

*Cooperation in Transactions and
Disputes: A Problem-Solving Legal
System?*

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Summary

Prevention of harm, distribution (compensation, risk allocation, or redistribution of income) and controlling administrative costs are the generally accepted goals of the civil justice system. Is optimal cooperation, defined in this paper as using the problem-solving method of negotiation, a valuable fourth goal? If the legal system can successfully support problem-solving negotiations, without endangering other objectives, this is likely to lead to creation of value in terms of the preferences of the parties, to reductions in the costs of dispute resolution, and probably also to lower costs of transacting. Thus, optimal cooperation in the problem-solving manner seems to be a goal that is consistent with the perspective of welfare economics, in which the well-being of individuals is the criterion for normative evaluation.

The net benefits of accepting this objective will depend on how the legal system can actually support problem-solving. This article discusses seven possible areas of implementation. A legal system attuned to problem-solving will be more open towards different types of interests and will stimulate the parties to find creative value-maximizing solutions. The perspective of problem-solving underlines the need to improve access to court, and more in general to reduce bargaining ranges by enhancing the way the legal system provides 'batnas'. If this is done, distribution of value will become easier and the effects of bargaining power can be diminished. Stressing the use of objective criteria, the perspective contains an invitation to redesign the rules of substantive private law so that they give better help to the negotiating parties when they deal with distributive issues. Useful objective criteria for distributive issues may be continuous instead of binary. Multiple objective criteria can exist next to each other. They do not have to be binding, but can be adjustable to individual differences in valuation of interests, different ways of creating value, and dissimilar external circumstances. The perspective of problem-solving also invites us to rethink the processes of contracting and dispute resolution, the role of blaming, and the principle of autonomy. Although many of the proposals suggested by this perspective are not new, it may help to develop a more coherent vision on reform of the civil justice system.

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I. INTRODUCTION

Cooperation² is essential for markets and societies. During the second half of the last century, much knowledge has been developed and put into action regarding the way people can interact to optimize their cooperation. But how is this reflected in the legal institutions that support markets and society at large? Certainly, the legal system provides a framework for cooperation. Legal institutions define property rights, provide for enforcement of contracts, sanction behavior that unreasonably interferes with other people’s interests, and set out procedures for disputes regarding property rights and liabilities. The way people cooperate within this framework, however, is left to them. Moreover, the framework provided by the legal system sometimes seems to discourage cooperation, in particular where it invites people having differences to retreat in legal positions. Thus, value that can be created through cooperation may be left on the bargaining table, and unnecessary transaction costs may arise. The question addressed in this study is whether the rules and practices of the law of contracts, the law of torts, and the law regarding dispute resolution, can be redesigned so that they give better support to cooperation.

A. Cooperation Through Problem-Solving

Cooperation can come in many forms, but without some idea of what it entails, it can hardly serve as a guiding principle. Therefore, I use the well-defined method of ‘problem-solving’ negotiation as a proxy for optimal cooperation. Throughout this article, this generic term will be used for interest-based and cooperative negotiation methods that are also known as ‘principled,’ ‘integrative,’ ‘cooperative,’ ‘

² In this study, I use ‘cooperation’ in the sense of coordinated action between individuals in a way that optimally benefits both. Although some connotations with ‘soft’ or ‘willing to concede’ may arise, it is hard to find a better general term. The term ‘problem-solving’ is reserved for a particular method of cooperation developed in Negotiation Theory, see the next note.

collaborative,' or (less adequately) 'win-win' approaches to negotiation.³ The problem-solving method not only gives us a clear picture of what can constitute optimal cooperation, it can also be used to assess in which situations cooperation is desirable at all. The concept of a 'batna', which will be explained in due course, reflects that cooperation is not always the best option. The basic message behind this concept is that a person should not cooperate with a certain other person if he has an alternative that better serves his interests.

The literature on negotiation generally distinguishes two types of bargaining. The first type is distributive bargaining, also called competitive or win-lose bargaining.⁴ In this type of bargaining, the parties want to maximize their share in resources that are seen as fixed and limited. Both parties have resistance points, reservation prices that are their minimally acceptable outcomes, usually because they have alternatives to agreement that are more attractive to them: their batnas (best alternative to agreement). The spread between these two points is their bargaining range or settlement range, and the goal of the negotiations is to get a maximum share of this zone of possible agreement.⁵ Distributive bargaining often takes the form of arguing over positions, and when the parties agree, it is by making concessions from their initial positions. It is a form of bargaining that is familiar from such simple transactions as the sale of a house. The parties haggle over the price, trying to get the

³ The method of problem-solving or integrative negotiations is developed in the literature on negotiation, see Roy J. Lewicki, David M. Saunders and John W. Minton, *Negotiation* (3rd ed., Irwin/McGraw-Hill, Boston, 1999) 108. (mentioning as distinguishing elements: a focus on commonalities rather than differences, an attempt to address needs and interests, not positions; a commitment to meeting the needs of all involved parties; an exchange of information and ideas; the invention of options for mutual gain; the use of objective criteria for standards of performance). Contributions to its development came from R.E. Walton and R.B. McKersie, *A Behavioral Theory of Labor Negotiations* (McGraw-Hill, New York, 1965), D.G. Pruitt, *Negotiation Behavior* (Academic Press, New York, 1981) and the method was brought to the attention of the general public by R. Fisher, W. Ury and B. Patton, *Getting to Yes: Negotiating an Agreement without Giving in* (2nd ed., 1991), who added the use of objective criteria and stressed this by coining their version: 'principled negotiations'. Although I think this is a major enrichment of the method, see Chris Guthrie, 'Review Essay: Using Bargaining for Advantage in Law School Negotiation Courses: Bargaining for Advantage: Negotiation Strategies for Reasonable People. By G. Richard Shell' (2000) 16 *Ohio St. J. on Disp. Resolution* 219, and one on which I focus in this article, I prefer the term problem-solving negotiations because it is more commonly used, and it avoids the connotation with people not willing to move from their positions because 'principles' are involved. Problem-solving is increasingly promoted for use in legal disputes, see Carry Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (1984) 31 *UCLA Law Review* 754, Carry Menkel-Meadow, 'Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?' (2001) 6 *Harvard Negotiation Law Review* 97 and Robert H. Mnookin, Scott R. Peppet and Andrew S. Tulumello, *Beyond winning : negotiating to create value in deals and disputes* (Belknap Press of Harvard University Press, Cambridge, Mass., 2000) 6 and 173-271. See for a history of the idea of problem-solving in the setting of resolution of (legal) disputes Carry Menkel-Meadow, 'Mothers and Fathers of Invention: The Intellectual Founders of ADR' (2000) 16 *Ohio St. J. on Disp. Resolution* 1, 16.

⁴ See Roy J. Lewicki, David M. Saunders and John W. Minton, *Negotiation* (3rd ed., Irwin/McGraw-Hill, Boston, 1999).

⁵ Howard Raiffa, John Richardson and David Metcalfe, *Negotiation Analysis; The Science and Art of Collaborative Decision Making* (The Belknap Press of Harvard University Press, Cambridge, Mass., 2003) 109-115.

best share of the bargaining range, knowing they can step out of the negotiations and look for another buyer or for a seller of a similar house. It is also often used in the setting of litigation. The parties try to predict how the court will rule in their case and what the costs of going to court will be because a court action is their *batna* by accepting the settlement being offered by the other party.

Problem-solving negotiations follow a different pattern.⁶ In this method, the underlying interests of the parties are the building blocks, which need to be uncovered by intensive communication. The parties then jointly develop solutions that best serve these interests. Thus, the resources available to the negotiating parties in order to solve the problem are expanded. When it comes to dividing the resources, each party tries to establish its *batna* and that of the other party. In this, it is similar to distributive bargaining. The dividing of the settlement range, however, takes place on the basis of objective criteria, such as market prices, generally accepted norms, or legal rules.

How could the legal system promote the problem-solving method? Take two partners in a business each serving some important customers. Assume they want to split up because of personal differences that surfaced when they discussed some bad outcomes in past deals. Most legal systems now invite them to see these adverse outcomes as the consequences of wrongful behavior by the other party for which this other party is liable. The business has to be split up in accordance with the terms of the contract, which may or may not include a good procedure for this contingency. Discussions of these topics will tend to be confrontational, are likely to be formal and probably costly. In the meantime, the parties will probably try to find a practical solution, usually by determining a settlement amount to be paid to one party in return for that party's willingness to give up control over the business.

Contrast this to a setting that stimulates the partners to discuss their differences in terms of their interests, not unlike the rules for divorce, which have in the legal systems of most countries moved away from assigning fault, first as an access criterion for divorce proceedings, and now increasingly also as a criterion for determining consequences like child custody, child support and maintenance for the spouse. The default rules of our improved legal system would invite the parties to identify solutions that maximally serve their interests. They would also suggest a menu of objective criteria for compensation and other distributive issues: various valuing principles for assets and formulas for calculating compensation for lost future opportunities to the partner that has to leave the business, for instance. Contracts in our imaginary legal world tend to build on these defaults, and tailor them to the specific circumstances by giving more concrete compensation criteria for the options

⁶ See for the key steps identified in the literature R. Fisher, W.Ury and B.Patton, *Getting to Yes: Negotiating an Agreement without Giving in* (2nd ed., 1991) (separate the people from the problem; focus on interests, not positions; invent options for mutual gain; insist on using objective criteria), Roy J. Lewicki, David M. Saunders and John W. Minton, *Negotiation* (3rd ed., Irwin/McGraw-Hill, Boston, 1999) 122-128. (identify and define the problem; understand the problem fully; identify interests and needs; generate alternative solutions; evaluation and selection of alternatives), and for a more formal analysis Howard Raiffa, John Richardson and David Metcalfe, *Negotiation Analysis; The Science and Art of Collaborative Decision Making* (The Belknap Press of Harvard University Press, Cambridge, Mass., 2003) 190-309.

of splitting up the business and of a sale of the share of one of the partners to the other.

The default rule for dispute resolution starts with a code of conduct with do's and don'ts regarding communication about differences, stimulating discussion of interests and emotional issues. The code gives the parties criteria to assess whether they are doing well in their settlement discussions or whether they might need the assistance of a mediator or lawyer versed in problem-solving. The contract again gives more specific information, like names of the people they might ask for help.

If the parties do not succeed in reaching agreement, the default provides for the remaining distributive issues to be laid down in a document that will be the basis for a court decision on the issues. In making its decisions, the court will apply the same objective criteria, according to a procedure to be determined together with the parties and tailored to their procedural needs and their resources. When different criteria lead to different outcomes, which they usually do, the court does not choose one criterion but looks for the middle ground, for instance by giving appropriate weights to all criteria.

The emotions and interests underlying complaints about the conduct of the other party in the past have a central place in the proceedings, but wrongful conduct, causation, and damage are not the prime criteria for dealing with distributive issues. If there is a suspicion or allegation of fraud, the communication and dispute resolution rules may provide for a different track, maybe stipulating a discussion between the parties under the supervision of a neutral party, which can be the first step towards discovery and more formal accusations.

What this suggests is that the legal system is not by its nature positional and adversarial, but surprisingly capable of supporting different styles of negotiation. Moreover, it can change over time in the direction of supporting more cooperative models of solving differences; not so long ago, most divorces were costly and emotionally stressful blaming battles. The central question this article raises is whether such change towards supporting co-operation is desirable and possible for at least some situations the legal system has to cope with.

B. What Follows

Part II explains why stimulating cooperation in the form of encouraging negotiating parties to use the problem-solving method may be a worthwhile goal for the law regarding private relations. This method invites the parties to create value, thus leading to welfare gains, and to distribute value fairly in accordance with objective criteria. In many situations problem-solving negotiations will also be less costly than distributive negotiations, so that transaction costs may decrease. Supporting cooperation does not seem to conflict with the existing goals of private law, although it is too early for an assessment of the costs and benefits of adding problem-solving as a goal for the legal system.

Part III explores which elements of private law are already consistent with the problem-solving method, which private law rules and practices conflict with it, and how these rules and practices could be brought in line with this mode of cooperation. Problem-solving is described in terms of seven key elements, five of which can be

phrased for ease of reference in the terms made famous by ‘Getting to Yes’: ‘Focus on interests, not on positions; Invent options for mutual gain; Develop your batna; Insist on using objective criteria; Separate the people from the problem.’⁷ Two additional elements have always been part of the integrative method, but deserve somewhat more attention in this article as they seem so different from what the legal system prescribes. In an attempt to create two more one-liners: ‘Avoid blame, look for contribution.’; ‘Be cooperative, and do not overestimate your autonomy.’

In the concluding section, Part IV, the results are summarized and a lists of topics for further research is presented, indicating what the goal of problem-solving would mean for contract law, tort law and law regarding dispute resolution, and hinting at some implications for other areas of the legal system. The conclusion is that the theory of problem-solving may be a useful guiding principle for reform of the legal system.

C. *Prior Research*

Using the theory of integrative negotiations for an evaluation of the legal system is an approach that can be related to several strands of existing research. Negotiation Theory covers two rather important aspects of human cooperation: deal-making and resolution of conflicts.⁸ The models Negotiation Theory provides are partly descriptive, and many theorists also offer prescriptive advice, but mainly to individual negotiators. Some studies have embarked upon the design of dispute resolution systems.⁹ This literature is still in its early stages, however, and mostly deals with dispute resolution inside organizations, or in some particular outside relations, such as relations with customers. This study extends this line of research, by taking the legal system as an example of a dispute resolution system that can be redesigned.¹⁰ Until now, most negotiation theorists accept the legal system as it is. They take for granted that the legal system supplies certain alternatives to agreement (batnas) in the form of the outcome of court proceedings. They then supply methods for optimally negotiating within this legal framework. Although they point out the impact of the legal environment on the processes and outcomes of negotiations,¹¹ and of the major

⁷ R. Fisher, W.Ury and B.Patton, *Getting to Yes: Negotiating an Agreement without Giving in* (2nd ed., 1991)

⁸ See for excellent overviews of the state of the art Roy J. Lewicki, David M. Saunders and John W. Minton, *Negotiation* (3rd ed., Irwin/McGraw-Hill, Boston, 1999) and Howard Raiffa, John Richardson and David Metcalfe, *Negotiation Analysis; The Science and Art of Collaborative Decision Making* (The Belknap Press of Harvard University Press, Cambridge, Mass., 2003).

⁹ William L. Ury, Jeanne M. Brett and Stephen B. Goldberg (Author), *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (Jossey-Bass, 1988), Cathy A. Costantino and Christina Sickles Merchant, *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (Jossey-Bass, San Francisco, 1996) and John P. Conbere, ‘Theory Building for Conflict Management System Design’ (2001) 19 *Conflict Resolution Quarterly* 215.

¹⁰ See also John Lande, ‘Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs’ (2002) 50 *UCLA Law Review* 69 (applying such design principles to court-annexed mediation programs).

¹¹ R. H. Mnookin and L. Kornhauser, ‘Bargaining in the Shadow of the law: The Case of Divorce’ (1979) 88 *Yale Law Journal* 950.

consequences of changes in this environment,¹² they are hesitant to suggest changes in legal rules that might improve the way differences are negotiated.¹³ This is also the approach of mediation and ADR theorists, who tend to think in terms of finding alternatives to legal processes rather than improving them. Building on research in social psychology and techniques developed for the helping professions, they developed what I will call the ‘technology’ of dispute resolution.¹⁴ This paper explores whether it is feasible and desirable to integrate this technology in the legal system, for instance in the rules and practices of civil procedure.¹⁵

Legal scholars long had a blind spot for negotiation processes. They focused on the procedural rules and the substantive law determining the judgments of courts. In recent years, however, negotiation processes ‘in the shadow of the law’ attracted more attention. Practicing lawyers feel the pressures from the outside to improve negotiation processes, and the use of problem-solving methods by lawyers is promoted extensively.¹⁶ Research is developing that shows that some legal rules provide a better environment for mediation and problem-solving negotiations than others.¹⁷ This naturally leads to the question posed in this article: ‘How could the legal system be adjusted to promote cooperation, and problem-solving in particular?’

This study builds in many respects on the teachings of Law and Economics. Economists, and in particular game theorists, study the way cooperation will evolve if the individuals sitting at both ends of the bargaining table can obtain better outcomes by cooperating.¹⁸ They mainly concentrate their efforts on finding design principles for contracts that cope with moral hazard, private information and unforeseen circumstances, however.¹⁹ In this literature, the legal system is mainly seen as a tool to enforce obligations. Sometimes non-legal sanctions are included as well in the analysis, like reputation, hostage-taking, refusals to deal, or instruments making

¹² E. E. Maccoby and R. H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* (Harvard University Press, Cambridge, Mass., 1992).

