance. Given the feasible explanation of the non-disclosure, coupled with the prudent underwriter's opinions about the application wording, the insurer is more open to reconsidering the avoidance of the policy.

The insurer also takes into account the claimant's persistence, and wants to avoid any public relations headache that the claimant could cause through the media. Settling this dispute also means that no further time, effort or capital will need to be spent in battling with the claimant, this in turn may create goodwill between the parties.

Having established the positions, or 'the what?', of the parties, the salesperson and the inventor then begin to talk in terms of the insurer's interests, 'the why?', which underlie the positions. In doing so, they take the conversation in the direction of what a resolution may look like to both parties. The insurer advises that it is open to exploring feasible options, 'the how?'.

It is proposed that the insurer reinstate the policy cover to resolve this claim, as this is more important to the claimant than having the cost of the treatment reimbursed. The cancer has been controlled through the treatment with the claimant being in remission, making further treatment no longer an issue. The claimant has already budgeted for this following the 'declinature' of the claim. Accordingly, having the claim paid out is of 'variable' value to the claimant, and in all the circumstances has become a lower priority in this negotiation. A higher priority for the claimant, is for the insurer to reinstate the cover for any other health conditions under the policy.

The inventor and salesperson ask the insurer what obstacles remain for it to stop the reinstatement of the policy if the risk factors are resolved. Having backed down from the position that the claimant poses a moral risk, the insurer's underwriter advises that as long as the cancer has no cover, there is no technical issue with reinstatement. The technical deputy reminds the insurer that if it is generally accepted that the cancer was likely to be pre-existing, the policy even without a specific exclusion for the cancer would not cover anything related to it. The insurer is still ambivalent about reinstating the policy without any specific exclusion for the cancer.

The insurer advises the salesperson that it would be willing to reinstate the policy if the claimant agreed to an exclusion for the cancer and the premiums are repaid back to date of the initial inception date. After further discussions with the claimant, the insurer is advised that the above terms have been agreed in goodwill. This is with the agreement that the claimant receive a letter from the insurer explaining the reinstatement of the policy, in case any future insurer questions the initial avoidance of the policy. The insurer has no problem with this and the parties settle the dispute on this basis.

5 Other factors and wider implications

(a) Realities of the NAL

The NAL is proposed as an ethical way to negotiate. It focuses on preparation to improve the quality of the negotiation and prospects of a mutually agreeable resolution. It does not guarantee however, the weaker party will always be successful as this depends on the parties and the issues involved. Like any negotiation there is always a possibility of the parties being unable to resolve the matter. In these cases, there may be a better alternative to a negotiated agreement.

Rather than being the panacea for all a negotiation's ills, the NAL offers a preparatory framework that increases the weaker party's advantages by making them better informed and better prepared to engage with their counterpart. Therefore, the components of the NAL are meant to be simple and applicable to any negotiation situation. However, the NAL party has to have a certain level of resources and capability to use it to the best of their advantage.

(b) Implications for insurers

Given that negotiation is a factor in claims handling, the NAL may have some useful implications for the insurer. As indicated in the last chapter, a stronger party such as the insurer can also use the NAL process. Just as the NAL professionals manage both information and the client through an assembly-line process, insurers also have actors performing similar roles.

The efforts of insurance professionals such as claims handlers, loss adjusters, insurance investigators, lawyers and underwriters,⁶³⁹ can be unified in the same way as in the NAL. These actors can pool their collective expertise and gathered information for the insurer to engage with the claimant on a claim. However, arguably, the dynamics of this unified effort for the insurer may be slightly different than in the NAL.

The insurer's information and analysis is focused on assessing and adjusting the loss by the loss adjuster, to implement the claim in accordance with the policy.⁶⁴⁰ With insurance, an investigator is brought in to investigate any complexities, irregularities or problems with claims, particularly where there may be "fraud indicators" which hint to "a potential fraudulent loss".⁶⁴¹

The difference between an insurance investigator and a NAL investigator is that the latter's research and inquiries cover more than just fraud issues, as they include a consideration of all the contextual information for the purpose of preparing for the negotiation discussion. Accordingly, a NAL insurance investigation should be more expansive, looking into the CIN, finding and dissecting both parties' interests and BATNAs, as well as getting into the facts of the matter (the policy and the claim).

