



Introduction

Niels Bohr said that profound truths are recognized by the fact that their opposite is also true. Negotiations are full of profound truths. Opposites await at every turn. Negotiation is an essentially paradoxical process. What is good for us can be good for the other side. And it can be its opposite. Or it can be partly one and partly the other. To succeed, we have to do things that are mutually exclusive. Our strength is our weakness. It is no surprise that most of us are deeply ambivalent about it.¹

In this Introduction I will explain why I wrote this book and provide an overview of what lies ahead. The question of negotiation success and learning has been the focus of my professional life. I will offer the answers that I have found, broken down into small steps and increasing in complexity. While the book's structure is symmetrical, with three parts each containing three chapters, its nine chapters are not of equal size. Rather, they resemble a pyramid. The paradox of negotiation is the crux of the matter and results in two more challenges. These challenges in turn result in the three stumbling blocks of learning – and they can become the three steps that we need to take in order to learn. The Introduction describes this paradox in a nutshell.

So, why another book on negotiation? There are many excellent books on all its facets. We can learn about negotiation and conflict, culture, emotions, improvisation, authenticity, or organizations – and we should. Our understanding of negotiations has substantially advanced in recent years, even if it trickles down to practice with varying speed across the globe. Yet, as hard as negotiation is, learning it is harder still. When we advance on one side, we block our progress on the other. Powerful cognitive illusions bar the way. The good news: When we understand these illusions, they become the very stepping stones of our success.²

My own professional training did not provide such an opportunity: It takes half a dozen years to become an attorney in Germany, but hardly any negotiation training is involved. Similarly, only a minority of German managers have been professionally trained in conducting negotiations. So, when I started practicing, I read as much as I could about this fascinating process. Yet, more often than not, something important seemed to be missing. Many books appeared to tell only one

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side of the story. Trying to put their advice into practice was never satisfying. Perhaps I did not do it right, but it often felt like trying to walk on one leg. Why was this?³

I came to realize that every transaction has two sides. Ideally what is good for us is good for the other party as well, but often it is not. So, we have to work with them, as well as against them. Consequently, all contracts are structured along these lines. This is true even where contracts are not explicitly negotiated, which varies across the globe. I have negotiated power plant contracts all over the world for Siemens AG. As part of an interdisciplinary team, I thus contributed to the successful conclusion of transactions worth hundreds of millions of pounds in Europe, Asia, and North America. What drew me to this work is that it is about making deals. We sat and worked with our business partners until we agreed – or agreed to disagree. Forensic lawyers have to focus on the past: Either the plaintiff or the defendant is right. The court room sees mostly zero-sum games. But my corporate team would shape the future.

We did not have to delegate the job to judges or lawmakers: We could do it ourselves. What a privilege! Wherever we were in the world, it was marvelous work, all about trust, open communication, and creative problem-solving. Together with the other side we strove to create the optimal transaction. We often gave the customer more than they had wanted before coming to the table – and often received more ourselves. And we were even getting paid for it! I read and admired the classics of win-win negotiations, such as Roger Fisher, William Ury and Bruce Patton’s *Getting to Yes* and Ury’s *Getting past No*. And I found what I read to be eminently true: Negotiation is the creation of value for mutual benefit, as shown in Figure 1.

So, what was the problem? It turned out that the opposite of this statement is also true. Yes, value can be created in complex transactions. Yet we live in a world of limited resources. It is a truism, but sometimes what we get must come at the expense of the other side. A win-win solution is not always possible, whether we

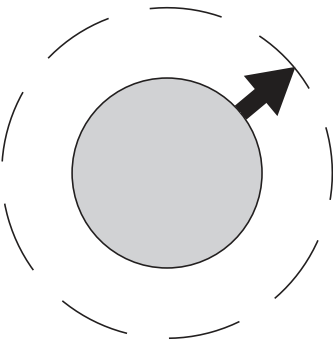


Figure 1 Negotiation as creation of value

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like it or not. And initially I did not like it at all. All too often I had to leave the cooperative part to the non-lawyers. My team mates from Engineering could brainstorm all day long. They worked out the optimal project configuration for both sides. But as I put all of it to paper, darker thoughts filled my mind. I had to imagine all the things that could go wrong, and then protect the company from them.