¹³ The best example of how far this line of thinking can be extended is arguably Robert H. Mnookin, Scott R. Peppet and Andrew S. Tulumello, *Beyond winning : negotiating to create value in deals and disputes* (Belknap Press of Harvard University Press, Cambridge, Mass., 2000).

¹⁴ See Chapter III.E.

¹⁵ Carry Menkel-Meadow, ‘Toward Another View of Legal Negotiation: The Structure of Problem Solving’ (1984) 31 *UCLA Law Review* 754, Carry Menkel-Meadow, ‘The Trouble with the Adversary System in a Postmodern, Multicultural World’ (1996) 38 *Wm. & Mary L. Rev.* 5 and Robert A. Baruch Bush, ‘Alternative Futures: Imagining How ADR May Affect the Court System in Coming Decades’ (1996) 15 *The Review of Litigation* 455, 461. are just some of the earlier explorations in this direction.

¹⁶ See supra note ==.

¹⁷ See Ray D. Madoff, ‘Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution’ (2002) 76 *Southern California Law Review* 161.

¹⁸ See the ground-breaking work of Robert Axelrod, *The Evolution of Cooperation* (Basic Books, New York, 1984) and further developments in what now is called ‘cooperation theory’ as described in Robert Axelrod, ‘On Six Advances in Cooperation Theory’ (2000) *Analyse & Kritik* 130.

¹⁹ See for an overview of this research Paul Milgrom and John Roberts, *Economics, Organization and Management* (Prentice Hall, Upper Saddle River, NJ, 1992).

contracts self-enforcing.²⁰ This article suggests to include the process of cooperation itself into the area of enquiry, and to explore how cooperation could be optimized by fine-tuning the legal system.²¹ In Law and Economics writings there is little as yet about the processes by which parties can create value, and the building of mechanisms that could help them to do this in a better way.²²

Although the approach suggested in this article is not dependent on the framework of Welfare Economics, it is consistent with it where the increase of the well-being of individuals can be used as a yardstick for its plausibility.²³ The underlying belief is that we may be able to increase the well-being of individuals by fine-tuning legal rules and other institutions so that they stimulate individuals to cooperate effectively.

In the future, Behavioral Law and Economics might provide a theoretical framework for investigating the way the legal system can support negotiations.²⁴ It investigates deviations from rationality, and explores the consequences of cognitive errors for the design of legal system.²⁵ Behavioral Law and Economics already has strong links to Negotiation Theory, and it is likely to come up with more suggestions for improvements in the legal setting for negotiations.

II. WHY PROBLEM-SOLVING?

Why would the promotion of problem-solving negotiations be a valuable goal? We will see that individuals are not always better off when they use this method and why that is so (A). From the social perspective, however, it is preferable that negotiating parties try to problem-solve in at least some situations (B). Stimulating the use of the problem-solving method might have effects on third parties, though, interfere with other objectives of the legal system, like prevention of harm, optimal distribution (risk allocation and compensation), and minimizing administrative costs, or it might

²⁰ See, for instance, Oliver E. Williamson, *The Economic Institutions of Capitalism* (Free Press, New York, 1985) and Hugh Collins, *Regulating Contracts* (Oxford University Press, Oxford, 1999) 101 and 114.

²¹ See for a similar approach, based on a combination of economic arguments and sociological observations, Hugh Collins, *Regulating Contracts* (Oxford University Press, Oxford, 1999).

²² See Steven Shavell, *Foundations of Economic Analysis of Law* (Harvard University Press, Cambridge, Mass., 2004 (forthcoming)) == for a standard treatment of the issue of bargaining failure, which is often attributed to asymmetric information, and where the incentives proposed are direct regulation, assignment of property rights, liability rules, taxes and subsidies.

²³ Compare Louis Kaplow and Steven Shavell, *Fairness Versus Welfare* (Harvard University Press, Cambridge, Mass., 2002) ==.

²⁴ See, for instance, the descriptive work of Russell Korobkin, 'A Positive Theory of Legal Negotiation,' (2000) 88(1789) *Georgetown Law Journal*.

²⁵ Following the line of Cass R. Sunstein, Christine Jolls and Richard H. Thaler, 'A Behavioral Approach to Law and Economics' (1998) 50 *Stanford Law Review* 1471 and Russell B. Korobkin and Thomas S. Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2000) 88 *Calif. L. Rev.* 1051.

conflict with the ‘adversarial nature’ of that system (C). The following analysis is not a rigorous assessment of costs and benefits of accepting problem-solving as an extra objective for the legal system, if only because pursuing this is not likely to result in a fixed end state, that can be compared with the present situation. As usually is the case with an aspiration, it can lead to many different intermediate or final results. What we can do now is just make a preliminary inventory of where such costs and benefits might be located.

A. *The Private Perspective on Problem-Solving*

The problem-solving method was developed as prescriptive advice for individual negotiators. As such, it is fair to say, it has been moderately successful. Surely, it is taught and used all over the world, in many different contexts, from business to close personal relationships. It also became a framework for third party interventions in negotiations and it is firmly established in legal practice.²⁶ Transaction lawyers, litigators, and even judges in settlement conferences use it in order to find solutions that optimally suit the preferences of the parties, in particular when they have a continuing relationship. The problem-solving approach is an essential element of most mediation methods and underlies parallel developments in transaction practice like partnering.²⁷ Problem-solving also makes its first inroads into the legal system itself. Some jurisdictions introduced mandatory mediation for certain types of disputes, in which problem-solving is likely to be used frequently.²⁸ They are even experimenting with problem-solving courts.²⁹

On the other hand, problem-solving is certainly not applied universally. Positional bargaining is still endemic in legal practice. Many lawyers support the problem-solving method in principle, but do not use it regularly.³⁰ One of many possible explanations is that the positional method often ‘beats’ the problem-solving one. It takes two to tango. If a problem-solving negotiator is confronted with a positional bargainer, the process is probably more likely to be positional.³¹ Although negotiation

²⁶ Andrea Kupfer Schneider, ‘Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style’ (2002) 7 *Harv. Negotiation L. Rev.* 143, 164 (empirically measuring negotiation styles and clustering 36 to 64% of lawyers in groups behaving in a problem-solving manner)

²⁷ Partnering literature ===

²⁸ See for an overview, == =

²⁹ In the area of addiction, domestic violence, child neglect and quality-of-life crime, see *Problem Solving Courts* <www.problem-solvingcourts.org> accessed at April, 23, 2003.

³⁰ Milton Heumann and Jonathan M. Hyman, ‘Negotiation Methods and Litigation Settlement Methods in New Jersey: “You Can’t Always Get What You Want”’ (1997) 12 *Ohio St. J. on Disp. Resolution* 253 (reporting that 61% of the lawyers would like to see more problem-solving negotiation methods, but 71% of negotiations are carried out with positional methods against 16% with problem-solving methods).

³¹ Ronald J. Gilson and Robert H. Mnookin, ‘Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation’ (1994) 94 *Columbia Law Review* 509 and Milton Heumann and Jonathan M. Hyman, ‘Negotiation Methods and Litigation Settlement Methods in New Jersey: “You Can’t Always Get What You Want”’ (1997) 12 *Ohio St. J. on Disp. Resolution* 253, 266.

theorists also supply advice to negotiators that want to problem-solve, but are confronted with positional or difficult counterparts, lawyers may not resist too strongly the positional tendencies that come with their upbringing.³²

Another reason why problem-solving is not yet the method of choice in legal practice may be that it does not always yield the best results. When the parties in negotiations about a contract or in a dispute use the problem-solving method, identifying their interests, finding options for mutual gain, and dividing the pie fairly, they will do well on average, because they will usually create some value and be able to curb transaction costs. However, attempts to get a superior deal by exploiting the other party, ‘fishing for suckers’, are sometimes successful.³³ Which approach to negotiation is optimal for an individual party in a negotiation process is difficult to say because it depends on the way the other party reacts. This can be described in terms of two fundamental tensions that are difficult to manage for individual negotiators striving for the best outcome for themselves or for their clients.³⁴

There is a tension between creating value and distributing value³⁵ and one between empathy for the other party’s interests and assertiveness regarding one’s own interests. Obtaining the best result is a matter of jointly creating value, but also of getting the best share when value is to be distributed. Assertiveness about one’s own preferences, or knowing what really is important for oneself, requires specific skills and expressing them has specific effects on the other party. Empathy in relation to the interests of the other party, understanding what the interests of another person are, calls for another attitude and skills. In the interaction with the other party, it may be difficult to find the right balance.³⁶ This is even more complicated because openness about one’s interests sometimes leads to exploitation by the other party. When the other party knows more about the first party’s preferences, and has some power over the realization of these interests, it may use this power to its own advantage.

³² See, notably, William Ury, *Getting Past No: Negotiating with Difficult People* (Bantam Books, New York, 1991).

³³ Compare Robert H. Mnookin, Scott R. Peppet and Andrew S. Tulumello, *Beyond winning: negotiating to create value in deals and disputes* (Belknap Press of Harvard University Press, Cambridge, Mass., 2000) 322.

³⁴ Ibid. (mentioning as a third tension the one between principals and agents, the conflict of interest that exists between clients and lawyers, for instance).

³⁵ Also known as ‘the negotiator’s dilemma’, see David Lax and James Sebenius, *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain* (Free Press, New York, 1986) == and Howard Raiffa, John Richardson and David Metcalfe, *Negotiation Analysis; The Science and Art of Collaborative Decision Making* (The Belknap Press of Harvard University Press, Cambridge, Mass., 2003) 85. or the ‘mixed-motive’ nature of negotiation situations, see Roy J. Lewicki, David M. Saunders and John W. Minton, *Negotiation* (3rd ed., Irwin/McGraw-Hill, Boston, 1999) 136.

³⁶ See Robert H. Mnookin, Scott R. Peppet and Andrew S. Tulumello, *Beyond winning : negotiating to create value in deals and disputes* (Belknap Press of Harvard University Press, Cambridge, Mass., 2000) 44-68.

B. *The Social Perspective on Problem-Solving*

From society's point of view, however, it is much easier to say what optimal negotiation and dispute resolution is. From this angle, both tensions tend to disappear.

1. Value Creation

Creating value generally leads to net social gains because the preferences of individuals are better met. The well-being of the individuals involved in the negotiations increases by definition if they find solutions that fit their interests optimally. The procedures for generating and evaluating alternatives that are part of the methods of integrative negotiations aim at finding Pareto improvements, making one party better off without making the other party worse off.³⁷ Thus, when people are encouraged to use these methods, when they follow these leads, and if these methods are any good, they are likely to find contracts and solutions for disputes that are more efficient.

In many situations attempts to claim value are likely to have no net effect on the well-being of the individuals concerned. How value is distributed between the parties in negotiations, including those about disputes, is something that society by and large leaves to them. Nowadays, legal systems allow prices and similar mechanisms that distribute value in contracts to take almost any value, with very few restrictions. If both parties are well informed and feel they are better off by settling a dispute, the way they divide the surplus determined by their respective batnas is, by and large, their business. So, claiming value at the expense of creating value is socially undesirable in these situations.³⁸

In other situations, the legal system is concerned with distributive issues. However, law mainly influences the distributive outcomes of contract negotiations and settlement negotiations indirectly. It does this first by determining, at least to a certain extent, what the court would do with a dispute if it is not settled or if an issue is left open in a contract. Law determines batnas.³⁹ Secondly, the applicable legal rules will have some convincing power of their own; they give neutral objective criteria to settle the distributive issues that will often be more acceptable to the parties than proposals from their opponents. If these legal rules have distributive effects that increase well-being, it is desirable that they are followed. Deviations of them are likely to decrease well-being, and claiming value by one party will sometimes lead to such deviations. When both parties claim value, their claiming behavior probably will, on balance, lead

³⁷ See Roy J. Lewicki, David M. Saunders and John W. Minton, *Negotiation* (3rd ed., Irwin/McGraw-Hill, Boston, 1999) 118-128. and for more quantitative and rigorous approaches Howard Raiffa, John Richardson and David Metcalfe, *Negotiation Analysis; The Science and Art of Collaborative Decision Making* (The Belknap Press of Harvard University Press, Cambridge, Mass., 2003) 226-268.

³⁸ A possible escape from this conclusion is that the welfare gains from winning extra value for the winner (i.e. the positive feelings associated with successfully grabbing more value) are bigger than the welfare losses that the loser experiences from losing (i.e. the negative feelings associated with being exploited). Apart from the normative implications if this were the case, this is not very likely.

³⁹ See Chapter III.D.

to the distributive effects envisaged by the rules. Then, however, claiming behavior may lead to unnecessary transaction costs.

This may especially be the case if negotiations take place within relationships. Pursuing preferences increasingly takes place within a relationship. A good example of this overall tendency is the shift in marketing from inducing individual sales to building a long-term relationship with the customer. This shows that even the paradigmatic non-relational contract, the consumer sales transaction, is just the same 'relationized'. Even tort many times takes place in within a relationship, or is relationized afterwards when people involved in accidents, or victims and insurance claim adjusters build a relationship to cope with the situation. Usually, a relationship will create more value for both parties if the tension with distributing value is managed well.

2. Empathy and Assertiveness

The tension between empathy and assertiveness likewise tends to disappear when the negotiations are examined from society's point of view. Both seem socially valuable, because they make it more likely interests are identified, and thus also that value is created.⁴⁰ Insofar as problem-solving negotiations stimulate empathy and assertiveness, encouraging them thus seems to be a valuable goal for society in general. Society as a whole also seems to have no interest in keeping people's preferences - their wishes, needs and fears - secret.⁴¹ Individuals may wish to do that for tactical reasons, for fear of their weaknesses being used against them by powerful others, or for reasons of privacy. Stimulating people to be open about their interests, at least in the context of negotiations, seems to be the preferable route from the social point of view.⁴²

So, from a social point of view the parties should create value. They should respect some limits on distributing value, and probably even distribute value fairly. But they should certainly not try to grab a bigger part of the value at the expense of jointly creating more value. Furthermore, the benefits of adding problem-solving as a goal for the legal system could, depending on how this is appreciated, entail more assertiveness and empathy, and thus more openness about interests.

⁴⁰ In addition, assertiveness and empathy might be preferences themselves. Knowing and expressing oneself and understanding others may be valuable assets for individuals. But assertiveness could also lead to less welfare, if interests are asserted that can not be met, and cause negative feelings, that would not be there when the interests would not have been identified in the first place. Likewise, empathy could lead to negative emotions like sorrow or regret.

⁴¹ Compare Jennifer Gerarda Brown and Ian Ayres, 'Economic Rationales for Mediation' (1994) 80 *Virginia Law Review* 323 (indicating that mediation can mitigate adverse selection and moral hazard).

⁴² There may be a relation, though, with the extent to which individuals who are open about their interests are protected against exploitation. See also Chapter III.G where I make some remarks on the role of trust in negotiations.

C. Possible Disadvantages of Supporting Problem-Solving

Or does the use of the problem-solving method have side effects or costs that neutralize or even outweigh the advantages? We will first look at external effects, then to the possible interference with other goals of private law, and finally to the possible benefits of the adversarial system that might be foregone by the increased use of problem-solving. This chapter can be somewhat more concrete than the preceding ones, because there is research on the relationship between various forms of dispute resolution and prevention that gives some idea about the nature of these interactions.

1. Negative Impact on Third Parties?

These side effects could, for instance, be negative externalities: damage to others than the parties involved in the transaction or dispute. However, because problem-solving is a method for negotiation, it will, as a rule, not influence people outside the negotiation arena.⁴³ What is more, the problem-solving method brings nothing new to the system of private law in this respect. Private law, in principle, deals with two-party relationships. If a third party is influenced negatively by what the two parties do, that third party usually has a line of action in the two-party framework against party one or two, or against both: an action in tort, for instance.

So when problem-solving is used as a tool to improve the system of private law, negative externalities of the method, if any, would show up in that system by that route. If, for instance, using the problem-solving method would increase the likelihood that the parties would create value for themselves at the expense of a third party, this third party would have an action in private law against them. The problem-solving method could again play its role in this action. So, although external effects may exist, they are unlikely to be very substantial.

2. Impact on Other Goals: Prevention

Introducing another goal for private law, relating to the interaction between parties when they negotiate transactions and disputes, could also impair the traditional goals of private law. It is likely that a change in the way transactions are negotiated and disputes are resolved would influence the incentives provided by the legal system to take measures to prevent damage. But how this would happen, is hard to say. There are many studies that have investigated the effects of different procedural regimes on prevention.⁴⁴ These studies suggest that procedural reforms may influence the level of prevention by changing the number of suits brought, the litigation costs for

⁴³ Some critics of ADR, though, hold that creative solutions of disputes tend to go at the expense of third parties, see David Luban, 'Settlements and the Erosion of the Public Realm' (1995) 83 *Geo. L.J.* 2619, 2627. To my knowledge, there is no empirical research supporting this allegation. Furthermore, the real issue is whether problem-solving negotiations do worse in this respect than other current forms of dealing with differences, like settlements obtained by positional negotiations.

