

LEGALESE

Decoded

*Tips and Strategies to Make Sense of
Legal Concepts in the Business World*



"A useful guide covering important information and best practices to understand legal concepts in business." – Manupatra

KALPANA MUTHIREDDI 

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*The fine art of negotiation calls for a skill or two
But the most important of all, is to see the others' point of view*



Chapter 1

NEGOTIATION



A Savvy Negotiator

The story goes that a man was out hunting and saw a large bear. He raised his rifle and took careful aim at it. As he was about to pull the trigger, the bear saw him and cried out, “Wait, don’t shoot! why do you want to kill me”?

Lowering his rifle, the hunter replied, “I want a fur coat.”

“OK,” said the bear, “I’m hungry and just need a full meal. Let’s come to a compromise.”

They sat down to negotiate and after some time the bear walked away, alone. The negotiation was a success. The bear had a full meal, and the hunter got his fur coat!

Who do you identify with in the above story, the hunter, or the bear? The hunter indicates the stronger party; and the bear, the smarter opponent. The above story underscores the importance of being able to negotiate for what we want, regardless of our apparent strengths and bargaining power.

Negotiation is a skill we use everywhere, but it is in the world of business that it is most quantifiable, as it directly impacts the bottom line. Negotiation is more than just a process to settle differences amicably. In business, successful negotiation indicates returning business and a lasting relationship with your business partners. This calls for strategy, savvy and empathy in equal measure. In this chapter, we will see how to improve negotiation skills in all these areas so that we can end up with rewarding deals in most, if not all the deals that we contract.

Why Negotiate?

The need for negotiation is driven by a desire for either a ‘Mutual Benefit’ to have an agreement that will serve the interests of all parties concerned; or a ‘Settlement’ where the parties arrive at a compromise in order to resolve or avoid a dispute that might otherwise harm the interest of either one or more of the parties concerned.

Much as one may like the idea of being a “hard-nosed negotiator”; a successful outcome that is lasting and guarantees return business depends upon an approach that is fair and seeks mutual benefit.

As Max Bazerman and Margaret Neale mention in their book, *‘Negotiating Rationally’*, the ultimate aim of negotiation is to be able to get a better outcome than what one might have got had they not negotiated.

The Stages of Negotiation

The process of negotiation may be divided into three broad stages viz., the preparatory or pre-negotiation stage; the negotiation stage, where the actual negotiation takes place; and the post-negotiation stage, where the deal is successfully closed.

Pre-negotiation

The pre-negotiation phase is the stage of preparation and planning your strategy for the deal. This is where you set the stage, so to say for the deal-making process and it involves preparation; understanding the deal; assessing your strengths and weakness as well as exploring means to exploit the other side’s weaknesses (which the bear in our story managed quite successfully).

Negotiation is more a matter of strategy than of style and being well prepared is the most important part of that strategy. Good preparation starts with and includes the following elements:

1. **Understand the deal**

Know and understand the objective of your contract. Get clear on the scope of the agreement, the range of services to be

provided; the pricing and payment structure; additional services that may be required that could impact the final cost, the timelines involved, unplanned but foreseeable expenses, credits and penalties, any possible subcontracts and so on. In case of international contracts, be clear on the currency in which you want to be paid; taking into account, the currency fluctuations, the risk allocation and ambiguity in currency values.

Next, get clarity on what it means for you to get the deal, what it means if you lose the deal. What happens if you do not close the deal? Are there alternatives to the deal? Can you achieve the same objective in a different manner, maybe a deal with a different entity or different services?

Once you are very clear on what it is that you need, and why, you will be better able to assess the best way to go about it and worthy alternatives in case you are not able to achieve it from this negotiation.

2. Build a good team

Have a well-rounded team where each member, preferably, comes with a specific subject matter expertise. It is important to have a team with different strengths so that you are well prepared with the actual negotiation and strategy. When the team members have specific expertise that complement each other's strengths, not only are you ready for any eventuality, but will also prevent team members from stepping on each other's toes. Next, get together with your team members and identify a list of possible options to get the deal. Leverage and synergize the strengths of different departments and team members and see how you can use those different options to get the deal.

3. Identify your goals

Know your objective and get very clear on what you intend to achieve with the deal. Gather as much information as possible about the other side's objectives. It will help to pre-empt their strategy if you know everything you can about your

counterparty's decision makers, underlying interests, and walk away position.