The loss adjuster may have a certain amount of leeway to be creative with the adjusting of the claim. However, for the insurer there is no dedicated role to inventing options for mutual gain from the intelligence and analysis gathered from the investigator. Also, the set format of running information through the insurer's process may not be as prescribed as it is in the NAL framework.

If the insurer were to adopt the NAL, this may assist with its processing of information. The better management of information should bring a greater awareness of the weaker party. With this, the insurer can factor in the "emotional rollercoaster" of the claims process on claimants.⁶⁴² This should always be an important consideration for insurers as the claimant's emotional state may obstruct the resolution of a negotiated claim.

⁶³⁹ Vaccaro, above n 629, at [28, 70 and 292].

⁶⁴⁰ Michalik and Boys, above n 601, at 6.

⁶⁴¹ Boobier, above n 603, at [114 and 129].

⁶⁴² At 70.

In a negotiation situation where an insurer is faced with a lay customer without any assistance, it may be to the insurer's benefit to assist the lay customer and take on the NAL on the customer's behalf to generate ideas. This is in line with the insurer being the embodiment of a social good (as mentioned earlier). Arguably, insurers as the stronger party have an underlying moral responsibility⁶⁴³ to 'do right' by their customer by working in the customer's interests to recover the loss, while still finding a way to fulfil the insurer's business objectives.

It can also be argued that due to the weaker party's ability to consume the time and efforts of the stronger party, it would be in the insurer's best interest to expedite a meaningful negotiation process. The insurer may be able to use the NAL process to exact meaningful engagements through the inclusion of the claimant in the information gathering and option generation processes.

The insurer's use of the NAL process to share information and to work with claimants may prevent them from feeling victimised, so that they do not need to use their coercive power of "powerlessness".⁶⁴⁴ Consequently, this reinforces the relationship through the reduction of passive aggressive actions and low power moves used against the insurer, and may serve to break the cycle of reciprocal adversarial behaviour.

Here, the insurer may temper the use of their own power by increasing the claimant's.⁶⁴⁵ This in effect would empower the weaker party by giving them a more equal role and a greater sense of agency in the outcome. Although these actions may appear to appease the claimant, the insurer is merely building the claimant's claim knowledge to enable them to participate actively in the settlement process. Any controlled compromises made by the insurer should be to obtain more of an overall benefit to all the parties as opposed to giving up any specific value for the insurer. Part of the possible benefit of tempering power, is to gain the claimant's trust by this gesture of good faith.⁶⁴⁶

⁶⁴³ Bacharach and Lawler, above n 28, at 177.

⁶⁴⁴ Hocker and Wilmot, above n 199, at [137-139].

⁶⁴⁵ At [136-137].

⁶⁴⁶ Elena Koseska, Liljana Batkoska and Kliment Arnaudov "Negotiation Skills – A Factor for Insurance Development in Conditions of a Changeable Surrounding" [2012] 44 *Procedia Soc Behav Sci* 193 at 195.

It may also benefit the insurer to include the claimant in the management of information early in the claims process, before any negotiation is needed. This may aid claimants to give fuller and better information earlier to insurers to expedite claims and resolve any initial problems.

If the claim escalates to negotiation, the insurer is able to use the NAL to work through the information with the claimant. This is with the intent of instilling in the claimant an objective understanding of the information to help manage expectations while being on the 'emotional roller coaster' of the claim.

(c) Intermediaries and ADR services

As briefly mentioned earlier, for the claimant to use the NAL they either have to have a certain level of resources and technical/negotiation proficiency, or have access to people who do. It is presumed that having the skills and experience of a team of NAL professionals at one's disposal may come at a cost. In an insurance environment, commercial customers may be able to afford services of lawyers in order to access the skill sets of the NAL professionals.

In contrast, everyday personal-line customers (lay claimants) may not have the capital and resources to enlist the help of negotiation professionals. Instead, they may be able to get help from intermediaries such as insurance brokers or community advocacy services to create their NAL team. An argument can be made that specialists acting as an intermediary for the lay claimant may be able to use the NAL to counter the disparity of technical knowledge between a lay customer and insurers.