⁴⁴ See for a recent overview Bruce H. Kobayashi and Jeffrey S. Parker, 'Civil Procedure: General' in Bouckaert and De Geest (eds), *Encyclopedia of Law and Economics* (Edward Elgar, Cheltenham, 2000) 1-26.

defendants, and the distribution of outcomes of suits or settlements.⁴⁵ But it is not easy to use this literature for a rigorous cost/benefits analysis of a system of private law with problem-solving as an additional goal. Most of this literature deals with the system of private law in isolation, assuming that there are no other incentives than private law sanctions, although there are many of those, and they are increasingly taken into consideration.⁴⁶ Moreover, this literature is often based on the assumption that individuals act rationally, an assumption that may or may not be questionable in general, but is taken to the limits of its usefulness when applied to people in a dispute, whose behavior is difficult to model in terms of rational decision making, because of cognitive imperfections and the sheer complexity of the information they have to process.⁴⁷ Although this test might therefore not be a decisive one, evaluating the impact of adding problem-solving as a goal for private law on the basis of the Law and Economics literature about dispute resolution, with its stress on prevention, would still give valuable information about the way a system such as the one proposed would influence harmful conduct.

This literature generally sees litigation costs as a social waste, caused by failure to predict the court decision or by other settlement failures, unless the parties seek precedents or want to preclude future litigation by others.⁴⁸ Litigation should be discouraged when the deterrence benefit (the reduction in harm prevented less the costs of preventive measures) is lower than the litigation costs.⁴⁹ So, lower litigation costs are desirable in principle, and more problem-solving in dispute resolution could contribute to lowering litigation costs. Lower litigation costs will in turn lead more people to bring suit, and thus to better prevention.

There is, however, a possible trade-off with accuracy. If litigation costs are linked to lower quality outcomes, for instance because the outcomes of litigation become erratic, people who should take preventive measures will experience lower incentives to take these measures and will not take optimal care. On the other hand, individuals who need not take care may be induced to take unnecessary preventive measures.⁵⁰ This literature strongly suggests that extra investments in accuracy become wasteful at a certain level. Whether the increased use of the problem-solving method would reduce the accuracy in adjudication, and to which level, remains to be seen.

⁴⁵ See Louis Kaplow and Steven Shavell, *Fairness Versus Welfare* (Harvard University Press, Cambridge, Mass., 2002) 225-227 and 248-250.

⁴⁶ See note === (Collins).

⁴⁷ See Lee Ross and Constance Stillinger, 'Barriers to Conflict Resolution' (1991) 7 *Negotiation J* 389 and Kenneth J. Arrow, et al. (eds), *Barriers to Conflict Resolution* (W.W. Norton & Company, New York, 1995).

⁴⁸ Bruce H. Kobayashi and Jeffrey S. Parker, 'Civil Procedure: General' in Bouckaert and De Geest (eds), *Encyclopedia of Law and Economics* (Edward Elgar, Cheltenham, 2000) 1-26.

⁴⁹ Louis Kaplow and Steven Shavell, *Fairness Versus Welfare* (Harvard University Press, Cambridge, Mass., 2002) 227 and 235. and Keith N. Hylton, 'Agreements to Waive or Arbitrate Legal Claims: An Economic Analysis' (2000) 8 *Sup. Ct. Econ. Rev.* 209, 235.

⁵⁰ Warren F. Schwartz, '0790 Legal Error' in Bouckaert and De Geest (eds), *Encyclopedia of Law and Economics* (Edward Elgar, Cheltenham, 2000) 1029-1040.

A related issue is that changes in dispute resolution systems may alter the expected outcomes of disputes and thus the incentives, for instance because they reduce payments to plaintiffs.⁵¹ A recent article summarizes and extends the literature on the effects of compromise verdicts on prevention.⁵² Compromise verdicts are the type of verdicts that apportion liability in the case of uncertainty over liability, or more conventionally, in the case of comparative negligence or uncertainty over causation. They are very relevant for our topic because the use of objective criteria as a means to distribute value is likely to raise the number of compromises in proportion to the number of all-or-nothing outcomes.⁵³ The article criticizes an earlier discussion⁵⁴ reporting better prevention by compromise verdicts and comes to the tentative conclusion that a system of compromise verdicts will not have an effect on prevention compared to an all-or-nothing system.⁵⁵

As we will see, the problem-solving method could also entail avoiding the blame frame.⁵⁶ Rules of conduct would be less central in tort and other disputes, and would be replaced by other criteria for distributing losses such as (causal) contribution. This is not a new issue, however. The standard Law and Economics approach to the choice between negligence, liability based on rules of conduct, and strict liability, based on causal contribution, is that what matters is that the defendant is made to pay.⁵⁷ Whether the basis is negligence or strict liability mainly affects the litigation costs, the level of activity, and the distributive effects, but not prevention. Apparently, these scholars did not find it necessary to adjust their models to take into account that saying that a defendant has acted wrongly has more preventive effect than saying the defendant is responsible for the damage.⁵⁸ The idea is that the defendant will infer that preventive measures are to be taken when they are cost effective.

A fuller account of the effects of adding problem-solving as a goal of private law should include indications that prevention is better served by systems that do not

⁵¹ Steven Shavell, 'Alternative Dispute Resolution: An Economic Analysis' (1996) 24 *J. Legal Studies* 1, 20.

⁵² Michael Abramowicz, 'A Compromise Approach to Compromise Verdicts' (2001) 89 *California Law Review* 231.

⁵³ See III.D.3

⁵⁴ Steven Shavell, 'Uncertainty over Causation and the Determination of Civil Liability' (1985) 28 *J.L. Econ.* 587.

⁵⁵ Michael Abramowicz, 'A Compromise Approach to Compromise Verdicts' (2001) 89 *California Law Review* 231, 275 (stating also that a mixed verdict system, that is a system where judges or juries would give all-or-nothing verdicts when they have a relatively high confidence in their determination, but compromise verdicts in more uncertain cases, would be superior to the compromise system).

⁵⁶ See Chapter III.F.

⁵⁷ Hans-Bernd Schäfer and Andreas Schönenberger, '3100 Strict Liability Versus Negligence' in Bouckaert and De Geest (eds), *Encyclopedia of Law and Economics, Volume II. Civil Law and Economics* (Edward Elgar, Cheltenham, 2000) 597-624.

⁵⁸ See for an approach that includes 'guilt' and 'virtue' as incentives, which approach could be extended to include blame and could be applied to the issue of strict liability versus negligence liability, note == (Kaplow/Shavell, Moral Sentiments).

focus on individual blame, but on contribution, especially in complex institutions where many people interact, such as hospitals.⁵⁹ When the blame frame is abandoned, the parties may feel more free to discuss possible causes of damage and possible remedies. What we can conclude, for now, is that there are no overwhelming signals from the existing literature that adding problem-solving as a goal for private law would seriously inhibit its preventive effects, and that it is worth investigating whether it may contribute to better prevention in some situations.

3. Optimal Distribution (Risk Allocation and Compensation)

A second traditional goal of tort law and the law of contracts is what we may call optimal distribution. It includes contributions to the well-being of individuals through the allocation of risk, by granting risk-averse parties compensation, for instance. And it also covers other possible reasons for redistribution that may be reflected in the rules of private law, such as allocation to ‘needy’ persons.

As to these distributive issues, intuition might suggest that stimulating the problem-solving method would lead to better results given that it stresses fair distribution against objective criteria.⁶⁰ As long as these objective criteria, which can be set by the legal system, reflect the desired level of compensation and access to court does not become more costly,⁶¹ the goals of optimal distribution or compensation seem not to conflict with the goal of problem-solving. There may be worries that the problem-solving method will allow some parties to escape their compensation duties wholly or partly because the system would become less threatening to people who try to run away from their compensation duties, but that is a matter of prevention, which we have already discussed.

4. Controlling Administrative Costs

The last traditional goal of the system of private law is the control of administrative costs. Transaction costs, including the costs of contracting, will sometimes be higher when problem-solving bargaining methods are used and will be lower at other times. Especially in simple transactions like consumer sales, where the pie is fixed, distributive bargaining can be less costly than problem-solving. Generally, if problem-solving does not create enough extra value to compensate for the extra costs, distributive bargaining will be superior from a social point of view. In more complex situations, when the parties already have a relationship, for instance, problem-solving will often be preferable.

The same basic reasoning applies to dispute resolution. Because the administrative costs of the tort and dispute resolution system are huge, adding a goal that promises reductions in these costs in at least some cases is probably one of the main reasons why an additional goal of problem-solving would be welcomed.

⁵⁹ See Chapter III.F.

⁶⁰ See Chapter III.D.3.

⁶¹ Compare Chapter III.C.

5. Losing the Benefits of the Adversarial System?

Many of the issues that would come up when problem-solving were admitted as such an additional goal have been raised in the more general debate on the pros and cons of adversarial litigation.⁶² This debate is far from ready to be concluded. But, for many, it is a non-starter: the adversarial system has become so engrained in society that it cannot be changed. Moreover, the comprehensive alternatives that were formulated for it, inquisitorial processes and increased government regulation, have obvious drawbacks as well. Some scholars have touched upon other alternatives, but they have not offered a sufficiently complete description of them.⁶³

For the purposes of this article, it is not necessary to take position in this debate because the essence of what is being discussed is the addition of tools for better contracting, an area where the adversarial system only provides background incentives, and the transformation of dispute resolution for some disputes. It does not question the adversarial system as a means to enforce unambiguous obligations, to uncover fraudulent conduct, or to deal with criminal prosecution.

Still, some of the lines of thought from this debate are useful when we try to assess the possible interaction between problem-solving and the adversarial system. Defenders of the adversarial system point to the following strong points. It prevents wrongful conduct by exposing and punishing it. It stresses the autonomy and individual dignity of human beings, especially in confrontations with governments and other powerful institutions, among other things because it embodies the fundamental right to be heard.⁶⁴ It takes the heat out of social struggles by transforming them in courtroom battles. It is the most effective way to determine the truth.⁶⁵ It is also an indispensable tool for looking at disputes from different perspectives, in particular because adversary presentation seems the only effective means of combating the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known.⁶⁶

These benefits of the adversarial system are appealing, and they warrant a much more thorough discussion than is possible here. At first sight, however, some of these benefits may not be endangered, or even be enhanced if problem-solving would be

⁶² See for a recent overview of this debate Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press, Cambridge, Mass., 2001) (critical of the adversarial system), Monroe H. Freedman, 'Our Constitutionalized Adversary System' (1998) 1 *Chapman Law Review* 57 (supportive) and Deborah R. Hensler, 'Suppose It's Not True: Challenging Mediation Ideology' (2002) *University of Missouri Journal of Dispute Resolution* 81 (discussing empirical studies on the preferences of litigants).

⁶³ Carry Menkel-Meadow, 'The Trouble with the Adversary System in a Postmodern, Multicultural World' (1996) 38 *Wm. & Mary L. Rev.* 5 (proposing a variety of methods for different types of disputes).

⁶⁴ See Monroe H. Freedman, 'Our Constitutionalized Adversary System' (1998) 1 *Chapman Law Review* 57.

⁶⁵ *Ibid.*

⁶⁶ Lon L. Fuller, 'The Adversary System' in Berman (ed.) *Talks on American Law* (1971) 24.

introduced as an element of the system. Being heard is an essential element of problem-solving as well.⁶⁷ Autonomy and dignity are central values in this process, although we will see that the autonomy of the participants in a problem-solving procedure may have a different character.⁶⁸ Protection of individual human dignity and interests in relation to powerful government or other institutions can be given within the problem-solving approach by improving access to court.⁶⁹ Reducing accusations based on attribution of blame and intent when these are mainly means to obtain access to compensation might even lead to extra protection of human dignity.⁷⁰ Looking at a situation from different perspectives could be one of the central qualities of problem-solving adjudication, if performed in a facilitating manner, because it not only stimulates the parties to voice these perspectives, but even to give recognition in regard of the perspective of the other party.⁷¹

Taking the heat out of social struggles can probably also be done by a more cooperative process than a ‘courtroom battle’, although there may be situations in which a truly adversarial debate is the best outlet for the emotions involved. There are many striking examples of adversarial litigation uncovering the truth. Whether it is always the most effective and cost-efficient way to determine the optimal amount of truth is another issue. Increasingly, discovery is undertaken on terms determined by the parties in cooperation and, if they cannot agree, by court intervention. This suggests it could be made into a component of a problem-solving procedure, at least in some situations. The same goes for adversary presentation in situations in which the interpretation of past events or a legal issue is the key to the solution of the dispute. Finally, although ADR processes are often criticized for their inability to create a sufficient number of precedents, there is nothing in the problem-solving method itself that makes it impossible to use the results as input for the way future disputes between other parties are decided.⁷²

In sum: it is too early to assess how problem-solving as an additional goal for private law would affect the other goals of the system or the valuable elements of the

⁶⁷ See hereafter, Paragraph III.A.1 (regarding the substantive, procedural, and relational interests of the parties, as well as their interests ‘in principle’, that are the input for problem-solving) and III.E.1 (regarding the active listening skills that are provided by dispute resolution technology and regarding the empowerment and recognition sought in these processes).

⁶⁸ See Paragraph III.G.3 (regarding autonomy in relation to the interests a person wants to bring into the negotiations, the choice for a batna, and the choice for a certain outcome, but stressing the limited usefulness of the idea of autonomy in processes where cooperation from another person is sought amicably, or through court intervention).

⁶⁹ Paragraph III.C.3 (stressing the importance of reducing the bargaining range by improving the batna of negotiating parties and discussing the quality of the legal system as ‘batna-provider’).

⁷⁰ Paragraph III.F.3 (regarding situations in which the defendant did not violate clear rules of conduct or only rules of a secondary nature).

⁷¹ Paragraph III.E.1

⁷² Objective criteria developed by courts, by mediators, or even by the parties themselves, can be used in future cases, for instance. If incentives to make the criteria available to other disputants are needed, the State could pay for the production of these ‘public goods’. See also Bianca Fromm, ‘Bringing Settlement out of the Shadows’ (2001) 48 *UCLA Law Review* 663.

adversarial system. On the other hand, it might contribute to solutions for some of the drawbacks the present system has.

III. PROBLEM-SOLVING AND THE LEGAL SYSTEM

How the problem-solving method could inspire change in the legal system will now be discussed more in detail. For this analysis, I will distinguish seven key elements of the problem-solving method, which first will be explained briefly. For each element, I will then consider the rules and practices of private law that are already consistent with the problem-solving method as well as those which conflict with it. Finally, I will discuss how these rules and practices could be brought in line with the problem-solving method. This discussion is preliminary. Many important aspects of private law will not be discussed.

A. *Interests*

1. 'Focus on interests, not on positions'

Problem-solving negotiations are sometimes called interest-based negotiations, because they take interests and not positions as their focus. The idea is that the negotiating parties try to protect their interests, their wishes, fears and desires, as the items that have to be protected by negotiated outcomes. The negotiation literature distinguishes four types of interests.⁷³

Substantive interests include economic and financial needs, but also any other individual preference of a person that he or she wants to protect through the negotiations. In negotiations with neighbors, a person strives for a peaceful and quiet living environment. Another person needs new opportunities for personal growth and sources of income in negotiations with his former employer. A manufacturer of household appliances needs reliable components and discusses this with a supplier.

Process interests relating to the way negotiations take place or a dispute is settled are also relevant, however. Inferences about what different people may value as procedural interests can be made from the literature on participant satisfaction with dispute resolution processes, which posits a wide array of such interests.⁷⁴ Procedural justice theorists often focus on third party interventions and stress elements like impartiality of a neutral decision maker, giving grounds for decisions, neutrality of the

⁷³ David Lax and James Sebenius, *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain* (Free Press, New York, 1986) and Roy J. Lewicki, David M. Saunders and John W. Minton, *Negotiation* (3rd ed., Irwin/McGraw-Hill, Boston, 1999) 115-117.