For ex: Are you extending an existing contract, or entering new markets? Do you want to look at a short term project or are you looking at a long-term collaboration? Do you want to prioritise getting a new account over making a profit in this deal?

Once you identify your objective in entering into this deal, you can prepare better and will be much more successful in achieving it.

4. **Know your negotiation style, leverage it and play to your strengths**

Negotiations are generally interest based or position based. Interest based negotiation takes into account the needs of both the parties and takes a co-operative approach, which benefits all parties concerned. These are usually called “integrative” or “win-win” negotiation styles. Also called a “win-all” approach, here, the parties look for a mutually beneficial result.

A distributive negotiation, on the other hand, is more position based. Position based approach is where they believe there is only one winner, and one party's gain is the other party's loss. Some look at negotiation deal making as a win-lose exercise, which is also known as a “zero-sum approach” negotiation. Here they believe that there is only one winner in the deal and the other side has to lose the deal.

While these are the text book descriptions, in actual practice, you will see a combination of these in action. If you have done your research, you will be better equipped to handle all types of negotiation styles or combinations of negotiation styles. But being aware of your own negotiation style is a good place to start.

What's Your Negotiation Style?

There are different styles of negotiation and one may choose a style based on their natural negotiation strengths or the objective to enter

a given deal. Do you believe that a negotiation can benefit all parties concerned; or are you of the opinion that one cannot win without the other party losing? Whatever your style, make use of it to create a good negotiation strategy and work with it.

Your strategy also depends on the objective of your negotiation. You could be creating a deal or you could be trying to resolve a dispute. If it's the former and if you happen to have leverage, you could get away with a zero-sum style of negotiation. If, on the other hand, you have a dispute that you are trying to resolve, you will be more comfortable with an integrative style of negotiation where both parties look to benefit with the cooperation of the other.

I personally prefer the integrative approach for a few important reasons. You may get an average deal with a win-lose zero-sum approach but for lasting success, try a collaborative approach aimed at maximising the benefit for all concerned.

In contracts, especially outsourcing agreements, where stakes are high, it is preferable to have an integrative approach where the interests of both or all the parties involved are taken into account. This leads to long standing contracts that benefit all parties in the long run. While it may be tempting to adopt a zero-sum style, during the negotiation process, it may prove counterproductive in the long run and not advisable if you are looking for a lasting and beneficial association with your customers, suppliers, vendors or clients.

What if you are keen on an interest based negotiation but your opponent is position based? In such a case, look at the underlying interest, find out what you can use as leverage, what your position in the final outcome is, and negotiate accordingly.

Negotiating to Ensure a Fair Deal

How do you ensure that you get a fair deal?

Negotiations are about give and take where value is given and received from both sides. You will have better success if you are clear on

the value you are providing to the other side and leverage that value to assert yourself effectively so that you get a fair or better deal.

Your planning and strategy comes into play here. The strategy involves preparation, discussion, identification and clarification of goals, knowledge of your wants and needs, the other parties' wants and needs, the impact of their strategy, actions or connections on your ability to negotiate and the final outcome. This becomes more crucial when there are more than two parties to the deal.

It is worth noting here that just because you are on one side of the negotiation table with a party, your positions are not similar, nor are they aligned. There might be conflicts of interest, or their decisions and actions can impact your leverage and how you fare in the long run. It is important at this stage to understand your leverage. The more options you have, the better leverage you will have to achieve your objective.

How each party views the deal can also have a significant impact on the final outcome. While you may have little or no control over the other side's negotiation style, having a good understanding of the deal itself, including their approach to the deal, will offer you a significant advantage.

Sometimes a party might want to collaborate or compromise. That's an ideal scenario. Other times, the opponent is looking to compete and approach the deal making as a win-lose exercise aka "sum-zero approach".

I personally prefer an integrative collaborative approach for a few important reasons.

With the sum zero approach, you may get the deal heavily loaded in your favour, but you will get an average deal as a result thereof.

For ex: You could compel a supplier to provide services at a certain price and provide added maintenance support, even though it may not be viable for them in the long run. As a result, you could end up with a badly executed contract or worse, a breach of contract because they could not honour all the terms agreed to in the contract.

A contract has better chances for success, when it is reasonable and fair for all parties concerned. In my opinion, and based on experience, an integrative negotiation which is aimed at maximising the benefit for all concerned is better than a distributive negotiation which is lop-sided.

