

Stefanie Jung · Peter Krebs

The Essentials of Contract Negotiation



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Preface

B2B negotiations are of great practical relevance. Mastering the art of negotiation can be decisive with regard to whether a contract is concluded or not. In case the parties agree on a contract, not merely the (rational) negotiation power but likewise the individual negotiation skills are a key factor to the eventual shape of the contract. Hence, employing well-trained negotiators is essential to all kinds of businesses. Acquiring negotiation skills requires much practical experience and also a certain talent. Besides, particularly dealing systematically with the topic of negotiations, learning basic skills in the field of negotiations, avoiding mistakes and the continuous aim of improving these skills is helpful. In the same way as amateur footballers in the lowest league up to the champions league all have a trainer who gives instructions, a systematic instruction to the field of negotiations is helpful for amateur negotiators as well as professional negotiators. With this work the authors want to spark the general interest for the topic of contract negotiations, help beginners and advanced negotiators to improve the quality of their negotiations and motivate researchers to deal with this exciting matter in more depth. It is worth it!

This book does not require any prior knowledge, yet it does, in parts, consciously concentrate on matters in-depth and in this context also includes references to further literature. Therefore, this reading is suitable for both beginners and advanced negotiators. On the one hand, the aim is to gather the current scientific status of the negotiation science, which is majorly influenced by the research conducted in the USA. On the other hand, the focus is on further developing or rather critically questioning present findings. Thus, it is attempted to critically analyse the different suggestions for negotiation tactics and—where possible—to make proposals for countermeasures.

This book was developed based on the German edition *Die Vertragsverhandlung – taktische, strategische und rechtliche Elemente* (2016). The underlying idea of this project was to offer an abbreviated version of the original book (which is nearly 500 pages long) that stresses the most important aspects for international negotiations. According to this idea, the title *Essentials of Contract Negotiation* was developed. Consequently, this book paves the way for a quick familiarisation with contract negotiations for practitioners and students. Therefore, the majority of the book is a

(revised) translation of the original template. The revised parts include the introduction into the subject of negotiations in order to provide a quicker understanding of the subsequent text. Above that, this book also comprises a new chapter on cultural differences in negotiations. In an exemplary manner, this chapter will illustrate selected US-American, German, and Chinese peculiarities in negotiations.

At this point, we would like to take the opportunity to thank all the people involved who have helped to realise this project. First and foremost, we thank Melissa Dowse, LL.B., and Rachel Schneider (both from University of Siegen), who were responsible for the translation and linguistic revision of the texts. Without their help the project would not have been realised. On this note, many thanks go to Melissa Dowse, LL.B., for her extensive assistance on this book. Further, we thank Michael Matejek (LL.M., University of Siegen) for developing the graphics. Lastly, we would like to thank the faculty III of the University of Siegen for its financial support, which has made the publication of this book possible in the first place.

We, the authors, find great joy in dealing with the matter of contract negotiations. That is why we would be delighted if the readers of this book could find a similar fascination for the topic. Feedback, further information, suggestions and critical comments are very welcome. Conversely, we are also happy to provide advice for others.

Siegen, Germany
March 2019

Peter Krebs
Stefanie Jung

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Abbreviations

5 Ps	Prior preparation prevents poor performance
ACBD	Always consult before deciding
AcP	Archiv für die civilistische Praxis (German legal journal)
Art.	Article
B2B	Business to business
B2C	Business to consumer
BAFO	Best and final offer
BATNA	Best alternative to a negotiated agreement
CBCA	Criteria-based content analysis
CIETAC	China International Economic and Trade Arbitration Commission
CMS	Compliance management systems
cf.	Confer
Chap.	Chapter
DAD approach	Decide, announce, defend approach
DDD approach	Dialogue, decide, deliver approach
DITF	Door-in-the-face
DoD	Detection of deception
EANT	Ethically ambiguous negotiation tactics
Ed.	Edition/editor
Eds.	Editors
e.g.	Exempli gratia
EI	Emotional intelligence
esp.	Especially
et seq.	Et sequentes
EU	European Union
FC approach	Full consensus approach
Fig.	Figure
FITD	Foot-in-the-door-technique
FOA	Final offer arbitration
FOG	Facts, opinions, guesses
FTF	Face-to-face