As suggested above, insurance brokers with a high level of specialist skill, knowledge and experience of the insurance industry, could fit into the role of the technical deputy for specific insurance lines. Being technical deputies, brokers can either hire out their services to other NAL teams dealing with insurance negotiations.

The NAL's universality also raises the potential for some of its framework to be used in alternative dispute resolution (ADR) services, such as an Ombudsman's office. The general management of information from the NAL may be beneficial, especially as ADR services attempt to obtain an early resolution. They can do this by using the gathered information to shuttle-negotiate a fair and reasonable resolution between the parties.

The NAL process may be further enhanced with an ADR service such as an Ombudsman's office. Subject to their terms of reference, they have a statutory right to require information from any party to a dispute that is necessary to resolve a complaint.⁶⁴⁷ In effect, an Ombudsman's investigators get a ubiquitous look at the information held by all the parties' to a dispute. This removes the effort in trying to coax important information from the parties. However, it still means that these investigators have to develop their skills in knowing what information to request in order to develop their preliminary hypothesis of the situation.

Although, the parties may not wish the Ombudsman to disclose certain information to the other side, the Ombudsman has to be selective with what information is disclosed. In the process of holding all the information, the Ombudsman has to hone the applicable intelligence towards the parties' interests in order to engineer a feasible and fair outcome for all the parties to the dispute.

In an Ombudsman's office the management of disputed cases are generally handled by investigators who go through the process of gathering, analysing and communicating information. With the NAL in mind, it is proposed that more complex ombudsman cases could utilise the full array of the NAL skill set. The NAL may also be advantageous to other similar work that is information and decision-making orientated such as commissions of inquiry or tribunals.⁶⁴⁸ This opens the potential of the NAL framework to more than just two-party negotiations.

⁶⁴⁷ Birds, Lynch and Milnes, above n 605, at 1223.

⁶⁴⁸ Alan Simpson *Te Ara: the Encyclopedia of New Zealand* (2012) Commissions of inquiry: Functions, power and legal status <<https://teara.govt.nz/en/commissions-of-inquiry/page-1>>.

V Conclusion

A Overview

This thesis studied how weaker negotiation parties could increase their power to reach better settlements; it did so by focusing on information and the dependency between the parties as the main sources of negotiation power. In particular, this thesis considered how a negotiator's effective management of information could help to enable a constructive negotiation discussion.

The study began by exploring the underlying theories of negotiation models, power, information and mutual cooperation. The assortment of ideas discussed in this thesis reflects how the topic of negotiation is made up of different disciplines such as law, economics, sociology and behavioural psychology. The literature review specifically focused on the dichotomy of competitive and collaborative negotiation theories. The evolution of this dichotomy showed how negotiations moved from being vehicles of pure legalism or economics to ones of creativity.

These negotiation theories assisted the thesis to construct a practical framework to help negotiators move from conflicting interests to dovetailing interests. This was done by seeing how negotiations could be repositioned towards the creation of value more so than the claiming of it. For a negotiation framework to achieve this rebalance involved shifting perspectives from a zero-sum view of power to a positive-sum one.

The effective management of information is seen as the key to this perspective shift, particularly, if the parties' preconceptions are built upon incomplete or inaccurate information. Having more information reveals the bigger picture of the negotiation, which may grant a wider scope and agility for negotiators to mould solutions for mutual gain that had not been previously considered. This mastery of information assists weaker negotiators to compensate, to a certain degree, for either a lack of resources or alternatives.

Rather than focus solely on strategies, the thesis sought to build a holistic framework for negotiators to better control their understanding of the negotiation. The thesis focused on certain phases of gathering data, analysis, option generation and persuasive communication. The intention was to personify these qualities into three main stations managed by three specific professionals, the analytical investigator, the innovative

inventor and the diplomatic salesperson. These professionals are the archetypes of the negotiator's ideal attributes when managing information.

The framework for these professionals, the NAL, is set up in an assembly-line style. Raw information is first gathered at the investigator's station, which refines this information into applicable intelligence and manufactures a negotiation hypothesis. The information moves down the line and is used to construct prototype options at the inventor station, the resultant product is then used by the salesperson during the negotiation.

