NEGOTIATION SKILLS: AN OBJECTIVE OF THE LEGAL ENGLISH COURSE

Tania MĂGUREANU *

This article draws on the experience and findings gathered through my involvement in the design and production of the recently published *English for Legal Purposes* (*ELP*) [1] textbook, co-ordinated by the British Council. It is devoted to one of the objectives of the ELP syllabus, regarded as an indispensable aspect of the education of would-be lawyers: the development of negotiation skills, within the wider area of professional communication skills (also including giving presentations, writing letters, meeting and discussing with clients or other lawyers, etc.).

In what follows I shall try to define the specific objectives of the ELP course in this area, by looking briefly at the place of negotiation in a lawyer's work, with particular reference to Romanian (current and future) lawyers' need to learn and develop the skills and specific language that are required in order to negotiate successfully. In this way, I hope to demonstrate the need to include the development of negotiation skills among the objectives of the ELP syllabus, and hence its coverage in a textbook designed for law students. By way of illustration, I shall present in the second part of the article the unit on **Legal Negotiations** included in the *English for Legal Purposes* textbook [1, p. 84-97].

Negotiation as part of the lawyer's practice

A lawyer's work has long been perceived as involving the skilful use of argument and the ability to ask the right questions of witnesses, so as to put one's case persuasively before the court. Yet, courtroom advocacy is but a small part of a lawyer's practice. As emphasised in the Inns of Court School of Law Manual on *Negotiation*, "a barrister's role extends well beyond this scene of courtroom drama. One could say it only represents the tip of the iceberg. Most cases never get to trial. A very high percentage of civil cases settle (estimates differ but it is probably around 80 to 90%) and these settlements are achieved by negotiation." [2, p. 1].

Negotiation between the parties involved in a civil dispute can occur at any stage in the unfolding of a case, from pre-action, to appeal and enforcement, and is usually conducted through the parties' lawyers. Generally the solicitor prepares the case for trial, while at the same time negotiating a settlement. In many cases a settlement is reached by court-door negotiation, i.e. by negotiation between the barristers representing the two parties outside the courtroom, just before the case is called on.

Negotiation is thus a vital part of a lawyer's work, required in a wide range of contexts and situations, from simple sales transactions, through more complex business agreements (such as agreeing a lease or a future partnership), to settling claims or resolving international disputes.

Negotiation as a teachable set of skills

It is generally acknowledged that negotiation is part of our lives, as we find ourselves involved in all kinds of everyday situations which require it. However, negotiating in legal contexts is a very complex, intellectually challenging activity, requiring a thorough understanding of the process, as well as considerable skill and practice in order to ensure a successful outcome. While it may be true that some people are clearly better negotiators than others, displaying an

* ***Lecturer, Department of Germanic Languages and Business Communication, ASE Bucharest***

inborn talent for getting what they want, it is now widely recognized that negotiation skills can be learned and developed, and that one can become a more effective negotiator through formal training.

The need for Romanian students of law to develop the skill of negotiating in English

We have seen that negotiation skills are "a vital part of a lawyer's repertoire" [2]: whatever their field of practice, lawyers are often involved in negotiating, whether as an inevitable part of the litigation process, as a necessary step towards concluding a business transaction, or as part of the complex process of seeking consensus before signing an international agreement. Romanian lawyers will have to use English to negotiate in any of these contexts, when working in companies offering legal consultancy to multinational corporations or to local clients dealing with foreign partners, in diplomacy, in European organizations or in institutions having links with international organizations [4]. Moreover, at a time when Romania is engaged in the process of negotiating EU accession, this alone would suffice to justify the place of a module devoted to negotiation in an ELP course, as negotiating language can be regarded as an integral part of the language of accession [5].

But what should would-be lawyers learn in order to become effective negotiators in English? What are the aspects that a unit or a training module on negotiation for law students should focus on? In other words, what objectives should be set for this component of the course? To answer this question, one has to identify first the particular features that characterize effective negotiation and the kind of behaviour that leads to success.

What are good negotiators like?

Although there is a large body of literature devoted to various aspects of negotiation in business and in the world of international relations, less has been written on negotiation in the legal context. Nevertheless, a number of empirical studies carried out in the past years have started examining the different ways in which people behave during negotiations, in order to find out what is and is not effective.