GTFT	Generous tit for tat
IACM	International Association for Conflict Management
i.e.	Id est
IO	Interpersonal orientation
LOI	Letter of intent
M&A	Mergers and acquisitions
MBTI	Myers-Briggs-type indicator
MESO	Multiple equivalent simultaneous offers
MGA	Mutual gains approach
MoU	Memorandum of understanding
NDA	Non-disclosure agreement
NOPA	No possible agreement
No.	Number
p.	Page
PON	Program on Negotiation
pp.	Pages
PRC	People's Republic of China
RFP	Request for proposal
Sect.	Section
SMART	Specific, measurable, assignable, realistic, time-related
SMARTER	Specific, measurable, assignable, realistic, time-related, evaluated, reviewed
SME	Small and medium enterprises
SOPHOP	Soft on people, hard on points
SVA	Statement validity assessment
SWOT	Strength, weakness, opportunities and threats
TFEU	Treaty on the functioning of the European Union
TFT	Tit for tat
TINA	There is no alternative
TV	Television
UCC	Uniform Commercial Code
UCLA	University of California, Los Angeles
UK	United Kingdom
U.S.	United States
USA	United States of America
Vol.	Volume
WATNA	Worst alternative to a negotiated agreement
WWW	What worked well
WWYDD	What would you do differently
ZOPA	Zone of possible agreement

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Chapter 1

Introduction and Instructions for Use



1.1 Introductory Remarks

Contract negotiations are of great practical importance. Findings on the functioning of contract negotiations and their implementation by way of tactics and strategies can help to reach an agreement, achieve better negotiation results or make a well-informed decision against an agreement.

This work is dedicated to business contract negotiations, i.e. B2B (business to business) negotiations. Hence, the below explained findings, tactics, strategies, overall concepts as well as framework conditions can apply to negotiations between companies as well to negotiations held within the company. This does however not preclude that the same or at least similar tactics and strategies are used in the context of family negotiations, diplomatic negotiations or in negotiations between businesses and consumers (B2C) or employees. Yet, in this work these tactics and strategies are only examined from the view of business negotiations.

This composition mainly focuses on the illustration of negotiation tactics and strategies. Here, tactics refer to the specific individual steps in the course of negotiations, whereas a strategy is continuously followed throughout the entire negotiation process. Overall negotiation concepts are developed so comprehensively that they claim validity for all existing types of negotiations. The only comprehensive negotiation concept currently in existence is the Harvard negotiation approach which will also be discussed intensively throughout this work. In order to provide a better common understanding, the following sections also illustrate basic terms used in negotiations as well as tactics and techniques which are fundamental to fully grasp the basic idea of negotiations. Further, the sections will also deal with the underlying effects and the mechanisms upon which these tactics are essentially based. Moreover, this composition includes the description of technical devices which are applied during negotiations.

In summary, this book distinguishes the following basic categories:

- basic terms
- mechanisms/effects
- tactical means
- techniques
- strategies
- overall negotiation concepts
- fundamental problems within negotiations

The explanations provided refer to these basic categories. The terms discussed in the course of this book are arranged in an alphabetical order. Since the authors consider an alphabetical listing of explanations to be much more comprehensive, they deliberately decided against presenting them in a continuous text. At the same time, an alphabetical listing also offers the opportunity to link the described terms by way of a system of references (see details below under Sect. 1.2). Furthermore, the index enables the reader to select specific aspects. In this context, also the topic lists in the appendix allow the reader to deal with specific questions (instructions are described further on).

Negotiation research links several science fields, most importantly the one's dealing with psychological, legal as well as economic aspects. The same applies to findings from the field of communications science. The objective of this work is to afford a general insight into the current status of the science dealing with negotiations. Thus, this book primarily gathers the most important findings from various disciplines. Beyond that, this work also claims to make these findings more practicable, overall enabling the reader to transform these findings into the actual negotiation process or helping the reader to successfully cope with certain tactics employed by their negotiating partners. The authors of this book attempt to critically examine the illustrated tactics and techniques and also evaluate their practical applicability within company-related negotiations. On occasion, the authors also introduce entirely new suggestions (e.g. the legitimacy limits of fraudulent behaviour).

Reading this book does not require any prior knowledge—but only an actual interest in the discussed matter, which is why it can act as a general introduction into the field of contract negotiations. It can, however, be of equal interest to experienced negotiators, due to the fact that it helps explaining the underlying mechanisms of action. Based on these findings, negotiators can improve their own tactics and strategies. In this context, the given literature references allow interested readers to commence further research on individual aspects. A number of references can already be found in the descriptions within the alphabetical overview of key terms. In addition, a detailed list of the literature used can be found in the list of references which is provided for in the appendix.

Most aspects of negotiations cannot be acquired by bare reading, but rather require practice and, to a certain degree, also negotiation talent. However, it is essential to understand how both—yourself and others—negotiate, what strategies, tactics and techniques can be applied, to what extent and why they seem to be functioning, and which specific factors influence the eventual success of a tactic.