⁷⁴ Compare Nancy A. Welsh, 'Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?' (2001) 79 *Wash. U. L.Q.* 787 in the context of mediation. See also Louis Kaplow and Steven Shavell, *Fairness Versus Welfare* (Harvard University Press, Cambridge, Mass., 2002), who question the value of the empirical work in this area because it does not seem to have been designed in a manner that could identify or quantify actual tastes for procedures. Still, the literature gives useful information about what types of procedural interests could be relevant to some people.

process, trust, treatment of participants, and voice or opportunity to be heard.⁷⁵ The ‘group value model’ suggests that people value procedures that encourage participation and confirm membership status.⁷⁶ The ‘interactional justice’ approach advises that people value the interpersonal treatment they get and attach importance to truthfulness, respect, propriety of questions, trust, friendliness, openness and justification in the interaction.⁷⁷

Relationship interests refer to the intrinsic value people or organizations can put on a relationship, but also to the instrumental calculation of the future benefits and costs of such a relationship. There are reasons to believe that these interests are increasingly relevant. Connections not only to spouses, parents and children, but also to friends, neighbors, acquaintances, employees, business partners, suppliers, customers and advisers are now commonly described as relationships, signaling that the parties have certain expectations about these connections. Some researchers even see the ‘need to belong’ as a fundamental human motivation.⁷⁸

Finally, people have interests in principle. They value ideas about what is fair or right, either because they intrinsically or instrumentally want to be treated that way or because they even want to see these principles being applied more generally. People have ‘tastes for notions of fairness.’⁷⁹

Interests come in different layers. Beneath the need for high-quality components lies the need of the manufacturer to be able to deliver attractive products; beyond that, there are the interests of the people employed by the manufacturer to preserve their income and their reputation. Underlying human needs that are often relevant in negotiations, whether in transactions or in disputes, are basic psychological and safety needs, but also the need for recognition, respect, affirmation, and self-actualization.⁸⁰ These needs not only apply to individuals, but also to groups with which these individuals identify, including the organizations in which they live or work. This makes a broad conception of interests equally relevant for business transactions and

⁷⁵ A.E. Lind and T.R. Tyler, *The Social Psychology of Procedural Justice* (Plenum, New York, 1988), A.E. Lind, et al., ‘In the Eye of the Beholder: Tort Litigants’ Evaluations of the Experience in the Civil Justice System’ (1990) 24 *Law and Society Review* 953 and Deborah R. Hensler, ‘Suppose It’s Not True: Challenging Mediation Ideology’ (2002) *University of Missouri Journal of Dispute Resolution* 81.

⁷⁶ A.E. Lind and T.R. Tyler, *The Social Psychology of Procedural Justice* (Plenum, New York, 1988).

⁷⁷ R.J. Bies and J.S. Moag, ‘Interactional Justice: Communication Criteria of Fairness’ in al. (ed.) *Research on Negotiation in Organizations* (JAI Press, Greenwich CT, 1986) 43-35 and R. Folger and R. Cropanzano, *Organizational Justice and Human Resource Management* (Sage Publications, Thousand Oaks, CA, 1998).

⁷⁸ R.F. Baumeister and M.R. Leary, ‘The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation’ in Higgins and Kruglanski (eds), *Motivational Science, Social and Psychological Perspectives* (Psychology Press, Philadelphia, 2000) 24-45..

⁷⁹ Louis Kaplow and Steven Shavell, *Fairness Versus Welfare* (Harvard University Press, Cambridge, Mass., 2002) 21 and 431-436.

⁸⁰ Roy J. Lewicki, David M. Saunders and John W. Minton, *Negotiation* (3rd ed., Irwin/McGraw-Hill, Boston, 1999) 116-117.

disputes, though not necessarily to the same extent as for interactions between individuals.

2. Rights and Interests

In the existing legal system, the focus is on rights. Often, rights reflect underlying interests. But not every interest is covered by a right. The most important rights granted by private law are property rights, remedies relating to the performance of contracts, and remedies that protect against tortious conduct. These rights cover important substantive interests: property rights protect interests connected to the possession and use of goods. Contractual rights cover interests in obtaining products, services, or money. Other substantive interests, however, like health interests or those related to leisure activities, are less completely protected. The recognition of substantive interests is an ongoing process. The debates among lawyers on rights to privacy, on protection against pure economic loss, and on new heads of damages can be interpreted as interests having to struggle for acceptance by the legal system. Another problem is that private law remedies, such as damages, injunctions, or specific performance, sometimes only offer indirect protection. The remedy does not correspond one-to-one with the interest. When you worry about your future health, the remedy of damages does not directly address this fear.⁸¹

We saw that process interests relating to the way a transaction is negotiated or a dispute is settled are also relevant. The rules of contract law protect some procedural interests, the preference of most people to be told the truth, for instance, through the rules regarding fraud. Generally, however, the procedure of contracting is rather undefined. Contract law does not have much to say about the way parties could communicate in order to preserve process interests like confirmation of membership in the group, respect, friendliness, and justification.⁸² Similarly, the law and practice relating to dispute resolution only partially protects procedural interests like voice, neutrality, and impartiality. The ability to voice opinions is limited because the parties cannot always communicate themselves, but have to speak through lawyers. Another restriction on voicing opinions and interests is that the procedure before a court concentrates on substantive issues and not every substantive issue is translatable into a right. Any one who has been in a courtroom knows that the parties sometimes want to speak about matters other than the legally relevant ones.

Relationship interests, the intrinsic value people or organizations can put on a relationship, and the instrumental calculation of the future benefits and costs of a relationship, also have difficulties finding their place in the legal system. There are several reasons why private law has problems with valuing relationships. One of them is that contract law and tort law are built on the autonomy of individuals and their

⁸¹ Compare *Norfolk & Western Railway Co. v. Ayers et al.* (2003), Supreme Court of the United States relating to mental anguish damages resulting from the fear of developing cancer.

⁸² See note ==

preferences. The interaction between people, which is what defines their relationship, is seen as a sequence of individual acts.⁸³

The ideas people have about what is fair or right, in their specific situation or in general, their ‘tastes for notions of fairness’, are protected in the sense that they sometimes can ask a court to confirm or reject these ideas. They can voice them if these tastes fit in the picture their lawyers present and the court finds them legally relevant. Their tastes for notions of fairness, however, might not coincide with the fairness ideas that are embedded in the legal system.

This preliminary analysis of the way interests are reflected in rights is disquieting; the picture that seems to emerge is that private law does not have a natural place for all interests that are relevant in the interactions between people that are governed by private law. Is this worrisome? Presumably it is. The incomplete protection of interests is likely to place strain on the system that may be avoidable. A well-documented cause of litigation is, for instance, that people feel badly treated by others who are involved in traumatic experiences, like patients and relatives who suffer from the adverse effects of medical treatment. What they expect is a ‘sorry’, or at least an open acknowledgement of empathy.⁸⁴ Their rights do not directly protect such needs, however, and the legal system sometimes even discourages apologies by allowing them as proof of liability. This is but one example of interests relevant to the dispute in its initial phase not being covered by rights and therefore not having a natural place in litigation or in the legal negotiations that precede it. If certain interests cannot be protected by the legal system at all, or only incompletely, so that they have to be wholly or partly dropped by the interested party, this is likely to cause frustration and related negative emotions.

These negative feelings are not only an extra harm by themselves, but they can also complicate the process of dispute resolution. Sometimes it is possible to keep these interests on the bargaining table, by exaggerating other interests that are better covered by rights and using these as bargaining chips: a person wanting protection of his or her procedural and relational interests through an apology is building a damage claim on facts that would, by themselves, not be sufficient reason to sue. This again complicates the resolution of disputes in negotiations and in court as interests that are wholly or partly faked enter the dispute. Disputants may also have to hide their real interests, because their bargaining position in the ‘litigotiation’ game would deteriorate if their real interests became known.

⁸³ Relational contract theory has tried to cope with this issue, see I.R. Macneil, *The New Social Contract, An Inquiry into Modern Contract Relations* (Yale University Press, New Haven, 1980) and for a recent overview of the Law and Economics view on the subject Robert E. Scott, ‘The Case for Formalism in Relational Contract’ (2000) 94 *Nw. U. L. Rev.* 847.

⁸⁴ See, for instance, Jonathan R. Cohen, ‘Advising Clients to Apologize’ (1999) 72 *S. Cal. L. Rev.* 1009 and Erin Ann O’Hara and Douglas Yarn, ‘On Apology and Consilience’ (2002) *The Washington Law Review* (discussing the different proposals for reform of the rules of evidence in order to accommodate apologies and providing a theoretical framework coming from evolutionary biology).

3. 'Taking Interests Seriously'

Why does private law only protect a selection of the things valued by humans? Is this just a matter of a tradition that becomes outdated in times when we have discovered many other interests worthy of protection? Or is there an inherent reason for a limited perception of interests that can be protected directly through legal rights? Is the condensation that takes place when interests are protected through rights a necessary one, because it entails a useful reduction of complexity, for instance? One of the reasons that private law protects 'stylized' interests through rights could be that this is the only feasible way to deal with the endless variety of individual interests and the ways they can clash. Or will the actual interests always reappear so that this reduction of complexity is only a temporary and maybe even a delusory one?

For now, we may at least observe that many fierce debates in private law have to do with acknowledgement of interests, the things people value, by the legal system. A systematic study of the way interests are protected by private law could reveal where the next legal battles can be expected, and probably even their outcomes, as we may expect that interests that many people share and value will eventually become protected by a right. Such an analysis could, for instance, be done for each of the four types of interests that we can distinguish: substantive, procedural, relational, and interests in principle. Taking the message seriously that interests, the real preferences of people, are what matters, could thus be a powerful tool for understanding new developments in private law, and even accelerating them. Making the legal system more responsive to interests is likely to increase human well-being.

In legal practice, lawyers designing contracts could become more aware of procedural and relational interests, and might be able to accommodate them through contractual solutions. In partnering contracts, for instance, it is not uncommon to design charters of cooperation in which the parties define principles for their communication and for their approach to possible disputes.⁸⁵ Such programs could be extended to other contracts regarding intensive relationships. More speculatively, the default rules regarding formation of such contracts could be linked to guidelines for negotiating this type of charters or legal systems could find other ways to stimulate ways of contracting that are more sensitive to procedural and relational interests.

If private law could find ways to improve the way it covers interests, its processes could also become less perturbed by mismatches between rights and interests. People would feel less need to invoke rights that are not backed by genuine interests, and they would have to struggle less for legal recognition of real interests. Whether a greater protection of interests through private law is realistic, however, is not just a matter of acknowledging interests, giving people access to the legal system to have their 'interests taken seriously.' The legal system also has to cope with conflicting interests.

⁸⁵ See ===

B. Value Creation

1. 'Invent options for mutual gain'

This brings us to the next step in the problem-solving process: finding solutions that maximally accommodate the interests of both parties. When they have identified the underlying interests, something that can be difficult for many reasons,⁸⁶ the parties should try to find a range of solutions that serve the set consisting all their relevant interests optimally. These are solutions located at the Pareto-frontier, where it becomes impossible to make one party better off without making the other party worse off.⁸⁷ Take again a dispute between a long-time supplier of components such as memory chips, and a manufacturer of household appliances about the quality of the chips. The manufacturer is worried about the quality, because performance tests show the chips do not meet the specifications, and he is angry with the supplier for his initial denial of this. The supplier has had an isolated manufacturing problem and some shortage in qualified personnel. They might explore a number of possible elements of solutions: temporarily exchanging personnel, exchanging test results, temporarily buying chips from another source, testing the final products in order to see whether their quality is impaired by the lower quality chips, new procedural agreements about self reporting of quality problems by the supplier, an apology for the miscommunication, letting other employees on both sides be the contacts, building a stronger relationship by letting people interact socially, or terminating the cooperation in a coordinated manner that minimizes damage.

This value creation is indeed a creative process in which the parties look for solutions that satisfy one or more interests without hurting other interests that the parties have, or, if this is not possible, with minimal damage to these other interests. It is not always easy to find solutions that meet the substantive interests because the resources may be limited. Exploring the next layers of interests below the superficially relevant ones may disclose new opportunities for value creation, however. It is often less difficult to accommodate procedural and relational interests because the price of meeting them is usually not high, and the value for the person invoking them can be substantial. Showing respect or making an apology requires only a little effort and sincerity.

In order to optimize value creation, parties are commonly advised to list their interests, often literally by writing them down on a flip-over, and then brainstorm about solutions that best suit them.⁸⁸ At this stage, they should generate many different solutions without evaluating them.⁸⁹ To begin with, the solutions that could possibly

⁸⁶ See *infra* notes == to == and accompanying text.

⁸⁷ Max H. Bazerman and Margaret A. Neale, *Negotiating Rationally* (The Free Press, New York, 1992) 89-101 (mentioning several common ways of value creation and stressing the use of differences) and Howard Raiffa, John Richardson and David Metcalfe, *Negotiation Analysis; The Science and Art of Collaborative Decision Making* (The Belknap Press of Harvard University Press, Cambridge, Mass., 2003) 213-268.

⁸⁸ Roy J. Lewicki, David M. Saunders and John W. Minton, *Negotiation* (3rd ed., Irwin/McGraw-Hill, Boston, 1999) 118-124.

⁸⁹ *Ibid.* 121.

contribute to the solving of the problem should be identified. Brainstorming should continue for longer than intuitively necessary. Ways to exploit the differences between the parties should be listed: they may differ in expectations, have different risk preferences, different needs as to timing, or value scarce resources differently.⁹⁰ It is better also to list unrealistic options because they might show the way to options that are more suitable. At this stage, the parties can disregard whose interests are best served by the solutions developed; they will evaluate the proposals at a later stage. Proposals that are too advantageous for one party can then be transformed into more acceptable ones, by letting this party compensate the other party in money or in other interests.

2. Rights, Claims and Value Creation

In the setting of the legal system, the track towards solutions is a different one. As we have seen, interests have to be translated into alleged rights. Private law allocates property rights that can be traded. Most substantive interests and some other interests can be translated into tradable contractual rights as well. Contract law has an open structure, based on freedom of contract, with few exceptions that limit the range of possible solutions that the parties may consider in order to best serve their interests. Therefore, many solutions are possible, but nothing is guaranteed. Whether rights are traded in a way that maximizes preferences is something contract law does not, in principle, deal with. Contract law is not concerned with processes of negotiation that lead to good, better, or even optimal contracts.

In a dispute, the parties have to translate their interests into rights or defenses. Next, the party alleging that his or her rights have been infringed can choose one of the remedies the law permits. In the example, the natural way to do this for the manufacturer would be to compare the quality of the chips with the agreed specifications. Any deficiency would amount to a breach of contract. Then, the system invites the manufacturer to choose a remedy that best suits the manufacturer's interests: damages, termination of the contract when the breach could be shown to be fundamental, or specific performance.⁹¹ The supplier can choose to deny that the delivered goods did not meet the specifications, or it can try to invoke defenses. In practice, disputes like this will often become an argument over whether the parties were in breach of their obligations and the remedy of choice is probably monetary compensation. While disputing about the merits of this claim, the parties will probably try to solve the problem in other ways, but there is nothing in the legal system that stimulates them to systematically list their interests, and to methodically search for solutions. On the contrary, the law of civil procedure is basically attuned to reviewing the positions of the parties on their legal merits, and therefore invites positional rather than integrative bargaining. In practice, relatively new institutions

⁹⁰ Max H. Bazerman and Margaret A. Neale, *Negotiating Rationally* (The Free Press, New York, 1992) 94-97.

⁹¹ These are the usual remedies for non-performance of contractual obligations in legal systems throughout the world, see, for instance, the remedies provided by Chapter 7 of the Unidroit Principles of International Commercial Contracts.

like settlement conferences establish settings that enable a search for creative solutions. However, they can also be used for other types of negotiations or information exchange and, in most legal systems, it depends on the preferences of the individual judge whether and how the problem-solving method of developing solutions is used.

Other examples of the limitations the legal system puts on the search for creative solutions can be found where people experience harm that is not easy to translate into monetary value, for example, when they cannot make use of their time in the way they expected: spoiled vacations, time spent waiting, or time spent on dealing with claims. Many jurisdictions have started, hesitantly and step by step, to compensate such interests in money, but there is still much doubt about the criteria for the assessment of such damages in the light of the personal circumstances of the victim. Is the value of time to be related to the earnings that could have been realized during the lost time, to what a person would have paid for higher quality use of that time, or to an abstract rate set at a rather arbitrary level for everyone? Stimulating people to take such interests into account by making them pay damages might be a costly and indirect way of prevention. Private law could also look for more direct tools to encourage people to be more careful with other people's time. It could, for instance, adopt rules requiring providers of goods and services to have smooth procedures for complaints and claim handling, to reveal waiting times in queues and other delays, or even to minimize those times and delays.

In other respects, private law has become more open to different solutions, tailored to the interests of the parties in their particular circumstances. Arguably, one of the prevailing developments in private law during the 20th century was the one towards individualizing solutions for disputes. Courts and academics alike deeply felt a need to make court decisions more contextual, to take into account more different circumstances of the case, in short to fit the decision to the case at hand.⁹² Many private lawyers, even academics that are trained to see the patterns in what they study, turned away from rule based decision making. Rules of private law became more open ended, often by adopting open standards referring to reasonableness, reasonable expectations, or general doctrines which area of application is not clearly delimited.