Gerald Williams, Professor of Law at Brigham Young University carried out experiments demonstrating that some lawyers get far better results than others while negotiating exactly the same case, which clearly indicates that there are varying degrees of effectiveness in negotiation [7]. Using questionnaires and interviews and observing lawyers' behaviour and performance during negotiations, Williams rated them on a large number of traits to determine whether they were competitive or cooperative and to assess their degree of effectiveness. According to his findings, 65% of negotiators could be categorised as cooperative and 24% as competitive. At the same time 59% of cooperative negotiators were rated as effective and only 3% as ineffective, as compared to only 25% of competitive negotiators who performed effectively, and 33% rated as ineffective.

Another comparative study of 'good' and 'average' negotiators in action found that, although there was no difference in the time spent by the two categories on planning their strategy, they were significantly different on other points. Thus, while average negotiators thought in terms of the present, effective negotiators took a long-term view, were much more creative, flexible and versatile, making lots of suggestions and considering twice the number of alternatives. Unlike the average negotiators observed, who set their objectives as single points, dealing with issues in isolation, the good negotiators set their objectives in terms of a range, considering the whole package. Another major feature of negotiators with a good track record was their ability to persuade not by giving lots of reasons and using many different arguments, but by repeating the same ones, based on a thorough knowledge of the case and the law. They also appeared to do more summarizing and reviewing, checking that everything was correctly understood.

Such studies give some insight into legal negotiators' behaviour and what is and is not perceived as effective, countering "the misconception that all lawyers are tough, aggressive, hard-nosed negotiators" [2, p. 25]. They emphasise the characteristics usually associated with effective negotiators, some of which may be personal skills and qualities, e.g. being rational and intelligent, analytical, perceptive and creative, others being trainable through education and practice, such as being thoroughly prepared on the facts of the case and the legal provisions pertaining to it, planning the overall structure of the negotiation and the concessions one is going to make, being persuasive through the use of argument, being skilful in 'reading' the opponent's verbal and non-verbal signals, so as to identify the different strategies, styles and tactics and deal with them effectively.

These are, then, some of the issues that law students learning to negotiate should become aware of. On the other hand, which of the above aspects identified as factors of success should come under the scope of the ELP course? What should be the role of the English teacher in attaining the overall objective of developing the learners' negotiation skills?

Clearly, those elements which pertain to knowledge of the law, analysis of the case, preparation of the negotiation in terms of facts (issues at stake, essential conditions, concessions, line of argument, choice of strategy, etc.) are the legal specialists' domain. Yet, even in this area the English teacher can provide support in the form of background reading or recorded extracts on the topic, or of discussions on the concept and process of negotiation in a professional context, which are most valuable in making students aware of the more theoretical aspects involved in negotiation.

Apart from these, in view of the complexity of the process and the need to master not only the strategies and tactics, but also the language of negotiations, the ELP course should also focus on the main features of negotiating language, helping to familiarize students with some of the set phrases used in various negotiation stages, to acquire linguistic functions required when participating in negotiations (persuading, suggesting, granting concessions conditionally, exchanging information, clarifying, reformulating, agreeing/disagreeing, rejecting, etc.), and creating opportunities for the learners to practise these in life-like situations.

For the rest of this article, I shall briefly describe the structure of the unit on *Legal Negotiations* that I have written for the *English for Legal Purposes* textbook, and present some of the tasks and activities specifically designed to highlight the aspects discussed above.

The structure of the unit

The *Legal Negotiations* unit is divided into four sections, according to the sub-topics dealt with, each focusing on several integrated language skills, although the main focus throughout the unit is on interactive skills, i.e. speaking and listening. Since one of the main aims of the unit is to raise students' awareness of negotiation in the legal context, the unit provides various opportunities for discussion and information gathering (through reading and listening) on the role of negotiation in resolving a case, on the factors that influence negotiations, the different strategies and styles one can adopt and the skills needed in order to be successful. An overview of the unit is given below with the aims of the different tasks being indicated:

Section A The place of Negotiation in Resolving a Case

➢ ***How are civil disputes resolved*** – plenary discussion designed to introduce the students to the topic

➢ ***Negotiating a case under the English law system and comparison with the situation in Romania***
- plenary and group discussion – aiming to activate the relevant vocabulary and to draw on the students' own thoughts on the benefits of settling a case rather than going to trial; highlighting the solicitor's, the barrister's, and the client's respective roles in the negotiation
- reading for background information – designed to provide extra input

Section B Can Negotiation Skills Be Learned?