Nonetheless, dealing with this book cannot, and also should not replace actual practice of negotiations. Rather, this work aims at preparing the reader for practice, intending to support the efficient management of negotiations, and encourage negotiators to reflect their commonly used own behaviour.

Even so, the featured negotiation tactics and strategies should not be regarded as general recommendations, as some elements of the individual tactics and strategies do not comply with the commonly aspired ethical standards or are, in fact, illegal. The authors generally outline their concerns about the risks associated with certain tactics. However, since there is an omnipresent risk that the negotiating partner will make use of unethical tactics, it is vital for negotiators to be able to identify them and have knowledge on how to react appropriately.

1.2 Instructions for the Use and Structure of the Book

1.2.1 Structure of the Book

This book is divided into different chapters. To begin with, the authors give a short explanatory introduction to the issue (Sect. 1.1). In the following section (Sect. 1.2), we provide a short introduction into the proper handling of this book in order to facilitate a better approach and improve the reader's accessibility of the discussed matters. Chapter 2 then outlines the planning process and the procedure of business negotiations. In this context, the six phases of negotiations are distinguished and described:

- Preparation of negotiations (Sect. 2.1);
- start of negotiations (Sect. 2.2);
- the core phase of negotiations (Sect. 2.3);
- the agreement (Sect. 2.4);
- Implementation of the agreement (Sect. 2.5) and
- the ex-post-phase (Sect. 2.6).

Even though in-depth reading of these introductory remarks is not required in order to understand the subsequently provided explanations for negotiations, they are the key prerequisite to the proper application of the knowledge presented. An efficient realisation of the illustrated techniques and strategies is only possible based on a fundamental understanding for the structure of negotiations between companies.

Chapter 3, the main part of this book, gathers findings, tactics and strategies, complemented by additional explanations of the basic terms in alphabetical order. Chapter 4 deals with cultural differences regarding negotiations. In this context, the chapter (comparatively) focuses on the negotiation practice in the US, Germany and China. The appendix of this work includes topic lists (see further below), a comprehensive list of the literature used and a glossary of keywords.

1.2.2 Possible Ways to Approach This Book

With particular regard to the composed tactics and strategies, readers can employ various methods to approaching this book. The keywords are in alphabetical order, hence there is no specific thematical order given. Readers who know exactly what they are looking for, can easily jump from one key word to another and may therefore use this book as a mere work of reference. The lexicon-like structure is particularly suitable to look something up quickly. Readers with a particular interest in specific aspects however, can also use the index as a means of orientation. The glossary contains all the keywords which are printed in bold letters throughout the texts. All general terms (at the beginning of the definition for the key terms), as well as all synonyms and terms with a similar meaning, are printed in bold. Likewise, phrases which are thematically closely connected to the general term are also highlighted.

Example

Terms printed boldly in the description of the Harvard negotiation concept:

Harvard negotiation concept	This is the general term and can be found under the letter H.
Getting to Yes	This is a synonymous term, which is also highlighted using bold letters in the text.
Principled negotiations	These are synonyms in a broader sense (bold).
Negotiations of merits	
Third way	
SOPHOP	This is a term which is closely linked to the Harvard negotiation concept and is thus also explained in that context.
Neutral evaluation criteria:	This term is also closely linked to the Harvard negotiation concept, and is therefore also explained.

Note: Although more terms are closely linked to the Harvard negotiation concept, not all of them have been added to the exemplary list above.

Since one keyword can include a number of connected terms printed in bold, the glossary references the general term (marked with “see below”).

Examples

Third way *see under* Harvard negotiation concept

Neutral evaluation criteria *see under* Harvard negotiation concept

Readers who wish to focus on specific topics can use the thematic lists (topic lists) provided in the appendix. These lists include all general terms linked to a certain subject (e.g. negotiation strategies). In order to keep these lists concise, no additional key words in bold (such as synonyms etc.) are included. Since the topic lists can be linked to one another, some lists are summarised under one general term. For instance, there is the superordinate term of “communication techniques”, under which inter alia topic lists for “answering techniques” and “questioning techniques” can be found.

Readers can, of course, also read the book right from the beginning or look up certain keywords here and there. In this context, the reference technique we use serves to provide the reader with suggestions for further terms, which might also be of interest.

As already mentioned, this book does not require any specific background knowledge. Yet, not all illustrated terms are equally important for negotiators. This work rather combines the main basis of negotiations, complemented with useful additional terms. To gain a general overview of the topic, it is recommended to first of all read the following section on the general “Preparation and Negotiation Process” (Chap. 2), with the connected key words and subsequently focus on more specific aspects.