Having said that, I have observed that some parties tend to favour the sum-zero approach, and get away with it, because of the position they hold in the market either as market leaders or niche players who have little or no competition. While you cannot influence their style of negotiation, you can ensure with the strategies discussed here that it does not unfairly favour them and the final contract is more or less integrative.

Get Your Negotiation Framework in Place

A great negotiation framework is an essential element of successful negotiation strategy. So, what's a negotiation framework? In simple terms, it means having your objectives lined out and the most efficient way to achieve them.

Set the agenda for the negotiation and share it with the other side. You will be in control. An agenda will help to have a clear plan of action and avoid unpleasant surprises. According to Roger Fisher and William Ury, authors of "*Getting to Yes*", the seminal book on negotiation, a great negotiation framework is based on the following among other factors.

1. **Be Objective:** Focus and identify with the issues, not emotions. An objective approach to the issues of the deal without getting overwhelmed by them is a good start. Don't let emotions (yours or your opponent's) get the better of you; but don't let go of emotional intelligence either. Contrary to the popular refrain of ignoring your emotions popularised in "*Getting to Yes*", Chris Voss, the author of "*Never Split The Difference*" gives importance to recognising and respecting the role of emotions in building a rapport with the other party. This co-operative approach will help you get further than an adversarial approach.

2. **Have The Right Focus:** Focus on the interests, not on taking a stand. It is important to know what the other side wants, rather than get side tracked by their stand and position. Don't get stuck with posturing, focus instead on common interests and how to achieve them.
3. **Know Your Opponent:** Hear the opponent and understand why they want something. That will give you better leverage in the negotiation and also help to get an overall better deal.
4. **Have a Co-operative Approach:** For better and lasting success, adopt a co-operative mind-set rather than a fixed win-lose mind-set. Keeping an open mind and focusing on the issues will lead you to creative alternatives that you might otherwise miss out on if you have a fixed, intractable outlook. An open mind, however, does not mean giving unnecessary or too many concessions.
5. **Improved Communication:** Ensure open channels of communication, even during the toughest part of the negotiation. By giving the other party a chance to express their thoughts, you will not only get a better idea of what they want but in times of a deadlock, when you cannot arrive at a common solution, it will help to keep the discussion going forward.
6. **Know Your Alternatives:** Know your BATNA, and your ZOPA. These are the two essential tools in your negotiation arsenal. BATNA stands for the Best Alternative to a Negotiated Agreement. It helps you identify what is the best that this agreement can give you and if there is an equivalent or better alternative available to you outside this agreement. ZOPA is the Zone of Possible Alternatives, i.e. that zone of common ground, where there are several options for viable alternatives available in the agreement that are acceptable to both parties.

More on these later on in the chapter. Being aware of these two will give you a realistic view of your position in the deal and will help strategize your negotiation accordingly.

7. **Don't Underestimate Your Opponent:** Don't overestimate them either. Be vigilant; and do your due diligence but unless there are red flags, don't go crazy trying to second guess everything they say or do. Remember, they want this deal as much as much you do.
8. **Be Considerate to Your Opponent:** Assertiveness does not mean being aggressive or loud. You can be polite and courteous and still put across your point, assertively. Professional courtesy and assertiveness are not mutually exclusive.

I have seen instances where a party was unnecessarily aggressive simply because they were trying to be assertive or because they thought they could get away with it. This may work once, but repeat business will not be possible, if you are needlessly aggressive or unprofessional.

9. **Keep Your Cool:** A detached, cool approach works well. Don't let the other party brow beat you. Easier said than done, but if it helps, remember, most often aggressiveness is just a tactic. If the other side gets aggressive, don't get cowed down or retaliate in the same vein. Calmly put forward your terms. Don't let them bully or embarrass you into giving in. Respond to the facts in their statements, not threats. They will soon see that brow-beating you will not work.
10. **Be Flexible:** Remember that there may be more than one path to the deal of your choice. A little due diligence and brainstorming will help identify these options. This is also where ZOPA (Zone of Possible Alternatives) comes in. We will discuss this in detail later on in the chapter.

The Negotiation Process

This phase consists of the meat of the entire negotiation exercise. Here, you must understand the larger picture, get clarity on the overall negotiation process; recognise and use your leverage; and be willing and

able to correcting yourself mid-course if your objectives are not being met.