The opposing counsel did exactly the same. Every word counted. What if we delivered late? What if there was a defect? What would happen in the case of a strike, archaeological findings, even war? These risks carried costs. And they also carried probabilities. We calculated the monetary value of our words. Some words impacted our bottom line, which we did not like. Or they impacted the price, which the customer did not like. Nobody wanted those risks, but somebody had to take them. Every now and then we did find a clever trade-off. Occasionally we could sneakily pass a risk on to a third party. But mostly we simply had to determine who would swallow it. And when it came to money, things only became worse. There were no two ways about it: We wanted the price to be as high as possible. They wanted the opposite. It was like having a pie that everybody wanted sitting between us. Even if we could not get all of it, both sides wanted as much as possible. Together we had to decide how to slice it.

This was not at all a noble pursuit of mutually beneficial outcomes. It mostly had a colder, Darwinian feel. We had to approach it with what has been called a “monetary mindset”: An I-win-you-lose way of looking at the world. The engineers muttered something about “typical lawyers” and happily left the room. But it was not altogether a bad job. At the best of times, the negotiation could become playful, even light-hearted. There were many things that we never wanted to talk about, such as our horrible alternatives and true walk-away price. There were even things that we hoped they would misunderstand, such as our horrible alternatives and true walk-away price. They knew this, of course, and we knew that they knew. And it was just the same for them.⁴

The whole thing often felt like a game of poker, or chess, or perhaps a judo match. If both sides knew what they were doing, and kept a certain distance, it could turn into a contest of wits. Tongues planted firmly in cheeks, we came to appreciate the adversary’s professionalism. Slowly I learned to like this side of the coin. But my win-win books did not help at all. If anything, they made things more difficult. Yes, I did try to understand what the other side really wanted, but often it was simply not compatible with our own wishes. They reached for the biggest slice of the pie. And so did we. The advice I needed now came from a very different stack of books. Books with titles such as *Start with No*, *Never Split the Difference*, or *Khrushchev’s Third Shoe*. I may not have liked everything they suggested, but most of it was undeniably true: Negotiation is the distribution of value for our benefit – and at the expense of the other side: see Figure 2.⁵

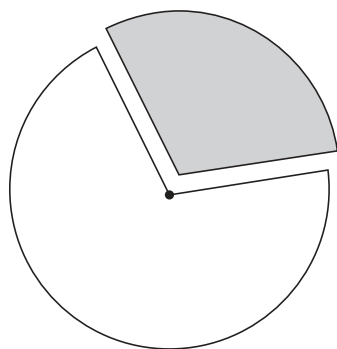


Figure 2 Negotiation as distribution of value

Negotiation is the process by which people with conflicting goals or interests determine how to allocate resources or risks, resolve conflict, or work together. The objective is to achieve the best possible outcome. We can compare, and often measure, how good the result is for both sides. Some negotiations have only one side: If you only haggle about the price of a carpet at a market, all you do is distribute value. But as soon as it becomes more complex, the creation of value becomes possible. Perhaps the carpet can be wrapped or delivered. Perhaps you are interested in other items? Would you like to pay cash or by card? In what currency? Maybe you could recommend the shop to fellow travelers? Or “like” it on social media? We can often break a single issue into multiple issues, or add completely new ones. We can trade things. Rather than being stuck in a purely monetary mindset, we can benefit from what Brian Gunia of Johns Hopkins calls a “bartering mindset.” Gunia reminds us that bartering, while almost forgotten in the West, is psychologically sophisticated. And it can be very powerful. A bartering mindset can help to create value. Instead of considering the other side’s needs in monetary terms, it encourages us to look directly at their needs. This perspective makes it easier to search for and find mutual interests. Most real-life transactions allow for more than the mere distribution of value.⁶

The reverse is also true: Most transactions are not confined to the creation of value. How wonderful when both sides can get all that they want. You may know the parable of the two sisters that argue about an orange. One wants to drink the juice, the other wants to bake a cake with the rind. In rare situations like these, nobody has to give up anything. No pie must be sliced. Both sides can be made perfectly happy. Alas, a win-win usually comes at the expense of a third party. That’s its dirty little secret. Somebody has to pay for it – just not somebody who is at the table. I will explain this more fully later. For now, just think of the neighborhood fruit vendor and the extra orange sale he did not make.