The terms are each discussed individually (in alphabetical order) but are not to be viewed isolated from one another. In fact, the illustrated techniques, tactics, and strategies are rather interlinked. To provide good linkage between the individual terms (despite the alphabetical order), the individual terms include references (marked with an arrow “→” and written in italics). Terms marked by these arrows are independent general terms that are explained (and are listed in alphabetical order). If a term is only presented in italics, it is a keyword which can be found under a different general term. In this case, the relevant general term is presented in front of an arrow, often in brackets.

Example

→ *Anchoring* – in this way, a reference to the general term of anchoring (under anchoring) is made

Anchor discreditation (→ *anchoring*) – this reference shows that the term “anchor discreditation” is further explained under the key term of “anchoring”. In the index, you will find the entry: Anchor discreditation *see under* anchoring.

This reference technique allows the reader to look up certain aspects and focus on further and thematically linked terms. To provide the greatest possible comprehensibility of the presented knowledge, it is accepted that in some cases redundancies may occur.

Since the various basic categories are simply too diverse, the individual terms do not have any specific structure. However, there are several elements that are mentioned regularly. In the first place, possible synonyms for a certain term are stated. Any sources or persons particularly influencing the term will be mentioned at the beginning of the definition. To provide interested readers with further information, these references regularly include the relevant literature (in the corresponding footnote). In order to clarify for the reader, which specific key term is being explained, the term is assigned to one of the basic categories (such as tactics, techniques, strategies, framework). This is followed by the explanation of the term and possibly the illustration of the specific circumstances, general conditions, etc. For illustration purposes, examples, graphics or explanations of scientific studies are included at the end. Since certain terms may be very similar, they are differentiated from other, possibly connected, key words at the beginning or the end of the explanation.

The German version of this book uses the so-called “generic masculine” which generally also includes females even if the word is per se used in its masculine form (example: “The negotiator (...) he (...) himself”). However, during workshops and seminars the authors came to realise that women tend to take on the role of men in negotiation simulations whenever the given instruction for the negotiation simulation is written in the generic masculine form. Also in the course of discussions it is evident that most people generally imagine a male negotiator. Thus, in order to avoid potential biases—where necessary—this book uses both forms (example: “The negotiator (...) s/he (...) himself/herself”).

Once again, it should be noted that not all the presented actions are advisable from a legal or even ethical point of view. The authors clearly state possible ethical concerns. Legal aspects are not included in this work as national legal orders generally differ from one another.¹ Nonetheless, it is important to be aware of (legally and) ethically questionable tactics and strategies, as there is a perpetual risk of the negotiating partner making use of these very actions. In these cases, it is crucial to firstly identify these tactics and then have corresponding reaction possibilities at hand. The choice of tactics used within negotiations depends inter alia upon the prioritisation of negotiation objectives, bargaining power, the tactic applied by the negotiating partner and the individuals’ personal attitude towards negotiations. It is also influenced by many other circumstances pertaining to each individual case, which is why from the outset it is prohibited to elaborate general recommendations for negotiations.

¹In the German (extensive) version of this book “Die Vertragsvergsverhandlung – taktische, strategische und rechtliche Elemente” (2016, 525 pages) legal aspects are included. In that work reference is usually made to German law.

Chapter 2

Preparation and Negotiation Process



Negotiations can be divided into different negotiation phases (→ *negotiation phases*). In literature, the specific number of phases differs. Be that as it may, the most important steps are

- the preparation of negotiations,
- the start of negotiations,
- the core phase of negotiations,
- the agreement,
- the implementation of the agreement and
- the ex-post-phase.

The following sections outline the most important aspects of each individual negotiation phase.

2.1 Preparation of Negotiations

Preparing the negotiations (see topic list for the specific key terms) is essential for the final success of negotiations. The → *80-20-rule* was therefore established by *Leigh L. Thompson*.¹ According to this rule, preparing negotiations is four times as important as the negotiation itself. Clearly, the significance of the preparation process cannot be generally quantified (as preparation can take up more or less time according to individual circumstances). Even so, the rule serves to highlight the importance of this phase. As *James A. Baker* once said: “*Prior preparation prevents poor performance*”² (5 Ps → 80-20-rule).

¹Thompson (2014), p. 34.

²Baker (2006), p. 5.