Understanding the Process

For successful negotiation, it is important to identify the different perspectives, thrash out the differences and agree on the final outcome. No two people will look at the same object and see the same item. Perspectives differ. They differ even more when they have different wants and agenda. So, when negotiating, don't assume that the other side is seeing matters from the same perspective or having the same understanding as you do.

Ensure that you know who you are negotiating with, and where they stand in the negotiation hierarchy. Are they the actual decision makers or a go-between who need approval for everything that they have negotiated? If you have provided all concessions and find that the person on the other side has no right to take a decision on the important issues or terms, you will not only have wasted your time and effort but will not have any leverage when you want concessions from them. Be extremely careful as to who is negotiating with you. You don't want to be wasting your time with somebody who has no authority to negotiate, only to find that all that you have negotiated has been undone because the person with authority refused all the terms that were agreed in the negotiation.

Get Clear on the Procedural Issues

This is what I call the logistics of the deal-making process. Getting clear on the various aspects of deal making will eliminate unwanted confusion and leave you to focus on what you want and achieve it much faster. A well planned, clear cut negotiation process will also ensure a hassle free and effective negotiation.

It involves creating the right team, identifying the leader of the discussion (the person who drives the discussion) in both teams, the agenda of the discussion; who will start the negotiation; who will lead the negotiation; who is the subject matter expert; who will take the final call on the different process et al. Process also includes timelines,

monitoring, SLAs, decision making authority, approval hierarchy, and similar issues.

Get the big picture first; you can fill in the details later. Once you get the big-ticket items in place, then you can focus on the minutiae. Negotiate the hierarchy of internal sign off processes, decision making authority and approvals, before you invest your time and effort. Having clarity and commitment in the process of the deal will help prevent nasty surprises later on in the negotiation.

Get acquainted with the factual and real challenges of the deal

Be aware and let the other side be aware of the bumps in the road to the deal, including any delays and disruptions. Unless you are acquainted with the ground realities of the deal as seen from the opposite side, there is a high chance of overreacting or misunderstanding adverse events. This is especially true in multinational and multi-cultural deals, where we are physically removed from the ground realities of the other party in the deal-making process. For ex: infrastructure challenges, legal structures, cultural nuances could throw you off tangent if you are not aware of them.

Focus on all relevant parties to the deal

Every party to the deal has the potential to impact the deal. Especially, in multi-party deals, consider the perspective of every party, regardless of whether they are your opponents or not. It is important to understand how they play out the deal. Their actions could greatly impact your leverage, chances and eventual success in the negotiation.

Understand the psychology of the other side

Do they see you as equals, or do they perceive you as more powerful, or less powerful in the deal-making process? How do they view the negotiation? What is their style of negotiation? Are they collaborative, or is it a battle of egos for them? Do they focus on the long-term and building lasting association or are they more focussed on short-term benefits? Always see yourself as an equal in the negotiation; frame it

that way in your actions and negotiation so that the opponent sees it that way too.

The advantage here is that once you map the entire negotiation strategy and scenario, you may have better insight into the strengths and leverages in the deal and including that of the other party. That will effectively help you to alter your own negotiation strategy accordingly.

The Invisible Influencers in Negotiation

Often there may be subtle elements influencing the course of the negotiations that we may not even be aware of. Here are a few of them that a well experienced negotiator is aware of and may use them to their advantage without your knowledge.

Traditionally, even the most hard-core business deals, all things considered, have been emotion based decisions. The human brain reacts at the most visceral level to certain external stimulus, processes the information so received and makes a decision, all within split-second speeds.

Here, we discuss some of those influencers (elements that exert a strong influence) which, when properly wielded, can lead to a successfully negotiated deal. It is important to note that these influencers affect everybody and can work as much for you as against. So, you must not only be able to use them, but be guarded against the bias they create in the opponent's mind. They are discussed below in a little detail.

i. Anchoring

The concept of Anchoring, a cognitive bias, was first theorised by economists Amos Tversky and Daniel Kahneman in their 1974 paper "Judgment Under Uncertainty: Heuristics and Biases".

This concept is used to understand what is called, "Anchoring Bias" when making a decision. "Anchoring is the tendency of people to make estimates based on an initial value. Different initial values yield different estimates which are biased toward the initial values." [*Amos Tversky and Daniel Kahneman: "Judgment*

under Uncertainty: Heuristics and Biases".1974] They called this phenomenon "Anchoring".