➢ ***What is a negotiation?***
- providing a definition of negotiation – aimING to elicit students' ideas on negotiation and highlight concepts such as parties with specific (possibly conflicting) goals and interests, communication, compromise, agreement
- comparing different views and definitions on negotiation

➢ ***Types of negotiation*** – raising awareness of different negotiation types according to purpose and parties' behaviour/relationship

➢ ***Negotiation strategy and style***
- reading – to provide input on the main strategies and styles identified by authors on legal negotiations
- discussion – to identify elements which characterize each strategy

➢ ***How to choose your strategy?***
- listening to expert advice on the topic **–** designed to develop listening for gist and for specific information (important skills in negotiation)
- identifying different approaches and discussing their effectiveness **–** aiming to offer guidance to novice negotiators, so as to help them behave according to their intentions or properly interpret and respond to the opponent's behaviour

Section C Negotiating Successfully

➢ ***Pre-requisites of success in negotiation*** – aiming to sensitise students to the various influences that can affect the outcome of negotiations
- brainstorming factors of success
- listening to lawyer giving advice and taking notes

➢ ***Have you got what it takes?*** – pair discussion on essential skills and qualities of a good negotiator

➢ ***Stages in a negotiation –*** small group discussion of the content and sequence of the basic phases of the negotiation process, intended to familiarise the students with the general, recognisable pattern of most negotiations, so as to enhance their understanding of the process

Section D The Language of Negotiations

➢ ***Set phrases used in the different negotiation stages***
- matching phrases to different stages, an activity designed to reinforce functional language for *bidding, bargaining, agreeing, rejecting, etc.*

➢ ***Language awareness*** – meant to highlight language items that are relevant in negotiation
- identifying ways of expressing condition in the bargaining stage
- discussing various language items occurring in negotiations

➢ ***Language focus: Making statements more tentative*** – designed to introduce and practice an essential aspect of the style of negotiating language
- ways of making the language more diplomatic

➢ ***Role play: Negotiating a settlement between a landlord and a tenant*** – an activity type characteristically used in any course devoted to the development of professional skills, as it provides a chance for the students to use the language and skills developed throughout the unit in a life-like situation

➢ ***Further reading: NEW WAYS OF SETTLING DISPUTES***
- reading about alternative dispute resolution (for individual study)

Since negotiation is about communication and compromise, the different sections and sub-sections of the unit include tasks whose aims address the needs of would-be legal negotiators, as can be seen from the overview above.

Activities and tasks

To illustrate how some of the main aspects of negotiation are dealt with in the unit, I have selected here a few activities, dealing with:
a) strategies and style in negotiating;
b) the language of negotiations, in particular, ways of making language more tentative.

B.4 Negotiation Strategy and Style

B.4.1 *Read the text below describing the main strategies identified by authors on legal negotiations:*

the **competitive** strategy, sometimes called **positional** or **hard bargaining,** which seeks to maximise one's own gains by taking a strong stance, on the basis that this will force the opponent to give in. The goal is victory. The competitive negotiator pushes the opponent into a corner, in order to get the most of what he is claiming. It is a 'win/lose' reaction to disagreement or conflict, which leads to confrontation. While it is useful in some circumstances, it can at times produce deadlock.