In commercial transactions, perfect compatibility of interests is the exception rather than the rule. Bringing together different interests is the entire point of

markets. Typically, everyone wants the juice. Even if you don't, you may pretend otherwise, so that you can ask for a concession. "Oh, you want *all* the juice? Well, I guess then I will need to ask for some apples." You would not do that? Are you equally sure about the other side?⁷

The possible outcomes of a transaction can be plotted on a matrix. The axes denote how good an outcome is for each of the two sides. It visualizes the point that joint gains may be increased and individual gains must be obtained: see Figure 3.⁸

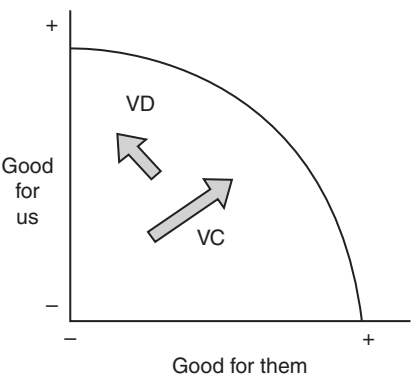


Figure 3 The geometry of the transaction: Value creation (VC) and value distribution (VD)

The Two Sides of the Contract

A pattern emerged when I applied these thoughts to my contract negotiations. A transaction consists of the promises that the parties make to each other. Every promise falls into one of two categories: "the planned" – what the parties plan to do, and "the unplanned" – what they hope they never have to do. This is not only true for power plant contracts. It applies whenever goods or services are exchanged.⁹

"The planned" describes what the parties plan and want to do. It is their reason for entering into the transaction. The builder of a power plant describes its specifications and performance. The buyer promises acceptance and payment in return. This is where the parties strive to expand the pie as much as possible. Conversely, "the unplanned" deals with all the things that can go wrong. Certainly, no one plans for them to happen, and perhaps they never will. But they might, so the parties have to prepare. These are the costly risks that nobody wants to take, so this is where each party strives to do well at the expense of the other side.

Every transaction, by contract or law, also includes some more generic provisions (such as a title, a preamble, a dispute resolution clause, etc.). And there are often technical exhibits that specify the promises made. But the most important part is the promises. Negotiating "the planned" primarily requires the creation of value, while

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negotiating “the unplanned” primarily requires its distribution. But both sides of the contract require both types of negotiation. We will expand on this later. First, a quick clarification is called for: Contracts depend on law as well as culture (see Figure 4).

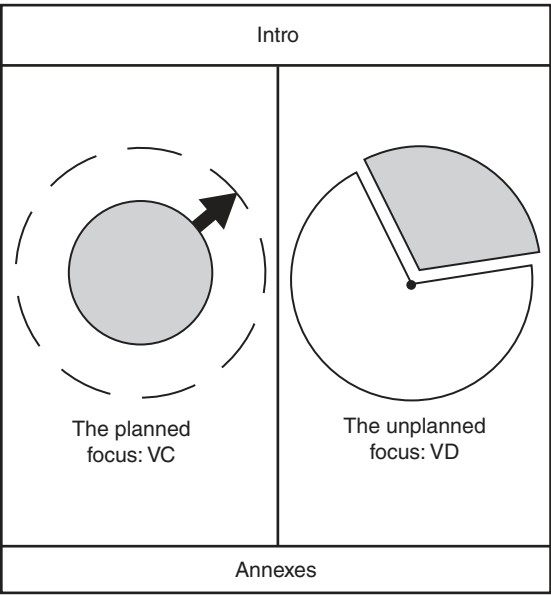


Figure 4 The geometry of the contract: Value creation (VC) and value distribution (VD)

The Law versus Culture

This duality exists even where no formal contract is needed. Of course, not all transactions require an elaborate written document, and actually, not many do. This is both a legal and cultural question. Westerners are accustomed to a long tradition of strong legal systems and the rule of law. They tend to view contracts as solid legal instruments that are strictly enforced if violated. Conversely, there are significant differences in the development of legal systems and the rule of law across Asia.¹⁰

Even more important may be cultural factors. Notwithstanding the considerable differences in tactical preferences among, for instance, the Chinese, Japanese, and Korean cultures, Asians have a long tradition of doing business without contracts, and of relying more on sincerity and “face.” A verbal commitment may be sufficient and binding: Asians can feel insulted when a legalistic Western business partner wants to specify penalties for broken promises.¹¹

The situation is different in the West. In sufficiently complex transactions, legal and accounting requirements encourage us to negotiate both the planned and the unplanned. The reason: Even if we do not speak about it, we still distribute the

relevant resources and risks. Whether explicitly or implicitly, we are concluding a contract. In the absence of a negotiated document, the law of the land kicks in. So, unless they agree otherwise, the parties settle on the default provisions of the law. Sometimes a party does not realize this, and the other side may secretly capitalize on it. For instance, in many countries the law puts us in a comfortable position when we buy things. Goods usually carry a warranty: The seller is responsible for providing them free of defects – just as the buyer has to make the promised payment. The national law defines what a defect is, and what the seller must do to remedy it. Perhaps the seller has to replace or repair it. Perhaps the replaced part carries another warranty. Perhaps the result is an endless string of “evergreen” warranties.