What is an *Anchoring Bias* and how to avoid it?

When making decisions, a person relies on the first information, viz., amount or value (the "Anchor") that they receive with regard to that matter which they will then use to make their decision. Anchoring influences the final decision by veering the person towards the initial data provided.

Tests have proven that anchoring bias is real and greatly influences the decision-making process. The first step to handling anchoring bias is to first recognise it when it is dropped by the other side. Then explain the other party why it is not acceptable and therefore out of the realm of discussion and only then give your counter offer explaining why it is more acceptable.

When you know the value of the service that is being offered, the value of similar services being offered in the market, and viable alternatives, you will be aware and prepared when an anchor is dropped in the discussion. If you are well prepared, it will help you anchor the discussion right up front, thereby moving the discussion to your favour.

For ex: When you are shopping for an electronic gadget, and see one priced at Rs.10,000/-, and you see a similar one priced at Rs.5,000/- the second one seems cheap. Your thoughts are influenced by the price of the first item whose price is anchored in your mind (Rs.10,000/-) and against which you are comparing the prices of subsequent items.

This is an anchoring bias. If you examine both items closely, and compare them in terms of quality and other essentials, identify which serves your purpose better and is more value for money regardless of price; then you have overcome your anchoring bias and are likely to make a better decision. The same applies for negotiating deals.

ii. **Confirmation Bias**

This is another prolific type of cognitive bias that affects the parties during negotiation. At its simplest, confirmation bias is the tendency to look at a mass of information and identify information that confirms our thoughts and beliefs. We interpret information that confirms our own perceptions and is favourable to us. So, we can see how this impacts negotiations, where parties are looking at information and interpreting it to suit their belief and opinions.

As Warren Buffett puts it eloquently, “What the human being is best at doing is interpreting all new information so that their prior conclusions remain intact.”

Why is it so important to overcome confirmation bias if you want to succeed in your negotiations? The biggest disadvantage is that the objective viewpoint is missing, and this is a major factor in the breakdown of negotiations. It is important to have checks and balances in place to counter confirmation bias.

Here’s how you overcome confirmation bias. Remember that we do not have the complete picture and try to get the larger picture in place. Follow up with due research and fill in the gaps in your knowledge about the deal. Listen to the other side, ask questions and get as objective information as possible about the deal. This will help you prepare better but also watch out for loopholes in the other side’s arguments, which will help you be more persuasive because you can see what the other side cannot.

iii. **BATNA—Understand the Deal and Identify your BATNA**

Once you know what you want and suitable alternatives to it, you are in a better position to negotiate. Even if you have no alternatives to the deal under discussion, you will know the walk away point; this is the stage at which the deal gets counterproductive and may not be worth pursuing. This is called BATNA—“Best Alternative to the Negotiated Agreement”.

In their path-breaking book, *'Getting to Yes—Negotiating Agreement Without Giving In'*, authors Roger Fisher and William Ury discuss the concept of identifying the Best Alternative to the Negotiated Contract (BATNA), as an essential element of negotiation.

Identify, develop and use BATNA as leverage in your negotiations

It helps to have a good idea of all potential alternatives available to you in the agreement that you are negotiating, in case the discussions fall through. A BATNA is the walkaway point where you can or should walk away from the negotiation if it doesn't work to your advantage. Once you have potential alternatives to the agreement, you will be in a better position to negotiate what you want, leverage your strengths better and have clarity on your weaknesses during the discussions.

Ideally, you would identify all the best viable alternatives available to you, in addition to the deal you are discussing, so that, in case you don't come to an agreement, you can fall back on these alternative options. Identifying your BATNA is an important pre-negotiation preparation. You will have a slew of alternative options to choose from, if the agreement does not suit your terms. A BATNA Not only gives you alternatives but also gives a walk away point during the negotiation at which stage, the agreement would get counterproductive. It marks that point beyond which any concessions given would prove detrimental and identifies that definite moment in the agreement when you should walk away from the discussions.

It is helpful to identify your opponent's BATNA so that you can leverage that to your advantage during the discussions. Having a BATNA also helps you to avoid the influence of an anchoring bias when your opponent veers the negotiation towards *their* preferred terms and the extent of concessions you can give during the negotiation.

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