This approach has been criticized, because court decisions become less predictable in such a legal environment. Moreover, settlement negotiations and litigation become more costly when more circumstances of the case are considered relevant. The move away from rule-based decision making also implies that decision costs are shifted from the rule-making procedure to individual decision making. Especially in situations that occur frequently in similar forms, this may lead to substantial extra

⁹² Claims on general tendencies like this are hard to substantiate. The tendency described in the text is reflected in the stances taken in the 'Rules versus Standards' debate, see for an overview of the literature Louis Kaplow, '9000 General Characteristics of Rules' in Bouckaert and De Geest (eds), *Encyclopedia of Law and Economics* (Edward Elgar, Cheltenham, 2000) . Most contributors tend to favor standards over rules in the majority of contexts and criticize complex rules. Others than Law and Economics contributors seldom express worry about the higher costs of adjudication (and of negotiation) under standards.

costs.⁹³ Finally, equal treatment may suffer. Nominally, it is guaranteed by applying the same general rules to everybody. But because these rules leave much discretion to the parties or the judge applying the rules, they may lead to different results in similar cases.

3. Stimulating Value Creation

If the legal system were to aim at problem-solving, value creation could structure the search for solutions that serve the interests of the parties that negotiate contracts. Thus, contract law could provide incentives for value creation, by stimulating disclosure of interests, for instance. Also, contract models often have some room for recitals. Explaining what the parties are up to in the contract is considered good practice. A more structured manner of reciting all relevant interests, not only the substantive needs of the parties, but also their procedural and relational ones, with the inclusion of their concerns and fears, could have an effect similar to that of the listing of interests on a flip-over, that is often recommended in negotiation handbooks. It could invite the parties, and their lawyers, to systematically search for value-creating solutions, given the interests that the parties have in the relationship that will be subject to the contract.

Value creation could also be an objective when rules regarding contract interpretation, default rules, or contract models are developed.⁹⁴ Studying the process of value creation, and in particular the possibility of finding a range of value maximizing options at the Pareto-frontier, could also contribute to theories about contractual gap-filling. Moreover, the possibility of value creation could be a reason to remove legal obstacles to renegotiation, which may have to be stimulated not just in case of unforeseen circumstances or hardship, but whenever value can be created that exceeds the additional transaction costs.⁹⁵ The parties can often make adjustments to an existing agreement that serve their interests even better, without having to re-establish the contractual equilibrium.⁹⁶ How they divide the value, the contract price or the principles for determining this, which is often the most difficult element to agree on, can remain unchanged, but in the course of their relationship, the parties can continue to create value. In fact, this often happens in practice, but then without a change of the underlying contract documents. Integrating this practice into the formal contractual

⁹³ Ibid.

⁹⁴ See Hugh Collins, *Regulating Contracts* (Oxford University Press, Oxford, 1999) 172 (arguing that legal support for wealth maximizing may, through the duty to cooperate, supplement or even override express contract terms). Certainly, other issues, like the incentives for information disclosure, are also relevant for the design of these rules, see for an overview of the literature on the complicated topic of the optimal design of default rules Richard Craswell, '4000 Contract Law: General Theories' in Bouckaert and De Geest (eds), *Encyclopedia of Law and Economics* (Edward Elgar, Cheltenham, 2000) 1-24..

⁹⁵ Barring incentive problems that, for some authors, are reasons to preclude renegotiation, see Morten Hviid, '4200 Long-Term Contracts & Relational Contracts' in Bouckaert and De Geest (eds), *Encyclopedia of Law and Economics* (Edward Elgar, Cheltenham, 2000) 46-72.

⁹⁶ David Lax and James Sebenius, *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain* (Free Press, New York, 1986) 287-289.

relationship, and stimulating it, would generally advance the interests of contracting parties.⁹⁷

When the step of value creation is considered, we also better appreciate the value of taking procedural and relational interests into account. At first sight, this seems to complicate the negotiations, but it makes solution easier in the end because they often present clear opportunities for value creation. Is this, taking process and relational interests into account, not one of the primary tools of sales people? Researchers studying the dynamics of problem-solving negotiations suggest that once people start creating value on these interests, they may achieve the momentum necessary to break through the next, probably more difficult issues.⁹⁸ This probably holds even more for disputes, which often have their roots in disregard of process or relational interests.

Dispute resolution procedures, whether provided contractually or by default civil procedure rules, could also give value creation a clear place. For instance, civil procedure rules could promote the listing of interests and possible solutions in the documents that are exchanged between the parties in the early stages of proceedings. In settlement conferences, brainstorming about solutions could become standard practice. Protocols for the pre-action phase,⁹⁹ or even the lawyers' codes of conduct, could support processes in which the parties communicate about their interests and possible solutions, rather than their claims and defenses.

This line of reasoning could even be taken one step further. If the parties cannot agree on a solution, a court could impose one of the solutions at the Pareto frontier of maximum value creation, or the closest to this it can get on the basis of the interests of the parties disclosed to it. It would not have to fall back on an evaluation of the legal merits of the claim. This would be a rather revolutionary approach. But in its practical effects, it would not be that far removed from what many courts now do, that is, trying to find a reasonable solution for the dispute, and then fitting it in the applicable legal rules, bending these or creating ad hoc exceptions to them if necessary.

Problem-solving private law could thus take the development towards individualized decision making to the extreme. It would recognize that disputes involve many different interests of the parties and that different people value assets, tangible or intangible, differently. By definition, this would lead to different ways of finding integrative solutions in different disputes and to different outcomes of distributive issues. One of the secrets of modern dispute resolution is using differences creatively. Or would such an attitude of courts impair equal treatment and erode valuable rules of

⁹⁷ See for a provocative approach to contracting, that incorporates some of these elements, and many more that would equally fit in the problem-solving approach, Stuart Levine, *The Book of Agreement* (Berrett Koehler Publishers, San Francisco, 2002).

⁹⁸ Compare Roy J. Lewicki, David M. Saunders and John W. Minton, *Negotiation* (3rd ed., Irwin/McGraw-Hill, Boston, 1999) 428-429.

⁹⁹ See III.E.2.

private law that would not be enforced anymore? We will come back to this question later.¹⁰⁰

C. Distribution: Batna

1. 'Develop Your Batna'

Apart from trying to create value, negotiating parties have to distribute value. They have to choose between the different possible solutions at the Pareto frontier of options best serving their joint interests. Expanding the pie makes division easier in one respect: there is more to gain for both parties. But the division problem is still there. The buyer and the seller of the company can maximize value by optimizing the timing and financing of the transaction. They can determine where they prefer the key employees to go with the company or to stay with the seller. But they also have to agree on a price, which is a purely distributive issue. In disputes, the parties can likewise find ways to best serve the interests, but often they also have to decide on the size of a compensatory payment by one party to the other party.

The distribution problem does not go away by following the problem-solving method.¹⁰¹ This is reflected by the next recommendation the problem-solving approach has on offer. One basic piece of advice to the parties is not to accept a settlement or other negotiated outcome when the batna (best alternative to negotiated agreement) is superior to the offer on the table.¹⁰² In transactions, the parties can look for alternative deals elsewhere on the market. Their batna is usually the deal they can get from another market party, less the search costs and the extra costs of negotiating that transaction. In disputes, the batna is often the likely outcome for a party of court proceedings: the expected court decision, which can be represented as a probability distribution of outcomes, taking into account difficulties at the enforcement stage, minus the costs of litigation. Incidentally, the recommendation that the parties should identify their best alternative to agreement and not accept a deal that leaves them worse off is not different from what is advisable in distributive negotiations. The batna is essentially the same concept as the reservation price or walk away point that parties in purely distributive bargaining should determine.¹⁰³

In both types of negotiations, the parties can influence their own batnas. For instance, they can start parallel negotiations with another interested party. In conflicts, they can hire a reputable lawyer and take procedural steps that improve their chances in court. Sometimes they can even influence the batna of the other party. A powerful company

¹⁰⁰ See III.D.3.

¹⁰¹ Compare Russell Korobkin, 'A Positive Theory of Legal Negotiation,' (2000) 88(1789) *Georgetown Law Journal*, 1792 (arguing that the importance of integrative bargaining is oversold and defining it as combining two or more opportunities for distributive bargaining).

¹⁰² See, for example, Max H. Bazerman and Margaret A. Neale, *Negotiating Rationally* (The Free Press, New York, 1992) 67.

¹⁰³ Russell Korobkin, 'A Positive Theory of Legal Negotiation,' (2000) 88(1789) *Georgetown Law Journal*, 1793.

may be able to force terms on a contracting party by threatening to withhold other essential products or services if it does not accept these terms. Likewise, a party in a dispute can deteriorate the alternative for the other party of going to court by making this more costly. The legal system provides or allows many such weapons: costly discovery requests, freezing of assets, claiming through the corporate veil, publicizing claims, and commitments to appeal any negative court decision are among the commonest examples.

An important characteristic of a negotiation situation is the bargaining range or surplus.¹⁰⁴ This is the area between the batnas of the parties, initially, or after the parties have improved their own and possibly deteriorated the other's batna. In this area, both parties are better off by making a deal. In some negotiations, the batna for one or both parties is very unattractive. They may be tied in a relationship, for example, an employment contract or a long-term supply arrangement that is very costly to replace. In disputes, the costs of going to court are often so high, that it provides no realistic alternative to accepting a bad settlement offer or even to giving in.

The size of the bargaining range is a two-sided coin. The upside is that the bigger the bargaining surplus, the easier it will be for the parties to find a deal that is advantageous for both parties as compared with their respective batnas. The downside, however, is that they still have to divide the surplus, and the more there is to divide, the more difficult this will be. Consider settlement negotiations about a claim of 100,000 where the expected litigation costs for both parties are 30,000. If both parties agree the probability of the claim being successful is 40%, any outcome between 10,000 and 70,000 is inside the bargaining range, which comprises not less than 60% of the value to be distributed. Compare this to transactions like buying a car or construction of a house, where the bargaining range is usually a much smaller proportion of the value to be distributed, maybe something like 5 to 15%, which makes the distributive part of the negotiation much easier.

In situations where the bargaining range is substantial in size, one party can take advantage of the other party by appropriating the better part of the bargaining range. Especially when one party has a relatively attractive batna, or is more inclined to take risks, there are opportunities for exploitation.¹⁰⁵ At worst, the more powerful party can then take all of the bargaining range. Often, in situations with a relatively large bargaining range, the bargaining process may tend to degenerate to less cooperative levels because the parties will be more inclined to test each other on opportunities for exploitation. Resolving this distributive issue is the more difficult in view of the fact that many mechanisms inherent to distributive negotiations prevent them from striking a fair and speedy deal. With respect to the exchange of offers and concessions, research shows that negotiators do better when their opening offer is

¹⁰⁴ Ibid.

¹⁰⁵ Robert S. Adler and Elliot M. Silverstein, 'When David Meets Goliath: Dealing with Power Differentials in Negotiations' (2000) 5 *Harv. Negotiation L. Rev.* 1, 21.

more extreme, but such offers are likely to deteriorate the climate of the negotiation.¹⁰⁶ In order to induce concessions from the other party, they will also often have to commit themselves to courses of action such as going to court. These commitments are likely to be experienced as threats by the other party insofar they hurt that party's interests.¹⁰⁷ Moreover, commitments sometimes have to be carried out in order to be credible. Although this is a simplification, these processes are not unfairly summarized as being a 'contest of will.'¹⁰⁸

2. The Legal System as Batna Provider

The legal system is a major provider of batnas. Indeed, providing people with better batnas can be seen as a one of its most important functions. Contract law, for instance, influences the information contracting parties give about the products or services they offer. Thus, it facilitates the finding of alternative bargains by lowering search costs. Competition law gives some indirect protection against market power by regulating monopolies, and sometimes even direct protection by regulating prices, if only by requiring a monopolist to charge a reasonable price.

In disputes, the legal system often is the exclusive provider of a batna.¹⁰⁹ If no negotiated agreement is reached, resolution by a court is the alternative, unless the parties jointly opted for another dispute resolution process, which then becomes their exclusive batna. This batna is built from several composite parts because it is the expected value of a court decision,¹¹⁰ taking into account enforcement problems, less costs of litigation. Each of these component parts is in turn determined by the rules and practices of the legal system. Substantive rules influence the outcomes reflected in court decisions. Rules of procedure and practices among lawyers also have their impact on those outcomes. Moreover, they determine the possibilities of enforcement or the likelihood of reversal in appeal. The batna in a dispute also being determined by the costs of litigation, rules of civil procedure and practices among lawyers are again relevant.

Thus, in negotiations about disputes, legal rules have their place as factors influencing batnas rather than as commands directly determining the result of a court action. When we add the openness and complexity of many rules, the batna available to a party in a dispute is frequently not a certain outcome, but a probability range of many different outcomes, that is difficult to determine. Moreover, each of these outcomes can only be reached at a cost, which tends to be substantial. Legal costs, opportunity

¹⁰⁶ Roy J. Lewicki, David M. Saunders and John W. Minton, *Negotiation* (3rd ed., Irwin/McGraw-Hill, Boston, 1999) 85.

¹⁰⁷ *Ibid.* 91.

¹⁰⁸ R. Fisher, W.Ury and B.Patton, *Getting to Yes: Negotiating an Agreement without Giving in* (2nd ed., 1991) 6.

¹⁰⁹ Alternatively, one of the parties may give in to the satisfaction of the other party or the parties may avoid the issue.

¹¹⁰ In simple cases: the chances of prevailing in court multiplied by the value of the award if the plaintiff prevails.

costs of time spent in the litigation process, and emotional costs often consume a considerable percentage of the value of the remedy made available by the legal rules. The bargaining situation is often even less satisfactory because the other party can influence these costs, and therefore the batna of a disputant. Being able to deteriorate the other party's batna gives power in negotiations,¹¹¹ but it is a destructive kind of power. Use of it, or even threats to use it, easily leads to escalation, and at least to extra costs of dispute resolution.

So, the legal system, although providing good batnas in theory for less powerful parties, often leaves them again at the mercy of the more powerful ones inside a huge bargaining range. Improving access to justice - reducing the size of the bargaining range by lowering the costs-component of batna's - is not always easy. Sanctioning abuse of procedural rules, for instance, sometimes helps, but may also lead to procedural disputes and thus to new possibilities to deteriorate the other party's batna, thus again expanding the bargaining range and re-introducing elements of power, though not necessarily in the hands of the same parties.

3. Reducing the Bargaining Range: Access to Court and Protection Against Dominance

Negotiation Theory assumes batnas in disputes are given and determined by the legal system, although the parties may be able to influence them within the confines of existing legal rules. If one of the major functions of the legal system is providing batnas, however, we might as well ask whether batnas can be improved from the perspective of supporting a negotiation process that creates maximum value and distributes value fairly. Proponents of a legal system that supports problem-solving negotiations would probably stress two things with respect to batnas.

First, they would favour rules and practices that enable parties to assess their batnas. The legal system already stimulates the availability of some information about prices, qualities and risks of competing products, services or other assets, and it could do so more systematically, thereby reducing search costs. This approach could be extended from deal making to dispute resolution. Assessment of batnas in that area would become easier if court decisions were more predictable. Making it a professional duty of lawyers to deliver more explicit predictions of outcomes and risks of court proceedings, in percentages and distinguishing different possible courses of action, using the tools of decision analysis, could be one way.¹¹² Procedures for joint assessments of the merits of cases during settlement conferences would be one of many other alternatives.¹¹³ Because the expected costs of dispute resolution are also an

¹¹¹ Robert S. Adler and Elliot M. Silverstein, 'When David Meets Goliath: Dealing with Power Differentials in Negotiations' (2000) 5 *Harv. Negotiation L. Rev.* 1, 22.

¹¹² See for these tools in the context of legal advice regarding disputes Robert H. Mnookin, Scott R. Peppet and Andrew S. Tulumello, *Beyond winning : negotiating to create value in deals and disputes* (Belknap Press of Harvard University Press, Cambridge, Mass., 2000) 109.

¹¹³ See Marjorie Aaron, 'The Value of Decision Analysis in Mediation Practice' (1995) *Negotiation Journal* 123 and Howard Raiffa, John Richardson and David Metcalfe, *Negotiation Analysis; The*

important factor determining the batna, making these more transparent would also be a good thing. Again, lawyers could be made to deliver more explicit predictions, taking into account the cost consequences of countermeasures that can be expected from the other party. Lawyers could also be stimulated to use remuneration schemes that make the costs for the client more predictable, moving away from hourly fees and encouraging fixed fees, contingent fees or more sophisticated means of value-added billing. Courts could help to make dispute resolution costs more transparent by establishing the route towards a final decision at an early stage of the proceedings.