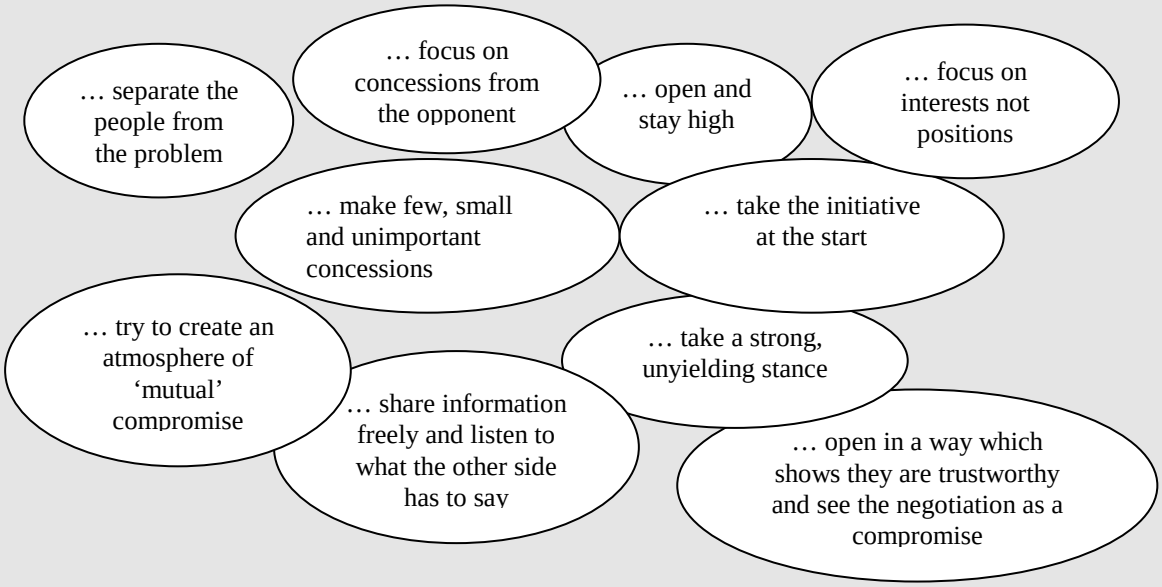
The **cooperative/compromising** strategy, sometimes called **soft bargaining,** which assumes that there must be concessions on both sides and seeks, by demonstrably being 'reasonable' in the demands and concessions made and sharing information, to engender trust and reciprocal behaviour in the opponent. The goal is agreement. It is a 'win/win' reaction which does not necessarily produce the best results, as the agreement will not always be one which adequately or genuinely resolves the underlying differences.

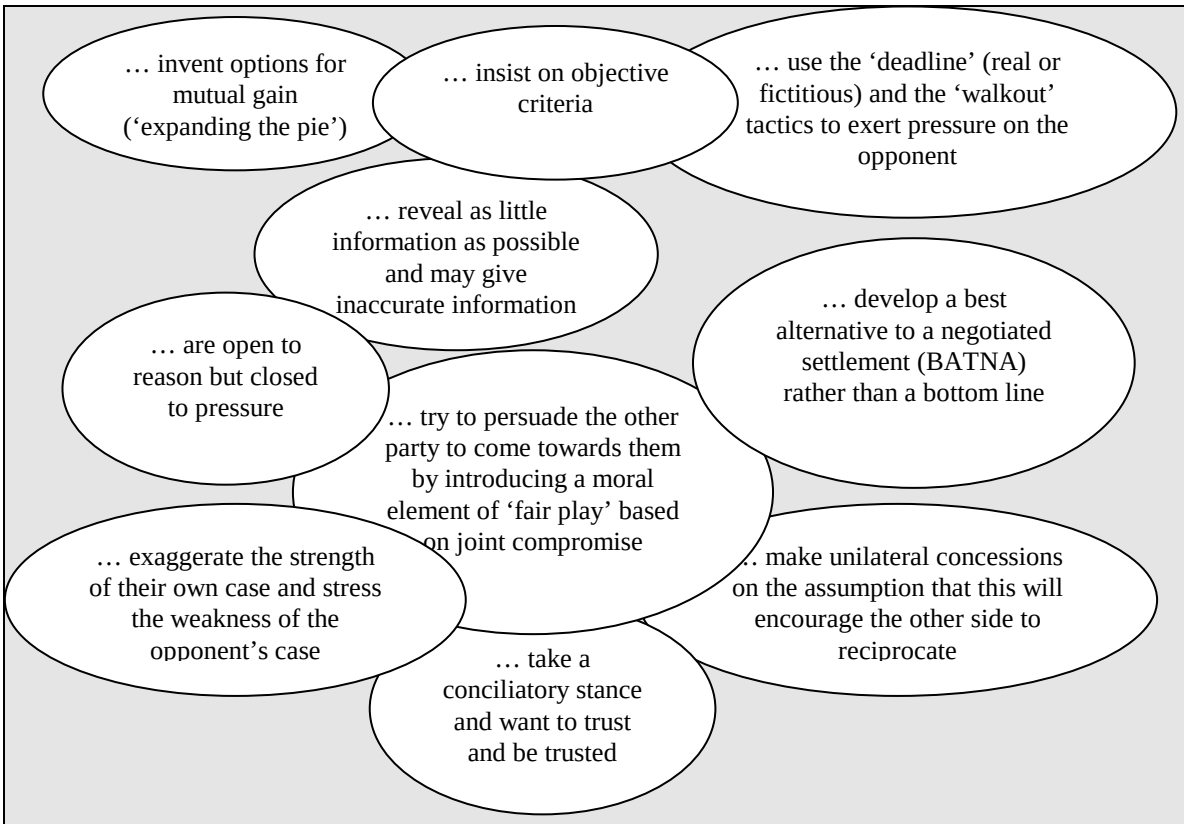
The **collaborative** strategy, also called **rationale bargaining**, which assumes that the parties can work together to reach agreement by exploring the underlying interests of the parties, sharing information, being creative in the options considered and judging any settlement against some agreed test or criteria. It is a 'win/win' reaction which can lead to optimum results. This strategy is derived from two similar but differing strategies promulgated by differing schools of thought, namely:

- the **'principled'** approach (developed by Roger Fisher and William Ury of the Harvard Negotiation Project), whose goal is to achieve a settlement which is fair and reflects both parties' real needs or interests with the lowest transaction costs relative to desirability of the result
- the **'problem-solving'** approach (set out by Carrie Menkel-Meadow of UCLA), whose goal is to achieve a settlement which is objectively fair by some external authoritative norm.

B.4.2 *Here are a number of component elements of the different strategies described above. Try to identify those which characterise each strategy and list them under the appropriate heading:*

Positional bargaining	**Soft bargaining**	**Rationale bargaining**
Competitive negotiators …	Cooperative negotiators …	Collaborative negotiators…
……..	…….	……..
……..	…….	……..





B.5 How to choose your strategy?

B.5.1 *Listen to an experienced lawyer advising a novice barrister on using different negotiating strategies and styles. Which of the elements you have identified for each strategy does she mention? What distinction does she make between 'strategy' and 'style'? What are the two main negotiating styles she describes?*

B.5.2 *Look at the following extracts from court-door negotiations. What strategy (and style) has the first barrister adopted in each of them? How does his opponent respond? Which approach do you think is more effective and likely to lead to a successful outcome?*

a.

A. I think it's only fair to point out from the start that I'm here today because the Managing Director of my client company is a civilised man. But I am **not** impressed by your client's case, nor am I impressed by your client's attitude in bringing an obviously frivolous and unsustainable counter-claim to our own. There can be no dispute that my client has the upper hand - a matter you need to consider with great care here today.

B. With all due respect, I do **not** believe your client has the upper hand, as you put it. My client was **justified** in withholding payment for the goods delivered two weeks after the agreed date, and **justified** in treating the contract as repudiated. The losses that form our counter-claim are a **direct** result from your client's actions and are therefore clearly sustainable in law.

b.

A. Surely the purpose of our discussion is to see if we can reach settlement. We shouldn't be wasting time discussing the minutiae of the case. Now, if you would please just tell me what your client is prepared to offer mine, we can move this thing along.

B. No, I'm afraid I simply **cannot** give you a figure and I do **not** agree with you that we are discussing the minutiae of the case. These matters are central to our discussion.

c.

A. My client is interested in reaching a compromise that could settle the differences and allow them to do business together again.

B. Well, that's certainly not out of the question, provided both sides are prepared to be reasonable.

A. So, with that possibility in mind, would it be a good idea to go back to the three issues I outlined at the start? Take each in turn, see if we can resolve those satisfactorily.

B. Yes, that would seem reasonable.

A. Well, the first issue ...

d.

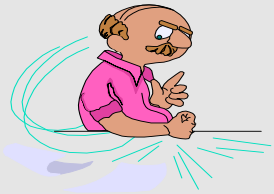
A. What I suggest is that I forego the losses on the last delivery and you forego the loss of profit on this month's sales.
B. No, what you're proposing is not fair! It's not acceptable.

A. But this way we are foregoing our own losses and your loss would be compensated.
B. I said no! I really cannot be expected to wipe out all my loss of profit claim! It's totally unrealistic.

A. But if you tie in here the possibility of ...
B. No, it's out of the question!

A. But if you would just listen!
B. It's not a question of listening! I know what you have to say. I just don't agree with it!

In two words: **IM-POSSIBLE!**



D.2 Language Awareness

D.2.1 *Read again the phrases used in the bargaining stage of a negotiation and identify the various ways of expressing conditions.*

D.2.2 *Read the following extracts from negotiations and answer the questions:*

What does would *express in each of these three extracts?* *Does* may *have the same meaning in these extracts?* *Why is the speaker using this phrase? Can you think of any other phrases that function in the same way?*	**1. a.** "Now, if you ***would*** please just tell me what your client is prepared to offer mine, we can move this thing along." **b.** "***Would*** it be a good idea to go back to the three issues I outlined at the start? Take each in turn, see if we can resolve those satisfactorily." **c.** "But if you ***would*** just listen!" **2. a.** "Depending on how we proceed, I ***may*** ask, as a condition of the settlement, that your client produce the documents which evidence the loss." **b.** Subject to a satisfactory resolution of the other outstanding issues, we ***may*** be prepared to accept this offer. **3.** "***With the greatest respect***, I don't believe your client has the upper hand, as you put it."