Like any other negotiation phase, the specific structuring of the preparation depends on the individual circumstances and concrete framework of the negotiations. Important factors which determine the preparation of the negotiation are:

- The negotiation object;
- the negotiating partner or the partners (→ *two negotiators*, negotiation team, for the possible actors in negotiations, see thematic list, concerning gender aspects → *gender*);
- the roles of the negotiation partners (seller, buyer etc.);
- the negotiation objective(s) (e.g. short- or long-term optimisation of company interests, improving or preventing a deterioration of the relationship to the negotiating partner, gaining attention and reputation, gaining negotiation experience, preventing certain actions/activities of the negotiating partner or third parties);
- the nature of the relationship towards the negotiating partner (e.g. one-time deal, → *permanent business relationship*);
- the personal relationship (trusting or strained relationship);
- one's own → *negotiation power* and in this respect especially one's own → *BATNA*;
- the negotiation power of the opposing party (especially the negotiating partner's *BATNA*) and
- the negotiation type (e.g. → *face-to-face*, → *e-mail*, → *auction*, → *renegotiations* etc. see topic list.)

To structure and professionalise the negotiations, developing a → *prenegotiation plan* which includes checklists may prove useful. The prenegotiation plan inter alia includes guidelines for the preparation of negotiations. These should be based on the negotiators' experience and the informative findings of negotiation research. The prenegotiation plan serves to remind the negotiator of any necessary preparations for negotiations. The checklists contained in the prenegotiation plan are usually used for preparatory work with the draft contract. Prenegotiation plans can be used especially for routine negotiations. In negotiations which deviate from the routine, checklists may be helpful but are perhaps incomplete. In companies, measures promoting digitalisation can contribute to make the preparation process more efficient. For instance, the use of internal systems and databases serves to support the prenegotiation plan and the experience gained in the course of previous negotiations should be utilised to further develop the preparation process (see also Sect. 2.6 concerning the ex-post-phase). In this sense, negotiations can be regarded as an iterative process.

In the first place, negotiators should determine the negotiation subject. In this regard, a buyer has to analyse his/her needs, while a seller has to develop marketable products or services to sell. Buyers search the market for potential vendors while sellers try to get in contact with potential buyers. In this context, another essential task is identifying potential negotiating partners as well as other relevant stakeholders that might influence the overall negotiation process (→ *think beyond the table*). In case of many influential stakeholders it can be helpful to draw a so-called *all-party map* (→ *think beyond the table*), i.e. a sketch that lists all relevant stakeholders

and their respective interests as well as the relevant relations and potential influence. Once the parties decide to negotiate, organisational questions such as the negotiation venue (including booking the rooms etc.), the number of people attending the negotiation (→ *two negotiators*), the → *agenda*, possible → *deadlines*, the negotiation type (→ *face-to-face*, via → *e-mail*, via telephone etc. must be clarified. With the exception of very large and very small negotiations, appointing a two-person negotiation team is a sound recommendation (→ *two negotiators*) for face-to-face and even in phone negotiations. In this regard, a two-people negotiation team offers the advantage that the one who is currently not negotiating can always take on the role of the observing → *analyst*. In general, it is useful to pair up negotiators with different content specialisations e.g. a technical and an economical-juridical expert.

Moreover, the parties should priorly agree on whether negotiations will be made in the course of a → *single text negotiation*, i.e. conducting a negotiation on the basis of a single text, usually a contract draft. In this instance, also questions such as which party is in charge of providing the draft, or whether the parties will resort to using drafts provided by a third party have to be answered. It would also be possible for parties to work with → *boilerplates*, i.e. specific standard clauses or text blocks, instead of using a complete contract template. In addition, the contract can be drawn up jointly by both parties without a draft or might also be a joint proposal derived from two suggestions. In any case, the legal preparation is an essential step in the phase leading to the negotiation.

Furthermore, information is the key to the proper preparation of negotiations. In this respect, it can make sense to firstly conduct an → *information demand analysis* in order to evaluate which information is needed. The second step is then to gather this information. In this context, it should be noted that not all relevant information is available prior to the negotiation. Gathering the relevant information (see e.g. topic list “questioning techniques”) is rather an ongoing task throughout all negotiation phases. Typical sources for obtaining information are the negotiation partner himself/herself as well as his/her competitors or business partners; intracompany information systems and publicly available sources (e.g. the internet, registries, relevant journals). The reliability of the information should be checked regularly (→ *detection of deception*). In this regard, it is oftentimes useful to try to obtain the information from another, independent source. However, it is not only important to conduct an → *information demand analysis*, gather the information, and consequently analyse the data, but also to reflect which information is available for the other side, which information about the own side should be disclosed in the negotiation process, and which information is confidential (→ *information control*).