Secondly, the legal system could try to provide better batnas, so that bargaining ranges can decrease. Thus, it would give better protection against the exploitation that becomes more attractive to try when the bargaining range is too large in proportion to the value that has to be distributed. The best way this can be done in the regulation of transactions is probably by facilitating the provision of alternatives on the market. In general, keeping switching costs at reasonable levels seems to be a point of attention. Of course there is nothing new here, just giving extra reasons to improve market conditions through competition law and other necessary government interventions. Taking the perspective that negotiating parties have, and more in particular the alternatives they have, might merely be a tool for a systematic survey of market situations and of the usefulness of legal tools that are relevant in this respect.

The main area of attention is disputes in which the parties are mostly tied to each other in a bilateral monopoly, and the legal system provides the only alternative to letting the other party win. Let us summarize where we are: if a court, or a contractual dispute resolution option, is not accessible at a reasonable cost, the bargaining range becomes too big, the rewards of exploitation make this a more attractive option, giving it a try may become irresistible and the expectation of attempts at exploitation might ruin the negotiation climate. Improving access to court is a constant concern of legislators, but only one among many. Moreover, it is under continuous pressure from the business interests of lawyers who try to increase their income from litigation and the negotiations preceding it. The view on the bargaining range offered by Negotiation Theory provides arguments to give access to court much more priority. It might even lead to the setting of targets for the maximum dispute resolution costs that would be acceptable in relation to the value to be distributed.

The batna of going to court, however, is not only a matter of costs. The general approach taken in court decisions is equally important. We have to remember that the parties not only distribute value by settling, but that they also can create value. If negotiations break down because the parties do not agree on the distribution of value, they may also lose the value they could create by finding integrative solutions for their interests. We saw that the law and practices of civil procedure could encourage value creation in settlements. We also discussed the rules regarding remedies, which could be much more attuned to value creation.¹¹⁴ Finally we noted the development

Science and Art of Collaborative Decision Making (The Belknap Press of Harvard University Press, Cambridge, Mass., 2003) 129-144.

¹¹⁴ See Paragraph III.B.3.

towards decision making tailored to individual circumstances and discussed the possibility of letting courts decide on the basis of problem-solving principles. Taking this line of thought one step further, we now have an extra reason to let court decisions reflect maximum value for the parties, choosing one option at the Pareto frontier. The way courts should distribute value, for instance by stipulating the amount of compensation, could then still reflect the rules on distribution embodied in the legal system. The value-creating elements could be protected by court orders, simulating the expected outcome of negotiations if they had succeeded based on the interests of the parties that were disclosed to the court.

In the case regarding the supply of memory chips, for instance, the court would choose an optimal combination of the elements of solutions provided by the parties, like exchanging personnel or test results, finding other sources of supply, new procedures, apologies, or termination. Obviously, the passing of time would rule out some alternatives, but the court would still maximize value from the remaining options. This would not only help the parties when they were unable to settle the case themselves with a decision that best serves their interests, it would also improve the climate for their settlement discussions. In such a setting, threats to go to court would only become threats to burden the other party with litigation costs, but not threats to take away the benefits of the deal. *Batnas* of negotiating parties would thus become better. Ideally, distributional bargaining would only be about distribution. The tension with value creation would to a large extent disappear.

Letting courts preserve value creation would require a major change in the character of civil procedure. Courts would not just focus on enforcing obligations. They would be more like providers of dispute resolution help, intervening when the parties would not be able to reach an agreement on the distributional elements, deciding on these issues for them, and preserving, or even increasing the value created.¹¹⁵ Court interventions would become a more attractive option, which might backfire into their caseload, thus endangering the prospect of improving access to court again. Courts providing problem-solving services instead of managing proceedings of a positional and adversarial character might, or might not be able to work at lower costs. More in general, the consequences of such an evolution are not easy to fathom.

In some respects, civil procedure is already developing in this direction. By stressing settlement as a worthwhile outcome and by providing services like settlement conferences and court-annexed mediation, courts gradually become facilitators of negotiated outcomes.¹¹⁶ Making adjudication itself a problem-solving process, at least

¹¹⁵ Compare Hugh Collins, *Regulating Contracts* (Oxford University Press, Oxford, 1999) 321-355. (law should facilitate settlements not vindication of contractual rights).

¹¹⁶ There is still a large divide between the settlement methods commonly used by courts, see Lisa B. Bingham, 'Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution' (2002) *Journal of Dispute Resolution* 101, 122 (describing 'logical techniques' such as evaluating a case or suggesting a settlement figure; aggressive techniques such as coercion, threatening lawyers and penalizing for not settling; and paternalistic techniques involving meetings with lawyers in chambers and calling a certain figure reasonable) and the facilitation provided by professionals in conflict resolution (see hereafter Paragraph III.E.3). It is worth noting, however, that the critical attitude of many commentators towards settlement and ADR seems mainly to be directed against those settlement

for some categories of disputes, can therefore also be seen as a natural next step in this development.

If courts would offer facilitating services and, in case the parties do not reach a negotiated outcome, evaluate against objective criteria, the debate regarding facilitative or evaluative mediation becomes relevant.¹¹⁷ Seen from the perspective of negotiating disputants, both facilitation and evaluation may be needed, so it is probably a question of finding the right mix or sequence. The perspective of problem-solving suggests that facilitation can be a first stage, that it can be extended into the stage where value is to be distributed¹¹⁸ and that evaluation by a neutral can be a last resort.¹¹⁹ Whether the same person (either a judge or another neutral decision maker) can supply both facilitation and evaluation is a difficult issue. Facilitating negotiations in the ‘shadow’ of the possibility of evaluation may cause serious problems. Introducing another person with other perspectives in the process can lead to discontinuities, however. It is also a matter of facilitation and evaluation requiring different skills. Furthermore, making yet another person familiar with the case can be costly. It may be, however, that the gap between facilitation and evaluation turns out to be less wide in situations where the rules for evaluation are attuned to the interest-based problem-solving negotiations between the parties. This brings us to the rules used by courts when they provide their evaluations.

D. Distribution: Objective Criteria

1. ‘Insist on using objective criteria’

As we have seen, the batnas of both parties determine the bargaining zone in which both parties can profit from the agreement. In many deals, the gains from cooperating are high in comparison to the batna. Parties are tied to each other in a relationship; running away comes at a very high price. Or the batna is going to court, which is so costly that it is not an appealing alternative. We saw that creating mechanisms that

practices of courts, which are replicated in evaluative mediation, and against evaluation by (less impartial or less publicly accountable) arbitrators or mediators, see, for instance, Deborah R. Hensler, ‘Suppose It’s Not True: Challenging Mediation Ideology’ (2002) *University of Missouri Journal of Dispute Resolution* 81 and Judith Resnik, ‘Litigant Preferences for Process and Judicial Preferences for Settlement’ (2002) *Journal of Dispute Resolution* 155. They seem less critical towards facilitative mediation.

¹¹⁷ See, for instance, Leonard L. Riskin, ‘Understanding Mediators’ Orientations, Strategies and Techniques: A Grid for the Perplexed’ (1996) 1 *Harv. Negotiation L. Rev* 7, Lela P. Love and Kimberley K. Kovach, ‘An Eclectic Array of Processes, Rather than One Eclectic Process’ (2000) *Journal of Dispute Resolution* 295 and Chris Guthrie, ‘The Lawyer’s Philosophical Map and the Disputant’s Perceptual Map: Impediments to Facilitative Mediation and Lawyering’ (2001) 6 *Harv. Negotiation L. Rev* 145.

¹¹⁸ See Marjorie Aaron, ‘The Value of Decision Analysis in Mediation Practice’ (1995) *Negotiation Journal* 123 for possible approaches.

¹¹⁹ Sometimes, though, other sequencing may be useful, such as facilitating the search for interests and possible integrative solutions, then evaluation of one key distributive issue, and after that facilitation with regard to other distributive issues.

decrease the gap between the batnas of the two parties can encourage cooperative solutions. By providing better batnas, the law can reduce the dependency of the parties on each other, making cooperation a real choice, instead of one forced upon a party by lack of realistic alternatives. Still, dividing the surplus to be obtained from an agreement is often a big problem in negotiations. Haggling, or worse, a contest of wills, is difficult to avoid.

The theory of problem-solving negotiations, however, has one more guideline on offer to improve the process of dividing the bargaining range. It suggests to continue the joint search for a resolution of the problem from the value creation phase to the phase of the negotiations where the value has to be distributed. In particular, the parties should jointly search for objective criteria that could lead them towards a distribution that is acceptable to them both.¹²⁰ Market prices, default rules or commonly used clauses could serve as objective criteria in transactions. In conflicts, the parties can borrow objective criteria from case law or from other sources.¹²¹

Take a dispute between a factory owner and neighbors about a nuisance problem: radio music and other noise from trucks loading at the factory annoying the neighbors. Apart from value creation by honoring each other's procedural and relational interests and by rescheduling loading activities to hours of the day where most of the neighbors are not at home, they may still have to determine the level of acceptable noise during day hours and during the early morning hours when undisturbed sleep is desirable. For the first issue, they could use objective criteria like regulations or practices regarding noise levels in houses in relation to various sources of noise, the noise originating from traffic or from commercial activities, for example. The resolution of the second issue could be inspired by rules or customs regarding night rest in other situations where people live close together, be it temporarily as in hotels, or more permanently.

As the example shows, many different objective criteria can exist for one particular dispute. Another secret of modern dispute resolution is that no decision is needed on which criterion is the right one.¹²² Various criteria can be applied to the problem, rendering different outcomes. It is the pattern of these outcomes that gives the parties a better feeling about what is a reasonable solution. They can also see where their particular circumstances fit in this wider pattern. If most of the neighbors have sleeping habits differing from what most people have, this can be a reason for adjustment of the outcome.

¹²⁰ See R. Fisher, W.Ury and B.Patton, *Getting to Yes: Negotiating an Agreement without Giving in* (2nd ed., 1991) 84-98., Roy J. Lewicki, David M. Saunders and John W. Minton, *Negotiation* (3rd ed., Irwin/McGraw-Hill, Boston, 1999) 125., Russell Korobkin, 'A Positive Theory of Legal Negotiation,' (2000) 88 *Georgetown Law Journal* 1789, 1827 and G. Richard Shell, *Bargaining for Advantage: Negotiation Strategies for Rational People* (Penguin Books, London, 1999).

¹²¹ R. Fisher, W.Ury and B.Patton, *Getting to Yes: Negotiating an Agreement without Giving in* (2nd ed., 1991) 88.

¹²² Fisher, Ury and Patton make this point, *Ibid.* 93 and 161. But it did not become a much discussed issue in the literature on negotiation.

The recommendation to use objective criteria has been taken on by critics of the problem-solving approach.¹²³ They argue that the parties will only bring forward objective criteria that support their positions. In a legal dispute, for instance, both parties will interpret the facts and turn them into arguments that support a claim or defense that would lead to a maximum outcome. Such one-sided objective criteria, like an extremely low or high price that was once paid for a similar car, are indeed similar to positions. But usually there are also more neutral criteria that parties may suggest as possibly useful, without translating them in a position. Suggesting criteria can be particularly effective when they reflect values the parties have. If a person tends to think in terms of efficiency or of rewarding effort, objective criteria based on these norms are likely to appeal to him.¹²⁴

2. Law and Objective Criteria

When transactions are being concluded, contract law helps the parties to find objective criteria for distributive issues, but mainly in an indirect manner: rules providing incentives to disclose information may provide incentives for transparency of prices and the quality of products and services. These are prices and quality levels offered by individual suppliers, however. The legal system does not have much influence on the availability of information regarding price and quality levels in general. This is left to the market where consumer organizations and commercial information suppliers operate to provide such data and thus enhance consumer choice.

What objective criteria are available for settling disputes? In one view, private law is full of objective criteria. Rules regarding contract formation, contract consequences, tortious conduct and civil procedure are manifold. They are constantly being refined by court decisions, legal doctrine, and, occasionally, statutory law. In another view, the information all these rules give about the division of the pie is rather limited. Most of them are rules that set the stage. They invite courts to inquire into certain circumstances. For instance, the rules of contract law and tort law seldom give direct answers to questions of liability or quantum of damages, two of the most important issues that have to be determined in almost every legal dispute.¹²⁵ (O Ben-Shahar 2002) Liability is determined in accordance with standards referring to 'due care' or 'the meaning reasonable persons of the same kind as the parties would give to a contract in the same circumstances.'¹²⁶ The criteria for attribution of comparative negligence are very open-ended as well. The parties must hope for a published court decision about a

¹²³ Critics stress that objective criteria are often difficult to distinguish from arguments supporting a position, see, for instance, White, 'The Pros and Cons of 'Getting to Yes'' (1984) 34 *J. Legal Educ.* 115 and Russell Korobkin, 'A Positive Theory of Legal Negotiation,' (2000) 88 *Georgetown Law Journal* 1789, 1827 and for a discussion Katja Funken, 'The Pros and Cons of Getting to Yes, Shortcomings and Limitations of Principled Bargaining in Negotiation and Mediation' (2002) *Zeitschrift fuer Konfliktmanagement*.

¹²⁴ G. Richard Shell, *Bargaining for Advantage: Negotiation Strategies for Rational People* (Penguin Books, London, 1999) 44.

¹²⁵ See also Hugh Collins, *Regulating Contracts* (Oxford University Press, Oxford, 1999) 79-81. in relation to the little guidance contract law gives on determination of quality standards.

¹²⁶ Compare Article 4.1 Unidroit Principles of International Commercial Contracts.

situation that closely resembles theirs. Such case law is sometimes not available. It may be difficult to determine which circumstances the court found decisive. Or there are many decisions, pointing in different directions. Moreover, the individualization of court decisions,¹²⁷ this tailoring to the individual circumstances of the parties that is so useful to in helping to let their individual interests be met, has also eroded the court system's capacity to deliver rules that guide parties when they have to distribute value.

Another structural problem is that many legal rules have a binary character.¹²⁸ They give 'yes or no' answers to questions of liability or preliminary issues that determine the outcome of court proceedings. These rules are less useful for parties looking for ways to divide value because the outcomes that the rules give are an exclusive attribution of all the value to either one of the parties. In order to come to in-between solutions, the parties have to estimate the probability of both outcomes. Criteria that have a continuous character, or that at least render more outcomes than just a one or a zero, can directly support in between solutions.

As in the area of transactions, the 'market' has found ways to provide useful objective criteria. In European legal systems, schedules for the calculation of damages for personal injury are quite common.¹²⁹ Similarly, courts or arbitrators having to deal with labor disputes have developed formulas for the determination of compensation in case of dismissals. Interest groups have sometimes agreed on quality criteria for a whole industry, or these criteria can rather easily be derived from protocols indicating good practice, as the ones available for the medical profession. Still, for many types of disputes, it is not easy for the parties to find useful objective criteria. One of the problems here is that developing good objective criteria is costly, whereas they are public goods. Like other rules, they are non-rival in consumption and nonexclusive, causing free rider problems.¹³⁰ Courts, scholars, and even legislators must exert the effort, bear the costs and are exposed to criticism when they develop objective criteria, whereas their rewards are probably at best a better reputation for developing objective criteria, which is not a reputation many people seem to strive for. The parties and lawyers that use objective criteria cannot easily be made to pay for the costs of developing them.

¹²⁷ See Paragraph III.B.3.

¹²⁸ Carry Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (1984) 31 *UCLA Law Review* 754, 768 and Carry Menkel-Meadow, 'The Trouble with the Adversary System in a Postmodern, Multicultural World' (1996) 38 *Wm. & Mary L. Rev.* 5, 25.

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¹³⁰ Francesco Parisi, '5000 Spontaneous Emergence of Law: Customary Law' in Bouckaert and De Geest (eds), *Encyclopedia of Law and Economics, Volume V. The Economics of Crime and Litigation* (Edgar Elgar, Cheltenham, 2000) 603-630.

3. The Objective Criteria Negotiators Need

The providing of objective criteria for the distributive issues of common types of disputes is a neglected issue in debates about better dispute resolution.¹³¹ Scholars tend to concentrate on the ways ADR creates value and overcomes barriers to dispute resolution. That the legal system provides rules which influence negotiations about disputes, directly as objective criteria and indirectly as determinants of batnas that have the form of court action, is taken for granted. Again, it is possible to reframe the issue and ask how legal criteria for distribution could be tailored to the needs of disputing parties.