D.3 Language Focus

D.3.1 Making Statements More Tentative

Successful negotiations often depend on avoiding direct disagreement and using tentative, diplomatic language. Study the grammar box below and note the different ways in which you can avoid sounding abrupt, inflexible or dogmatic, by making what you say more tentative and negotiable.

grammar box

1. Using **would** to take away the dogmatic tone of many statements.
e.g. That's not acceptable. → That ***would be*** unacceptable.
We expect them to accept our proposals. → We ***would*** expect them to accept our proposals.

2. Using **introductory words or phrases** – ***Actually; With (all due) respect; To be honest; I'm afraid; Frankly, etc.*** - to warn the listener that disagreement or some unhelpful or unwelcome remark follows.
e.g. That option is out of the question. → ***I'm afraid*** that option is out of the question.
You give us no alternative but to cancel the contract. → ***In those circumstances,*** you give us no alternative but to cancel the contract.

3. Using the **interrogative**, esp. the **negative interrogative** to make suggestions sound more tentative and negotiable.
e.g. That is too much. → ***Is(n't)*** that too much? / ***Wouldn't*** that be too much?
Let's discuss our offer first. → ***Could(n't)*** we discuss our offer first?

4. Using **qualifiers - a little (bit), some, slight, etc. -** to restrict general statements that are likely to produce disagreement.
e.g. I have doubts/reservations about that. → I have ***some*** doubts/reservations about that.
We had a disagreement with the suppliers. → We had ***a slight / a bit of a*** disagreement with the suppliers.

5. Using the **comparative** in offering an alternative suggestion, to imply that the other person's suggestion is acceptable, but yours is more acceptable.
e.g. ***Wouldn't*** Friday ***be more*** convenient? / Friday ***might be more*** convenient.
Ms Johnson might be a ***better*** person to approach.

6. (**a)** Using **not very + the positive equivalent of a negative adjective.**
e.g. That suggestion is impractical. → That suggestion is ***not very practical.***
That proposal is insensitive to the employees' demands. → That proposal is ***not very sensitive*** to the employees' demands.

(b) Replacing a verb with negative meaning by **don't + the positive equivalent.**
e.g. I disagree completely. → ***I don't agree*** at all, I'm afraid.
I dislike that idea. → ***I don't like*** that idea at all.

7. Using **the past continuous** of the verb *wonder* to avoid asking questions that are too direct and abrupt and of verbs like *hope, expect, plan, etc.* to sound more friendly and open and give the impression of including the other partner in the discussion, so as to engage them in an open negotiation.
e.g. Have you come to a decision yet? → ***I was wondering*** if you'd come to a decision yet.
We hoped you'd accept our proposal. → ***We were hoping*** you'd accept our proposal.

D.3.2 *Make the statements below less direct and more diplomatic by using the various language points illustrated in the grammar box:*

I'm unhappy with that suggestion.
We need another meeting next week.
We hoped the problem would be solved today.
Information is needed before we can come to a conclusion.
That's a useless line of argument.
We intended to deal with each issue separately.
It's a good idea to negotiate an overall deal.
We need time before making a decision.
That's inconvenient.
I don't want to meet so soon.
I reject what you say.

Conclusion

To conclude, I should stress that the unit described here is by no means exhaustive. It was designed with a particular category of learners in mind, viz. second-year students in law faculties. Depending on the specific needs of individual (groups of) learners, the material may need to be supplemented with more theoretical information and/or practical tasks on various issues involved in legal negotiations, including a careful study of negotiating language.

A wider module on negotiation, designed more specifically for the training of international negotiators, should perhaps include more input on the various factors that influence negotiations, as well as practice of the different bargaining strategies and tactics one can resort to. There should also be more insight into and practice of the various techniques of using language persuasively, of dealing with conflict and deadlock, of concluding the negotiation and accurately recording the terms of the agreement. Last but not least, special attention should be paid to the cross-cultural aspects that are likely to occur when negotiating internationally.

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