With the help of the information gained, it is then necessary to determine both, one's own interests and those of the negotiating partner (if possible). Many negotiators focus merely on their own position instead of analysing underlying interests. The → *Harvard negotiation concept*, however, firmly suggests focusing on interests, because this offers the chance to find *common interests* with the negotiation partner as well as merely *diverging but not conflicting interests* (→ *Harvard negotiation concept*). An interest-based approach thereby offers the possibility to

increase the mutual gains (\rightarrow *win-win strategy*) for the parties (*expanding the pie* (\rightarrow *negotiation pie*)). This can lead to a bigger \rightarrow *negotiation pie*. The term negotiation pie refers to the total value of the negotiations. If the overall net result can be maximized, both sides—presuming equal participation—will profit from increased negotiation pie correspondingly. The \rightarrow *orange example* illustrates the difference between interests and positions. In the example, two sisters argue over an orange. Both of them demand the whole orange (representing the position). If they negotiate according to their position, they might decide to split the orange. However, one sister only needed the juice and the other one only the peel (representing interests). Based on an interest-oriented negotiation they could have found a solution that fully satisfies both of their interests optimally.

In the course of preparations, negotiators should analyse both: (1) The interests and (2) the positions of both parties. In B2B negotiations, one usually faces a \rightarrow *principal-agent-situation*. That means that a principal commissions someone to act as his/her agent; in this specific case, to negotiate and make decisions in his/her place. Under these circumstances, it might be useful to analyse the interests and positions of the negotiator himself/herself and of the company s/he is representing.

A personal \rightarrow *BATNA*, i.e. the best alternative to a negotiated agreement, is essential for one's own negotiating position. By determining their own BATNA in the process of the preparations, negotiators clarify whether the specific negotiated agreement is (from a relative point of view) advantageous in comparison with other alternative actions. The individual BATNA essentially determines the own objective negotiating power. Buyers usually request offers from several sellers and compare them. In this respect, the seller's BATNA is usually harder to determine as s/he might not be able to exactly evaluate the number of other possible customers.

Since a BATNA is not immutable but rather dynamic, strengthening it during the negotiation phase—e.g. by establishing possible alternatives to the specific agreement (e.g. alternative sellers)—is essential. Negotiators should also try to establish the BATNA of their negotiation partner. Here it should be pointed out that identifying your own BATNA can already prove difficult, which is why establishing the opposing party's BATNA can be even more complicated. Even so, one should attempt to gather any kind of information that could aid identifying the other party's BATNA. It is precisely this correlation of \rightarrow *negotiation power* between both parties which constitutes a key factor in the subsequent definition of the negotiation strategy and tactics which will be applied in the process of negotiations. Revealing the negotiating partner's interest can also serve as an indicator for possible objections and reservations. If these factors can be anticipated, determining an adequate response in the negotiations (i.e. anticipating objections and reservations) is a possible option. To root out these objections, it might make sense for one team member to play the devil's advocate \rightarrow *advocatus diaboli* during the preparation process.

The *resistance point* (\rightarrow *deal-breaker*), i.e. the point at which the negotiations should be terminated (without reaching a result), is closely linked to one's own BATNA. If a better alternative to the current negotiation is available, negotiations should normally be terminated. The same applies to the negotiation partner. It is

crucial to establish the own parties' resistance point before entering the negotiation as it provides clarity and can help avoid lengthy (hence costly) and unsuccessful negotiations. Vice versa, the expectations the own side has towards the negotiations should also be analysed beforehand. Thus, the preparation phase includes the formulation of one's own final and intermediate goals. In general, it is advisable to set concrete, ambitious targets (\rightarrow *ambitious target price setting*) since these targets act as a self-fulfilling prophecy. These goals should not only be concrete regarding their extent but should also be as specific as possible (\rightarrow *know your target*), meaning that aims are formulated regarding every single negotiation point. In this context, the \rightarrow *SMART goal formulation technique* can be very useful tool. Clearly determining the goals concerning the individual negotiation points is also the basis for determining the overall goal.

The own parties' \rightarrow *resistance point* and the resistance point of the negotiation partner determine the possible bargaining range also known as the agreement zone of the negotiation parties. The area where the respective minimum targets of the parties (so called \rightarrow *deal-breakers*) overlap is called \rightarrow *ZOPA* (zone of possible agreement). If there is a ZOPA—in theory—the parties should be able to reach an agreement, because from a rational point of view this agreement will prove advantageous to both contracting parties. Vice versa, this implies that initiating negotiations without a ZOPA (*NOPA*—no possible agreement (\rightarrow *ZOPA*)) is not worthwhile. Oftentimes, the parties have to in the first place start to negotiate, in order to find out if there is a ZOPA. If they realise that there is no agreement zone they should terminate the negotiations, since generally negotiations are time and cost intensive. Hence, within the preparation process, it is important to at least estimate whether there is a ZOPA and if so, the respective size of it due to the fact that the ZOPA is the basis for determining possible strategies and tactics. In case there is a big ZOPA, the distribution of the negotiation pie will play a key role. In case of a small ZOPA the challenge is to reach an agreement at all.