The point here is that, as long as the parties do not find their own specific agreement, the law provides the “fallback” contract. (At the same time, it is true that in all jurisdictions there are obligations that cannot be amended by the parties. For instance, the parties cannot absolve themselves from binding health and safety regulations or environmental protection laws. But in many of the world’s jurisdictions, individuals and companies have a lot of leeway to determine their mutual rights and obligations, should they so choose.) So, we are well protected from any damages that a purchased product or service may cause us. The liability of the seller is usually not limited in any way. Hence it would be a terrible mistake to rely on the default when we are *selling*: We would be exposed to unlimited liability, and the procurement manager on the other side of the table would not believe their luck. In the same way, we would like the default when we are buying.

In other words, we distribute and create value when we negotiate a transaction, whether we do so explicitly (by working with a draft document) or not (by concluding an agreement with a handshake). The only difference is that in the latter case, the content of our transaction is determined by law instead of (our) contract. Which, in turn, determines the economics of the transaction: If a risk is probable, but not excluded by way of contract, the buyer must either reduce the profit or increase the price (in order to pass on the cost of the contingency to the seller).

Not negotiating risk in the hope that it will go away is like a child hoping to disappear upon covering their eyes.

This is not to say that a contract cannot, or should not, be changed after signature. Quite the opposite. As we know, it is difficult to make predictions, especially about the future. Even the best contract cannot foresee all future circumstances. While this is true all over the world, it is especially significant in Asia, where it is assumed that life-changing circumstances cannot be predicted or “contained.” In the Asian view, contracts are inherently deficient and can never be completely fair because they cannot deal fully with the future. Instead, a signed contract is but a snapshot of current conditions and thus cannot be final. It should

be opened and renegotiated once circumstances change in order to arrive at a new and fair arrangement between the parties.¹²

Beyond these legal and cultural considerations, writing down what is agreed serves a more fundamental purpose. It may sound trivial: Agreements consist of words. Working on these words is the vehicle for agreeing. We need words to formulate positions, interests, rights, and obligations. Only by articulating them can we determine if we do, in fact, agree. What appears to be agreement can fall apart when we go through the trouble of expressing what we really mean. On the other hand, once there is an agreement on the words, we already hold the contract in our hands. They are but the same. We just have to sign.

The Two Sides Are Opposites

So, whether based on law or contract, a transaction consists of both value creation *and* value distribution. As you know, this is the elephant in the room: The behavior that leads to value creation is different from the one needed for value distribution. The first necessitates cooperation, while the later requires competition. The tactics for one are usually the opposite of the tactics for the other, at least in spirit. Yes, sometimes they can be complementary: To reject an unfavorable offer and respond with an aggressive counteroffer is certainly a competitive move. Yet it may also be necessary to encourage the other side to cooperate. (If this seems counterintuitive to you, you are right. But paradoxically it is true. Bear with me here.) However, most of the time, these tactics require the opposite of one another. I will explain the six key cooperative tactics as well as the six key competitive tactics that decades of empirical research have produced.¹³

For now, to make the point, just consider this example: In order to claim value, you should make the first offer. And you should make it as extreme as you plausibly can. Why? Because this is an excellent way to nudge the other side toward giving you a large piece of the pie. The one thing you generally do *not* want to do is to reveal your secret bottom line (there are two exceptions to this rule, as we will see). Even Fisher, Ury, and Patton, the godfathers of cooperative negotiations and the authors of *Getting to Yes*, acknowledge that sometimes the problem is not too little information, but too much. Then you are better off just keeping quiet.¹⁴

But there is a downside. Think of the sisters and the orange. If they never told each other what they really are willing to accept, they might not have made any agreement at all. This is a structural problem. To create value, we have to expose ourselves. But then other sides might take advantage of us. Or, we might protect ourselves (and perhaps even take advantage of the other side). But then we can only distribute value.

So, what’s the big deal? Why don’t we just take the contract and look at the clauses? That will tell us what to do: If it is a “planned” clause, it is all about creating value, so we simply use cooperative tactics. If not, it is about the distribution of value, so we just use competitive tactics! If we don’t like slicing (or expanding) pies, we have to find another job. Isn’t it easy enough? Well, yes. And no.