In complex negotiations with multifaceted issues, information may need to be fed back through the assembly line to the various stations; this is to attain further information, refine ideas or revise options. It is also proposed that the NAL could be effective in a team setting assisted by a technical expert.

The thesis then applied the NAL to a theoretical insurance case. The topic of insurance was chosen as the case study as insurance is an information heavy service and naturally lent itself to the NAL. The insurance claim scenario portrayed a simulation of a negotiation going through the NAL process. The case study also outlined other insights of the NAL which could be further developed with empirical research.

B Recommendations

The thesis identifies practical implications for negotiators using the NAL. First, the negotiator's marshalling of information should lead to the creation of certain tools to aid with the communication with the other party. This includes:

- (1) having a negotiation hypothesis to help guide the negotiator through the discussion;
- (2) applicable intelligence to persuade and barter for missing information; and
- (3) the vehicle of prototype opinions for both parties to 'fine tune' and to drive them towards a resolution.

For complex topics, the negotiator should have a team to compartmentalise specific tasks. This includes having a temporary technical expert to give an industry perspective about the negotiation issues. To protect against the circumstance of one or more members being unavailable, each actor should be able to perform all of the professional roles. This

would enable individual members to venture out on their own to handle negotiations, or to begin to form their own individual NAL teams.

The NAL should be able to be used in any situation. The collaborative strength of the framework can be further emphasised by all the negotiation parties using the NAL, as everyone would be aiming to maximise their applicable intelligence to meet their interests. Increasing the amount of useful information increases the probability of reaching a viable option to conclude the negotiation.

The implications of the NAL could also extend beyond negotiations to help with managing the information for disputes being arbitrated or conciliated by ADR bodies or tribunals. The NAL may help with the inclusivity of the parties in these processes by prompting and supporting better bilateral decisions, and equally involving all parties in these disputes to grant them more agency and investment in the end result.

C Future Work

The NAL is an academic exercise, applying certain ideas from applicable negotiation theories. Therefore, this work can be seen as a springboard for empirical exploration which could expand on certain ideas. For example, surveys could be undertaken of negotiation professionals to understand how they specifically manage information. Successful and collaborative negotiations can also be compared to the ones that are not, to identify overlooked factors that may provide further insight on how to improve the NAL framework.

Another area of development could come from the inventor and salesperson stations, by further studying how professionals try to blend interests to improve the facilitation of trade-offs between the issues to create reciprocal compromises. With the inventor station, further research may look at creative-negotiated solutions. Certain approaches could be dissected and fine-tuned to particularise the inventor's approach in their station.

As the case study had a relatively simple scenario with just two main issues and two negotiating parties, it did not require information to be fed back through the stations multiple times to arrive at an agreed resolution. Therefore, in future research, the NAL could be tested with more complex negotiations.

For instance, a further study of the NAL could encapsulate an examination of European Union (EU) negotiations where the issues are more political, as they are tied together with international obligations and nationalism. The client would not only be the EU but also the citizens in the individual states, creating a different dynamic in terms of the authority of the negotiating parties. One could explore how this authority dynamic impacts on the management of information and how the NAL framework would cope with this.

Further research could arrange professional negotiators into teams through a controlled negotiation study to negotiate particular scenarios using the NAL framework, and the experiences from this can then be analysed. This type of research could lead to examining the group dynamics of the NAL in respect of processing technical knowledge, team cohesion and the division of tasks between the professionals. Future studies could also compare the abilities and effectiveness of the lone NAL negotiator with a NAL team in different types of negotiation scenarios.

To conclude, the NAL offers weaker negotiators a way to unpack information and undertake a careful exploration of negotiation issues. With this, the negotiator is placed in a better position to master and relay an evidenced narrative to the other party, enabling options to be worked out together. This should grant the weaker party more confidence in presenting the issues, and the ability to direct the negotiation away from a more adversarial path. This is all in the hope that the weaker party may gain a workable level of respect and trust in the eyes of their counterpart.

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Appendix 1. The Flow of Information in the NAL