Dealing with individual aspects also includes the consideration of lines of compromise (see for example \rightarrow *non-linear compromises* and \rightarrow *split the difference*) and options of action. Research shows that negotiators, who dedicate more time to this, achieve better results. Moreover, it is crucial to assess the importance of certain aspects. Regarding the ZOPA's importance for the negotiation process implementing a \rightarrow *traffic light system* could be beneficial. According to this approach, single negotiations points are rated on a scale from "fully disposable" to "indispensable" using e.g. colours (red, orange, green).

Even if the negotiators prefer to remain flexible in their reactions, consideration should still be paid in advance to which strategy to pursue and which tactics, under which circumstances, could be applied. In the course of time, each negotiator develops his/her own negotiation style. In certain cases, it might be interesting to use a test (e.g. the Myers-Briggs-type indicator (MBTI) or the Thomas-Kilmann Conflict Mode Instrument³) to establish your own personality profile with regard to negotiations. The own personality is a significant factor that needs to be considered when

³Thomas and Kilmann (1974).

choosing the appropriate strategy and tactics. Particularly in the case of important and complex negotiations, it may make sense to run a simulation of negotiations in advance. Within negotiation literature, the so-called → *seven elements of negotiation* approach, developed by *Bruce Patton*, describes the main points of negotiation preparation. In case of an international negotiations with parties with different cultural backgrounds it is also important to be conscious of cultural differences (also with regard to specific negotiation habits and styles) within the process of the preparation (cf. Sect. 2.4).

2.2 The Start of Negotiations

The start of negotiations is strongly influenced by the chosen way of negotiation (→ *face-to-face*, → *e-mail* etc.), the contract's importance and other influencing factors (like → *permanent business relationship* or one-off negotiation). At this point, the characteristics of the start of negotiations during face-to-face negotiations is illustrated. However, in general there has been prior contact between the negotiation parties. The negotiation venue is the meeting point of the negotiators and agreed upon in preparation process (see Sect. 2.1). Already during the reception, a first → *impression* is established. This impression is particularly formative (as well as the last impression) due to the *confirmation bias* (→ *impression (first and last)*), i.e. the → *bias*, stating that people tend not to consider arguments that contradict their first impression. This is why it is worthwhile for the negotiator to endeavour for a positive first impression. These kind of positive impressions can be created by means of a pleasant negotiation atmosphere. Hence, it is important to make the other party feel at ease. This is usually achieved by commencing → *chit-chat*. Instead of jumping right into the core phase of the negotiation, it is generally recommendable to invest a considerable amount of time in becoming acquainted with the other party. The intensity and extent of this phase does not only depend on the individual preferences of the negotiator, but is also determined by cultural differences (see Chap. 4). It is frequently desired that negotiators become acquainted with one another during joint dinners or sports events. For the most part, negotiators with a high degree of empathy are particularly equipped to contribute to a good atmosphere between the negotiating parties.

Particularly in the starting phase of negotiations, the parties are engaged in building a harmonious relationship in order to establish negotiation trust. Trust is one key element for successful negotiations. In this context, intrapersonal (between persons) and institutional trust (within the individual organisation, e.g. a company) has to be distinguished. The starting phase of the negotiations is distinctively suitable to establish intrapersonal trust, which also helps to build institutional trust. The more important trust is for the negotiation and implementation of the contract; the more time the parties invest in building a harmonious relationship. In this context → *chit-chat* holds an important role. In many cases, the search for private similarities (→ *find something in common*, → *similar-to-me-effect*) from the outset of the

negotiations can be beneficial to establishing trust. Studies show that people are more congenial towards people who are similar to them and are perceived more positively than people they do not share any similarities with.⁴ In the context of building a harmonious relationship, also the expressed → *body language* is essential. The imitation of the negotiation partners' body posture (both lean forward, both cross their legs etc.) is generally regarded as a positive sign for their sympathy. People tend to trust other persons and perceive them as persuasive if they imitate their own posture (so-called *chameleon effect* (→ *body language*)).⁵

One of the most essential communicating techniques applied in this particular phase of the negotiation is → *active listening* as it helps to create a positive atmosphere of communication and encourages the other side to go on talking. Active listening can be either expressed verbally or non-verbally. A clear non-verbal sign is nodding and facing towards the negotiating partner. Verbal signs include expressions like "Yes ", "I see ", "oh ", "hmm". Not only during the starting phase of negotiations, but also in the overall negotiation process, negotiators should pay attention to listening more to what the conversation partner says than speaking themselves. This recommended ratio is emphasised by the → *70-30-rule*, even though the exact relation cannot be quantified definitely (see also Sect. 2.3).