We usually cannot separate the two sides. Every transaction has a pareto optimal curve – a line of all possible outcomes that cannot be improved upon without making at least one side worse off. But no law of nature dictates that the best result can always be achieved by creating value. One or both parties might be better off by claiming value rather than by creating it. It certainly is true that in many scenarios, we are better off creating value than claiming it. That is the case when we receive a smaller share of a larger pie. But, again, increasing the pie does not necessarily give us better results than seeking to grab the biggest slice. Win-win tactics *can* beat win-lose tactics – but the reverse is also true. The negotiation can be visualized as Yin & Yang: see Figure 5. Not only are the two opposites linked together: Each also needs the other, and each carries a kernel of the other side within. I therefore use the ampersand rather than the conjunction “and,” when the two sides appear as a unit, partly deriving their meaning from the polarity. The same rule applies to the terms “Cooperation & Competition” and “Deliberation & Intuition” when we are referring to them as single concepts, which we will explain in the two subsequent chapters.

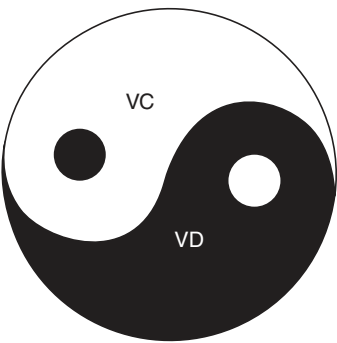


Figure 5 The Yin & Yang of negotiation

Both sides of the contract require both types of negotiation. Planned clauses such as the specifications of the transaction create value. But they also have a cost, such as the contract price, that must be distributed. And unplanned clauses such as warranties and liabilities allot risks. But they also permit the bartering of trade-offs. The two sides are inseparable. And there is an even more profound reason. The tactics of value creation and value distribution, as incompatible as they are, share one common tactic: We must not overdo them. Each tactic becomes too much of a good thing if it does not incorporate a measure of its opposite. And each carries a bit of the other side. Creating value, as I will show, usually requires the claiming of

value (just from somebody that is not at the table). And claiming value does often require the unintended surrender of a piece of the pie to the other side.

Behavioral economics and psychology tell us that (at least in the West) our minds hate contradictions. We learned to think in the tradition of Aristotelian logic and have difficulty accepting that opposites may be simultaneously true. Our minds prefer coherence, and there are numerous faulty intuitions (so-called “cognitive biases”) that tempt us to see negotiation as more coherent than it really is. Perhaps you know Wittgenstein’s animal (shown in Figure 4.1): An optical illusion that lets you see either a duck or a rabbit, but never both at the same time. I argue that this is what happens to us when we observe a negotiation.¹⁵

In Chapter 1 I will describe the paradox of the negotiation task, and the six key tactics of cooperation and also of competition. Unfortunately, we know from research that most people are not very good at using either set of tactics. There are a number of traps into which negotiators predictably fall. When put to the test, people tend to settle for too little. They walk away from the table when an agreement would have been perfectly possible. They sell themselves short and agree to something that is worse than their alternative. They fail to identify compatible interests. They do not reach mutually beneficial outcomes. And they typically leave money on the table. Most people do not think with sufficient clarity about their own interests and alternatives, or about the other side’s alternatives and interests. They fail to grasp what they themselves really want and what they could get out of the other side. But not only do they walk away from the table with much smaller slices than they could, they also habitually fail to realize that a negotiation does not have to be limited to such pie-slicing. Negotiations often do not just involve the distribution of resources and risks; they can often give the parties more than they had originally aimed for. To use a metaphor that is popular with both scholars and practitioners: Not all pies are “fixed”; instead, negotiators can often “expand” them. Yet they frequently fail to realize that in practice. “In short, people’s negotiating behavior and decisions are very often suboptimal. And too often this means that value is not created and captured – even by experienced negotiators.”¹⁶

Many negotiators are either too competitive or too cooperative for their own good, often because they see the task as more coherent than it really is. Crucially, these tactics are not wrong. They can just become excessive – even for the most seasoned of negotiators. To illustrate this point, I will turn to the example of two prominent politicians, US President Donald Trump and German Chancellor Angela Merkel. Their politics are almost diametrically opposed, and you might have strong feelings about them. (I certainly do. But this is not our topic.) Intriguingly, they are also diametrically opposed, if we are to believe their words, in their self-professed negotiation styles. To me, they personify competitive versus cooperative tactics. And, in contrast to their politics, I argue that they are both right. And wrong. That is the paradox of negotiation.