The literature on problem-solving gives some hints as to which objective criteria are helpful in settling disputes.¹³² As we have seen, the criteria could be continuous, giving higher or lower outcomes, instead of providing 'yes or no' answers. For some legal issues that presently have a binary character, new rules could be introduced that allow for intermediary outcomes. A prominent example of such a change has of course been the change from contributory negligence to comparative negligence. In most jurisdictions there are other examples of courts that have found ways to divide the pie instead of distributing it exclusively to one of the parties. Many jurisdictions now accept proportional liability in case of uncertainty regarding causation.¹³³

There is more to say, however, about the kind of legal criteria that optimally help parties to divide value, whether it is contested property or damage. Ideally, the criteria will be applicable to both sides.¹³⁴ They should be practical, in the sense of not being too costly to apply, which will usually depend on the availability of information that is necessary for application. As we will see, objective criteria would preferably not require an evaluation of the past conduct of the parties, because this is a burden for the negotiation process.¹³⁵ Where this cannot be avoided, it may at least be possible to stay away from references to intent, which put even more stress on the relationship between the parties and thus on the negotiation process.

In contrast to what traditional legal thinking requires, there could be multiple criteria for one type of problem,¹³⁶ making the development of such criteria a much easier job. Various criteria would often yield different outcomes, but it could be left to the parties

¹³¹ Chris Guthrie, Review Essay: Using Bargaining for Advantage in Law School Negotiation Courses: Bargaining for Advantage: Negotiation Strategies for Reasonable People. By G. Richard Shell' (2000) 16 *Ohio St. J. on Disp. Resolution* 219, 235.

¹³² R. Fisher, W. Ury and B. Patton, *Getting to Yes: Negotiating an Agreement without Giving in* (2nd ed., 1991) 88-91.

¹³³ See Michael Abramowicz, 'A Compromise Approach to Compromise Verdicts' (2001) 89 *California Law Review* 231 for a comprehensive discussion of the pros and cons of these approaches in comparison to all or nothing verdicts.

¹³⁴ R. Fisher, W. Ury and B. Patton, *Getting to Yes: Negotiating an Agreement without Giving in* (2nd ed., 1991) 89.

¹³⁵ See Chapter III.F.3.

¹³⁶ As suggested by R. Fisher, W. Ury and B. Patton, *Getting to Yes: Negotiating an Agreement without Giving in* (2nd ed., 1991) 93.

to choose an outcome that matches the pattern obtained by applying the different criteria.¹³⁷ In this process, they could give criteria different weights, according to their plausibility and their fit to the problem at hand. Probably even courts could use this approach when they have to decide on the distributive issues if the parties do not reach an agreement.

In this way, the legal system could also solve one of its most important paradoxes: wanting to be general, to be predictable, and to give tailor-made outcomes for individual cases at the same time. With non-binding general rules, guiding negotiations and decisions as objective criteria, tailoring the decision to the individual circumstances is still possible. This can be achieved by creating value and by adjusting distributional outcomes to the circumstances or letting them be inspired by other equally relevant objective criteria. Rules do not always have to bind the parties or the courts, but can be tools that help them to solve disputes. If they are not binding in the legal sense, but just valuable guidelines that parties and judges will usually take into account because of their inherent quality, they can be formulated in their usual general fashion. They do not have to be emptied of any informational content, like many present rules of private law, because this open-ended character is necessary to apply them to so many different circumstances. It can be left to the parties to adapt them to the circumstances of the case and, eventually, to the judge if the parties do not solve their dispute. Because rules are seen as tools, they can be more informative, and probably even bring more structure and equality in decision making than can be achieved by the present system. For similar reasons, the production of such rules would be stimulated by letting them just have a guideline character. Courts, scholars, and even legislators can formulate them as general guidelines without having to worry about being bound by them in unforeseen situations in which the rules would lead to unacceptable results. Their application in concrete circumstances would be the responsibility of the parties and the judge in that particular situation.¹³⁸

Although this may be an interesting approach, many objections will have to be dealt with. Such a changed attitude towards at least some of the rules of private law presupposes courts capable of collecting suitable criteria and trustworthy in applying them in an unbiased manner.¹³⁹ It also requires a basic understanding of what constitute suitable objective criteria between the parties and the court. Mechanisms that make courts accountable for outcomes, from the way they give reasons for decisions to appeal procedures, may have to be revised or even reinvented.

¹³⁷ Sometimes both parties could even have access to different criteria, see, in the context of contract interpretation, the interesting approach of == Ben-Shahar.

¹³⁸ Compare the approach of 'presumptive positivism' as developed by Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decisionmaking in Law and in Life* (Oxford University Press, New York, 1991) and more generally on these issues Louis Kaplow, '9000 General Characteristics of Rules' in Bouckaert and De Geest (eds), *Encyclopedia of Law and Economics* (Edward Elgar, Cheltenham, 2000).

¹³⁹ Cass R. Sunstein, 'Must Formalism be Defended Empirically?' (1999) 66 *University of Chicago Law Review* 636.

E. Process Technology

1. 'Separate the people from the problem'

We have now discussed four basic elements of problem-solving negotiations: interest based, generation of many 'value-maximizing' solutions, evaluation against batna, and distribution in accordance with objective criteria. The next three elements relate to the processes that are needed to make problem-solving negotiations work. The present chapter first discusses the communication between the parties.

In order to determine the interests, parties following the problem-solving method have to listen carefully to the other person and to express their own interests equally well.¹⁴⁰ This is 'audi et alterem partem' in the more sophisticated version of empathy and assertiveness. The parties may experience serious difficulties when trying to find out what the other party's interests are and even when discovering what they themselves prefer. People often only become aware of their real preferences during the negotiations about a transaction. Indeed, service providers like doctors, management consultants, or lawyers, as well as many sellers of tailor-made products spend considerable time helping their customers to discover their needs and preferences. Ignorance about one's interests or inability to express them may even lie at the root of the failure of parties to solve a dispute themselves.

Jointly developing solutions for mutual gain presupposes communication about, and understanding of, both your own and the other's interests, as well as a willingness to consider solutions that help both parties advance their interests. In order to evaluate a batna, the parties have to be able to catalogue interests, rank them or even rate them, explicitly, or at least intuitively. Applying objective criteria also requires good communication skills. All these processes, although some might call them basic life skills, are difficult enough. Often they are complicated by emotions, worries about the unknowns of the transaction, excitement about the new opportunities, irritation in a dispute, or the grief related to a loss that has to be coped with.¹⁴¹ In addition, there is a range of cognitive errors that plague people when they negotiate.¹⁴² Strategic conduct, maneuvering aimed at obtaining the best outcome for oneself, at the expense of others, results in another sets of barriers to resolution of a conflict of interests.

These pitfalls of negotiation, and the techniques to avoid them, are so important that most handbooks on negotiation start here.¹⁴³ Communication is essential, and if it does not work it has to be restored before the parties can get to the substance of the deal or the conflict. 'Separating the problem from the people' is tantamount to

¹⁴⁰ Roy J. Lewicki, David M. Saunders and John W. Minton, *Negotiation* (3rd ed., Irwin/McGraw-Hill, Boston, 1999) 166-169.

¹⁴¹ *Ibid.* 284-286.

¹⁴² See, generally, Kenneth J. Arrow, et al. (eds), *Barriers to Conflict Resolution* (W.W. Norton & Company, New York, 1995).

¹⁴³ R. Fisher, W. Ury and B. Patton, *Getting to Yes: Negotiating an Agreement without Giving in* (2nd ed., 1991) 17-41.

communication techniques that intend to enable the parties to follow the four basic steps of the problem-solving procedure, to cope with their emotions and to overcome the other barriers to finding a solution for the negotiation problem. A whole 'technology' has developed to get and keep them going. This technology facilitates the process and puts it back on track when barriers are encountered on the way. Some of these facilitating techniques are: active listening, probing, different types of questioning, rephrasing, summarizing, brainstorming about solutions, and methods for evaluation of batnas.¹⁴⁴ Empowerment, the feeling of the parties that they can cope with the situation, and recognition, their ability to see the situation of the other party, are objectives that may guide the use of these techniques.¹⁴⁵ They can also be interpreted as targets for creation of a situation in which the parties are ready to think and talk about solutions that are appropriate for their interests. If they are empowered and can give recognition, they will be more fully able to explore and evaluate possible outcomes of the negotiation, be it an agreement or a reasoned choice for their best alternative. Interestingly, most of these techniques can be learned and applied by negotiating parties, as well as by third parties facilitating negotiation processes, although both self-help and third-party intervention may have advantages in some situations.

When using the word technology, I am not suggesting that these methods are easily learned or applied. I fully appreciate the difficulties of using them and of using the right tool at the right moment, which probably is not possible unless these techniques have been internalized to such extent that it would be more appropriate to talk of an attitude rather than a technique. Moreover, different techniques compete and imply different views on human interests, on conflict, or on the way differences should be resolved. The word technology, however, rightly expresses that methods facilitating conflict resolution have been developed that are explicit, reproducible, and empirically testable.¹⁴⁶ And although the methods differ, they seem to have a common core that is sound enough to build on.

A point worth noting is that most of the communication methods incorporated in the problem-solving method are widely used outside the realm of transactions and disputes covered by the legal system. They are methods of interaction that are relevant for every negotiation and, depending on what you still call negotiation, for most dealings with other people in general. Many elements of it are also used wherever people need to be managed or have to work in a team within an organization. Active listening skills, techniques for finding optimal solutions in terms of interests and competences to evaluate options are not only part of standard management methods, but are also important elements of services offered by the helping professions.

¹⁴⁴ Roy J. Lewicki, David M. Saunders and John W. Minton, *Negotiation* (3rd ed., Irwin/McGraw-Hill, Boston, 1999) 409-472. and A.E. Barsky, *Conflict Resolution for the Helping Professions* (Wadsworth, Belmont CA, 1999).

¹⁴⁵ R.A.B. Bush and J.P. Folger, *The Promise of Mediation: Responding to Conflict through Empowerment and Recognition* (Jossey-Bass, San Francisco, 1994).

¹⁴⁶ It might be interesting to compare this modern technology in respect of being explicit, reproducible and empirically testable with the technology of 'litigotiation,' which is often still described in terms of an art.

Coaches and therapists also use them. This suggests that a development of the legal system in the direction of problem-solving would not be an isolated exercise. Such an approach could bring legal services probably more in line with the service models employed successfully by other advising or helping professions, and, perhaps, with the daily experiences of clients and their beliefs about proper cooperation.¹⁴⁷

2. Legal Communication

There is already much literature explaining that the legal system regulating transactions and disputes entails many elements that conflict with this emerging communication technology that supports negotiations and, more in general, cooperation.¹⁴⁸ The rules and practices of the legal system restrict communication channels, encourage an exchange of positions, and concentrate on substantive interests.

This is less so in the area of transactions, where the legal rules have not much to say regarding the way the parties should communicate. Still, the practices of contract negotiation are rather formal. Once the parties have determined the commercial fundamentals of the transaction, the negotiation process is often taken over by lawyers. Then, many of the contacts between the parties will be in writing, which serves the useful goal of making it transparent for all parties involved. But information in writing makes people cautious; misunderstandings and beliefs about intentions cannot easily be checked. Moreover, the negotiation process often has the form of an exchange of draft contracts and comments on them, a procedure which invites positional bargaining and may inhibit a search for creative solutions.

Arguably, the gap between modern dispute resolution techniques and the dispute resolution services the legal system provides is much larger. Pre-trial dispute resolution is even more entrusted to lawyers, restricting direct communication between the parties, and formalizing it. The legal system, with its catalogues of available remedies and its requirements regarding concrete claims as entry conditions to court intervention, fosters the positional bargaining tendencies many parties in a dispute already have. Emotions and barriers to conflict resolution get no systematic attention in civil procedure rules or practices. The system focuses on communication regarding facts and arguments that support claims or defenses. Using techniques like probing, asking questions, or active listening is not impossible in these settings, but is much less likely to be successful.

Transaction practice and dispute resolution practice alike are developing into new directions where it is much easier to use the techniques of problem-solving. Many transaction lawyers now use problem-solving skills, at least when negotiations along traditional lines bog down. Civil procedure rules and practices have been changed

¹⁴⁷ See Patricia Franz, 'Habits of a Highly Effective Transformative Mediation Program' (1998) 13 *Ohio St. J. on Disp. Resolution* 1039 who compares the beliefs underlying (transformative) mediation with worldviews like the one expressed in Stephen Covey's bestseller, *The 7 Habits of Highly Effective People*.

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during the past decades almost everywhere in the direction of fewer formalities and more stages where the parties meet in person. Settlement has been upgraded from an implied objective of civil procedure to an explicit one, opening the door for use of the techniques that are suitable for this. Pre trial information exchange is organized in new ways, that are easier to reconcile with modern communication methods.¹⁴⁹ Mediation, in which this technology is commonly used, is considered by many disputants, and even tried by an increasing percentage, sometimes under pressure from courts, or even as a precondition for access to those courts.¹⁵⁰

3. Increasing Process Awareness in the Legal System

Although these developments are encouraging, and the positive attitude towards experimentation that comes with them is a good thing in itself, they still take place in an environment that is designed and built on foundations that are partly inconsistent with using the communication techniques of modern dispute resolution. Moreover, the use of negotiation technology within this environment still depends on choices made by individual lawyers, judges, or other dispute resolution professionals. Legal negotiations are a multi-party game, however, with parties themselves, backed by other stakeholders, lawyers, and third parties.¹⁵¹ If the persons concerned do not all agree on one procedure and its accompanying communication methods, which will often be the case, especially in disputes, they are likely to be stuck with the default: the method of communication that is implicit in the conventional system that has been developed in many centuries. These default methods of negotiation and communication are determined by the legal system, and by the common practices of lawyers, such as the usual ways of processing documents when doing a merger transaction. The road to real change, therefore, is probably the adjustment of these default procedures: that is changing the formal rules of the legal system or explicitly and wholeheartedly introducing new practices that are likely to be followed by such a majority of persons involved that they stand a chance of becoming a new default.

¹⁴⁹ In the Civil Procedure Rules 1998 enacted in the UK the Pre-action Protocols regulate the exchange of information between the parties prior to trial, see *Pre-Action Protocol for the Resolution of Clinical Disputes* <http://www.lcd.gov.uk/civil/procrules_fin/> accessed at April, 20, 2003. The Pre-Action Protocol for the Resolution of Clinical Disputes, for example, aims at encouraging 'a climate of openness when something has 'gone wrong' with a patient's treatment or the patient is dissatisfied with that treatment and/or the outcome.' Moreover, it 'provides general guidance on how this more open culture might be achieved when disputes arise' and 'recommends a timed sequence of steps for patients and healthcare providers, and their advisers, to follow when a dispute arises.' Article 3.4 (vii), for instance, provides that the health care provider should 'advise patients of a serious adverse outcome and provide on request to the patient or the patient's representative an oral or written explanation of what happened, information on further steps open to the patient, including where appropriate an offer of future treatment to rectify the problem, an apology, changes in procedure which will benefit patients and/or compensation.'

¹⁵⁰ See for an overview of empirical research regarding court connected mediation programs Roselle L. Wissler, 'Court-Connected Mediation in General Civil Cases: What we Know from Empirical Research' (2002) 17 *Ohio St. J. on Disp. Resolution* 641.

¹⁵¹ See for an elaboration in these terms Ronald J. Gilson and Robert H. Mnookin, 'Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation' (1994) 94 *Columbia Law Review* 509.

Transaction lawyers may be able to develop templates for negotiating deals, with modern negotiation technology built in. Many companies already have procedures for dealing with differences in relations with employees, customers, suppliers, or even shareholders. These procedures, which probably already reflect the problem-solving method or its equivalents from management theory, could be further extended into the realm of legal dispute resolution.

Civil procedure rules and court or arbitration practices could also be adjusted to accommodate modern dispute resolution techniques. If court hearings entailed more elements of the problem-solving method, the associated communication techniques could become standard tools that everyone present at the hearing could expect the judges and lawyers to use. Protocols for dealing with certain disputes could explicitly encourage the parties and their lawyers to make use of these skills. Mastering such skills could be a requirement for access to the legal profession. Assessing the way they are used could become an element of evaluation of dispute resolution efforts, stimulating learning by doing and reflecting on experiences.

F. Blame

1. 'Avoid Blame, Look For Contribution.'

A topic that deserves separate treatment is blame, because it is so central in the legal system.¹⁵² Assigning blame is a natural urge of people when confronted with a negative outcome. People generally favor human agency explanations while deemphasizing evidence of mitigating circumstances.¹⁵³ In theory, it is possible to distinguish different levels of attribution to other persons.¹⁵⁴ A person's conduct can be just the cause of some event, this person can be responsible for it, the person can have acted morally blameworthy, and, finally, the conduct can be extra objectionable because the act was intentional. In practice, these distinctions are easily blurred, especially when the attribution is linked to sanctions, which people tend to see as a reaction coupled to conduct that is morally blameworthy.