Depending on the individual negotiation situation (e.g. imbalanced negotiation power) reversely, in this negotiation phase also power games and power demonstrations are commonly used. In this context, one of the negotiation partners often tries to impress the other one e.g. with representative buildings and pompous, big rooms (→ *big fish*). Also luxurious company cars etc. may achieve the same effect. Moreover, also company presentations are designed to impress business partners. → *Imperial gestures* are used to stress one's own high status and at the same time attribute a lower status to the other side. Imperial gestures include letting the other party wait before the meeting, positioning oneself at the head of the table or letting e-mails being answered by one's secretary. Negotiators using imperial gestures do however run the risk of struggling to sufficiently establish trust and a good rapport with the other side.

Even though the parties engage a lot in small talk, the initial phase of the negotiation can be already used to gain valuable information about the negotiation partner. The negotiator may e.g. obtain information about the person s/he is negotiating with (interests, expertise, negotiation style, personality etc.) and the organisation the negotiator is working for (organisational structure etc.). If the parties are aware of the fact that an exchange of sensitive information will take place, it is recommended to sign a non-disclosure agreement (NDA) in this initial phase of the negotiation process.

⁴ Sears and Rowe (2003), pp. 13–24.

⁵ Chartrand and Bargh (1999), pp. 893–910.

2.3 The Core Phase of the Negotiations

The core phase of the negotiations will only be presented briefly and fragmentally, since the concepts explained in the main part of the book deal comprehensively with the characteristics of this phase. According to our understanding as it is presented here, the core phase of negotiations, extends from the point of the → *first offer*, which sets the *anchor* (→ *anchoring*) for the negotiations, to the final offer (→ *BAFO*), and its acceptance or rejection by the relevant → *decision-maker*. This range encompasses the full negotiation, in which the parties strive for solutions, options, and compromises (see thematic list “solutions and compromises”).

The strategies and tactics (see topic list) presented in this book can be particularly applied for the core phase of negotiations. These strategies range from a win-lose approach (→ *win-lose strategy*) to → *win-win strategies*, for example. Among the tactics presented here, a clear distinction can be drawn between aggressive tactics and those, which exploit the effects of → *behavioural economics*. Aggressive tactics, for example, aim to mislead the negotiation partner (see thematic list “deceptions”), or are based on exerting pressure and threats (see corresponding topic list). It is important to at least know those tactics and possible reactions to them, as they are used regularly.⁶ Some authors even consider bluffing as a necessary skill of a negotiator.⁷ In practice, negotiators often lie or overstate their own BATNA (→ *better offer*), bluff about the availability of a product (→ *tactic of small quantities*) or pretend that there are → *budget limitations* (see also → *all I've got*). Whether a negotiator wants to use those tactics, depends on his/her ethical standards. But even if one is not inclined to use those techniques it is important to at least be aware of them and have knowledge on how to prevent or respectively to react to them, if your negotiation partner makes use of them. Common tactics that include threats are: → *see you in court*, → *BAFO*, → *take it or leave it*, → *Russian front*.

Tactics which exploit the effects of → *behavioural economics* use the fact that people do not always act rationally. In fact, actions of people—and therefore also negotiators—are marked by restrictions on rationality, will power and the pursuit of self-interest. → *Biases* show the systematic distortions of perception, memory, thinking, and decision making. In negotiations, the *anchoring effect* (→ *anchoring*) is probably the most famous decision heuristic. The anchoring effect shows that a distortion can be observed into the direction of the anchor (in negotiations, often the first price offer) without the people concerned being aware of this effect. This is why it is often recommended to make the → *first offer* to use the anchoring effect for own benefits. For more tactics basing on these kinds of effect, see the corresponding thematic list (“behavioural economics – effects”).

⁶“In the context of negotiations, bluffing is a generally accepted business practice where pretense is used to imply that one’s position is stronger, more clever or more determined etc., than one’s position really is.” Guth (2008), p. iii.

⁷“Commercial negotiations seem to require a talent for deception.” Shell (1991), p. 93; see also Lakhani (2007), p. 101.