Blame can be seen as an emotional outlet for hurt feelings that are difficult to express directly.¹⁵⁵ Blame is thus likely to be a sort of proxy for underlying interests: needs, wishes, and, more in particular, concerns or fears. Indeed, mediators often use views

¹⁵² This contrasts sharply with the relatively little attention blame gets in research. W.L.F. Felstiner, R.F. Abel and Sarat A., 'The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming' (1980) 15 *Law and Society Review* 631 is still widely cited, but contains almost nothing on the psychology of blaming. For an overview of the psychological research, see M. D. Alicke, 'Culpable control and the psychology of blame' (2000) 126 *Psychological Bulletin* 556. A plausible popular account of the causes and effects of blaming by researchers from the Harvard Negotiation Project in the context of problem-solving negotiations, on which I draw here, can be found in Stone, Bruce Patton and Sheila Heen, *Difficult Conversations* (Penguin, 2000).

¹⁵³ M. D. Alicke, 'Culpable control and the psychology of blame' (2000) 126 *Psychological Bulletin* 556, 568.

¹⁵⁴ Kelly Shaver, *The Attribution of Blame* (Springer, New York, 1985).

¹⁵⁵ Stone, Bruce Patton and Sheila Heen, *Difficult Conversations* (Penguin, 2000) 59..

of the parties expressing blame as the starting-point for their search for underlying interests. What may also trigger blame is the fear of being blamed; it might be a defensive reaction. That may be one of the reasons why blame is so common in disputes. It probably occurs less frequently in negotiations about transactions. Even there, blame comes up easily when the negotiations stall.

Blame has important functions.¹⁵⁶ It can be an effective teaching tool that helps people avoid repeating their mistakes. It can also be used to stimulate people to put forth their best efforts. However, it has many disadvantages as well. First, spontaneous attributions of blame are notorious for being influenced by factors like emotional state of mind, unfavorable attitudes towards the actor, towards other acts of his, or towards the group to which he belongs, severity of outcome and a tendency to see people rather than the environment as causes.¹⁵⁷

Blaming also affects the way people deal with a problem in negotiations. Confidence may be a casualty of blame, and this seems to be at odds with empowerment, an important condition for moving forward in negotiations. In their convincing treatment of the impact of blame on how people deal with differences, Stone, Patton & Heen state that blaming stands in the way of learning what really is the problem and what can be done about it. It is hard to talk about because it necessarily implies a discussion in terms of actions that caused the problem, evaluation of these actions against standards of conduct, and sanctioning. Blaming implies bad conduct and punishment. Therefore, it invites defensiveness, strong emotions, and arguments, everything that comes with the role of the accused.¹⁵⁸ People who are blamed are less likely to be understanding, open, and willing to apologize. They are less interested in finding out the truth about what happened and may even obstruct it.¹⁵⁹ Distributing responsibility to one or more persons also requires an analysis of individual conduct and invites remedying the situation by sanctioning this conduct. Often it is more fruitful to look at the wider system in which the problem arose and to stimulate changes in the system:

¹⁵⁶ See Louis Michael Seidman, 'Soldiers, Martyrs and Criminals: Utilitarian Theory and the Problem of Crime Control' (1984) 94 *Yale Law Journal* 315, 337 (blame as teaching tool) and the interesting and more positive account by David G. Baldwin, 'How to Win the Blame Game' (2001) (July 2001) *Harvard Business Review*, who researched how Major League Baseball managers make decisions. He claims that blame can be a powerful and constructive force: as teaching tool, to prod people to put forth their best efforts (when used judiciously and sparingly, and while maintaining both their confidence and their focus on goals). His observations led him to identify five rules of blame: First, know when to blame and when not to. Second, blame in private and praise in public. Third, realize that the absence of blame can be far worse than its presence. Fourth, manage misguided blame. And fifth, be aware that confidence is the first casualty of blame.

¹⁵⁷ Compare Lerner's 'Just World Hypothesis', which is a widely used explanation for the inclination to blame victims, see M. J. Lerner and D. T. Miller, 'Just world research and the attribution process: Looking back and ahead' (1978) 85 *Psychological Bulletin* 1030.

¹⁵⁸ Institute of Medicine (Linda T. Kohn Committee on Quality of Health Care in America, Janet M. Corrigan, and Molla S. Donaldson, Editors), *To Err Is Human: Building a Safer Health System* (National Academies Press, Washington, DC, 2000) 111 (reporting the fault system to create incentives to hide errors and suggesting no-fault solutions in order to eliminate the adversarial inquiry into fault and blame that characterizes the current system).

¹⁵⁹ Stone, Bruce Patton and Sheila Heen, *Difficult Conversations* (Penguin, 2000) 64-65.

the relationship between the people, the surrounding technology, or other elements of the wider setting.¹⁶⁰ By inducing defensive reactions, strong emotions, and counterattacks, blame puts stress on relationships. More in general blame is backward looking and not forward looking, where things can still be changed for the better.

If this is a fair account of the effects of blaming, it is likely to complicate problem-solving negotiations. It adds strain to the relationship between the parties. In some respects, it is even the opposite of what people should be stimulated to do when they have differences.¹⁶¹ Blaming inhibits listening to the other party and understanding that person's interests.¹⁶² Because the focus is on the conduct of the other, the blaming party easily loses sight of his or her own interests and of possible solutions. On the other side, it causes defensive reactions that again inhibit the ability to see underlying interests and possible solutions. It can also be unfair. Being accused of having acted wrongly is one thing when there was a clear rule that was transgressed. In many disputes, however, it is almost impossible for one party to say that the whole problem was caused by the other party's wrongful conduct. What conduct could be expected was not at all clear, or the duties that were not lived up to were of only minor significance. Blaming also invites counterattacks based on blame, making it more likely that a victim is blamed as well.

This is why proponents of the problem-solving method tell us to avoid the blame frame. When parties start to blame one another, the reaction should be to rephrase the blaming issue as an issue of interests.¹⁶³ They advise us to reserve the blame frame for situations where distributing responsibility to one or more persons by an analysis of individual conduct, and remedying the situation by sanctioning this conduct is necessary or the preferable way of dealing with a problem, even when all the drawbacks of using the blame frame are taken into account.¹⁶⁴

2. The Blame Standard

The legal system often uses the framework of defining an obligation or duty, checking whether it is performed, and sanctioning when it is not. Most of the time, these obligations and duties reflect standards of conduct. Defining and enforcing rules of conduct is the essence of contract law and tort law. In both areas, strict liabilities, where responsibility is independent of conduct, are the exception; even when strict liabilities are invoked standards of conduct can still be relevant as they reappear in the guise of defenses. The law of civil procedure also mainly consists of rules of conduct.

¹⁶⁰ Ibid. 65-66. and Lucian L. Leape, 'Forward: Preventing Medical Accidents: Is 'Systems Analysis' The Answer?' (2001) 27 *American Journal of Law & Medicine* 145.

¹⁶¹ Stone, Bruce Patton and Sheila Heen, *Difficult Conversations* (Penguin, 2000) 58-66.

¹⁶² Ibid. 59.

¹⁶³ R. Fisher, W. Ury and B. Patton, *Getting to Yes: Negotiating an Agreement without Giving in* (2nd ed., 1991) 37 and 116.

¹⁶⁴ Stone, Bruce Patton and Sheila Heen, *Difficult Conversations* (Penguin, 2000) 63.

In addition to this primary level of conduct rules, contract law and tort law give procedural rules for some issues that are hard to deal with by substantive rules: notice requirements may relate to the way parties communicate about non-performance, for instance. Many disputes about substantive issues, therefore, give rise to secondary disputes of a procedural nature, and even third- or fourth- order disputes are not uncommon. The discussion might unfold like this: If a person could not actively have prevented the damage on the spot, he could have anticipated it and have taken precautionary measures. If he was not in the position to take such measures, he could have made another person to do it. If he had no authority over this person, he could have alerted this other person. If he did not have the information that was necessary to anticipate the event, he should have informed himself better. If he does not remember correctly which information he had at which moment, he may be caught not telling the truth, or identified as someone who does not properly records information. Although there are many exceptions, the typical way a dispute is processed by the legal system is thus that a standard of conduct is found, a person is accused of not living up to this standard, and the remedy the legal system provides is translated into a claim.

This framework of standard of conduct, blaming, and claiming has obvious advantages. Legal sanctions are indispensable for the prevention of many forms of unwanted conduct. Blame and the related concept of guilt are sanctions in themselves that contribute to prevention.¹⁶⁵ If nobody could ever be blamed and sanctioned for not living up to obligations, the economy and society at large would cease to function. These sanctions are not only necessary for prevention, but the principle that the resulting damage should also be rectified is a straightforward method to decide whether the victims of harmful conduct should be provided with compensation.

For many obligations, the framework of standard of conduct, blaming and claiming is not only indispensable, but also relatively unproblematic. A debtor not paying back a loan at the agreed time, a supplier of clearly defective goods, or a reckless driver causing an accident should be corrected, and an invitation to live up to his obligations is what he can expect. The framework is more troublesome, however, in situations in which the obligations of the parties are not as clearly defined or where it is doubtful whether they have lived up to the relevant standards of conduct. In many disputes, lawyers have to more or less create the standards of conduct. They 'derive' them from ambiguous sources, such as when they construe a term as implied in a contract or extract a more concrete duty from a very general doctrine such as negligence. In these situations, the emotions, defensiveness, and other common reactions associated with being blamed, are likely to be even stronger.

For lawyers, creating duties, blaming, and claiming are normal tools. They know that the three levels of blame, mere causation, legal responsibility, and being morally blameworthy, should be distinguished. They know that blaming is mostly a way of attributing damage, and not a moral condemnation. They know that what the law requires of individuals is often not realistic in real life. They also know that not observing duties is frequent and human. Lawyers may soften the impact of blaming

¹⁶⁵ Louis Michael Seidman, 'Soldiers, Martyrs and Criminals: Utilitarian Theory and the Problem of Crime Control' (1984) 94 *Yale Law Journal* 315, 338.

on their clients by telling them this game is part of the legal process, and that legal blame should not be taken for real moral blame. But for the clients, the game is bound to be reality. They are the ones who are being blamed. They are being threatened with sanctions for their alleged misconduct. Moreover, in many situations, lawyers play a more serious version of the blame game. Lawyers often blow up the accusations that are only 'legal' into 'real' ones in order to increase their chances of prevailing in courts.¹⁶⁶ Courts will presumably have less difficulties to decide that a person is liable, and especially for extensive consequences, when there is someone really to blame. So lawyers sometimes do try to convert 'legal blame' into 'real blame'. In some contexts, they even have incentives to label harmful conduct as intentional. When that is done, dispute resolution is likely to become even more difficult. Bad intent suggests bad character¹⁶⁷ and when the debate changes into one about character, it will cause yet more defensiveness, making the empowerment and recognition that are necessary for effective negotiations even more difficult to achieve. Moreover, in a dispute in which one is already inclined to see the other as an adversary, attributions like intent can easily become self-fulfilling.

3. Alternatives for the Blame Frame

The blaming framework, though it seems to cause substantial costs, appears to be an essential element of the way the legal system operates. Is this where the problem-solving method runs out of steam? Or, in other words, is the tendency of the legal system to promote blaming a necessary and unalterable element of this system? Let us explore some ways the legal system could cope with this controversial element.

It may be useful to start with restating that responsibility and sanctions are indispensable elements of the legal system when its goal is to prevent undesirable conduct. Prevention by the legal system is hardly thinkable without many standards of conduct and sanctions. Blaming may also indirectly serve that other goal of private law, compensation. Determining who has caused damage through improper conduct is also a way to distribute value.¹⁶⁸ The amount of blame on both parties provides us with an objective criterion. The social norm¹⁶⁹ or moral heuristic¹⁷⁰ that says that damage caused by improper conduct should be compensated is so powerful because it is apparently a nice fit to both primary goals of private law, prevention and compensation (optimal distribution). This also explains why it is so difficult to find alternatives for the framework of duties, blaming and claiming. Alternatives may only

¹⁶⁶ Compare Neal Feigenson, *Legal Blame: How Jurors Think and Talk About Accidents* (American Psychological Association (APA), Washington, D.C., 2000).

¹⁶⁷ Stone, Bruce Patton and Sheila Heen, *Difficult Conversations* (Penguin, 2000) 48.

¹⁶⁸ Louis Michael Seidman, 'Soldiers, Martyrs and Criminals: Utilitarian Theory and the Problem of Crime Control' (1984) 94 *Yale Law Journal* 315, 340 (calling this the 'distributive function' of blaming).

¹⁶⁹ Louis Kaplow and Steven Shavell, *Fairness Versus Welfare* (Harvard University Press, Cambridge, Mass., 2002) 135.

¹⁷⁰ Sunstein, Moral Heuristics == (warning against moral intuitions 'wrenched out the contexts in which they make sense').

be a substitute for blaming with respect to one of the goals, and may have to be supplemented by other alternatives that substitute the other goal. In the following, I will not engage in a full-scale discussion of alternatives for the present system. Rather I will focus on some alternative approaches that could be inspired by the problem-solving method. I will not discuss other valuable tools for prevention like reputation, social norms or other non-legal incentives, and alternative compensation instruments like strict liability, government and private funds, or social security.

We might try to do something about the procedural and relational consequences of blaming by considering alternative methods of communication. For instance, we may wonder whether the goal of prevention really requires that other persons express that the wrongdoer has not lived up to the standard and that a sanction should follow. Some of the negative side effects of blaming might be mitigated when an answerable person is given the chance to make up his own mind about responsibility and to express his views first, before he is hit by an accusation. When there is a sufficiently clear standard of conduct, like an agreement that payment is due on a certain date, or a safety rule, it may be sufficient to inform him of the harm experienced and ask him what his ideas are about dealing with this situation, in relation to the reasonable expectations that the harmed person has on the basis of the contractual relationship.¹⁷¹ The other party will generally be able to link the harm to the standard of conduct himself. Evasive answers can be met by follow-up questions. If necessary, a more responsible reaction can be triggered when the person experiencing a problem with the conduct of another specifies the conduct he expected, leaving open whether this expectation was realistic or right. If no responsibility is taken then, and it should be, it is probably early enough for a formal accusation. Such alternative manners of communication are likely to lower the costs of discussing responsibility, enabling a more thorough evaluation of possible causes and remedies and thus improving learning. Hence, this would be an advisable way forward, unless these cost savings and effects on prevention would be offset by positive contributions of the act of blaming. Is, for instance, the threat of being blamed an effective extra sanctioning element that inspires people even more to live up to their obligations?¹⁷²

The blame frame is probably the most problematic in disputes in which the parties have not contravened clear standards of conduct that they reasonably could have been aware of or in which they had reasonable grounds to believe that the standards would not apply in the circumstances.¹⁷³ We saw that lawyers often have to ‘create’ standards

¹⁷¹ See Hugh Collins, *Regulating Contracts* (Oxford University Press, Oxford, 1999) 143 and 182. (arguing that contract law should protect reasonable expectations rather than express contractual rights).

¹⁷² See for a more general discussion of these trade-offs, but with less focus on the administrative costs of discussing fault, Louis Kaplow and Steven Shavell, *Fairness Versus Welfare* (Harvard University Press, Cambridge, Mass., 2002) 134-154.

¹⁷³ Compare Louis Michael Seidman, ‘Soldiers, Martyrs and Criminals: Utilitarian Theory and the Problem of Crime Control’ (1984) 94 *Yale Law Journal* 315, 339 (suggesting, for criminal law, that blame is an appropriate extra sanction in case of infringement of property rules but not in case of liability rules).

afterwards,¹⁷⁴ with the benefits and errors that come with hindsight, particularly when they want to obtain a more favorable distribution of value for their clients. In these situations, the legal system actively transforms the dispute into a blaming game. Prevention might still be relevant in these situations, in the sense that the general possibility of being blamed invites people to think about the effects of their actions on others. But for the reasons discussed in the preceding paragraph, blaming in these situations can also be extra harmful and even plainly unfair.

The goal of prevention would probably not suffer in these ambiguous situations if the parties discussed the things that went wrong in terms of contribution instead of blame.¹⁷⁵ Mapping the contribution system, the possible causes of the adverse outcome, avoids many of the side effects of blaming. It might enhance prevention whenever it leads to considering more possible causes, including those explanations that reside in the interaction between people, rather than in individual conduct, or the ones from external factors. Another way of reinterpreting blame is the ‘Personal Control Model’ that centers on the freedom to effect outcomes and the constraints on this freedom, like physical, cognitive, emotional, and situational constraints or competing causal factors.¹⁷⁶ In this approach, the amount of control can be established, and responsibility can become a gradual matter, instead of an all-or-nothing issue. This is likely to make the approach less threatening for the actor and less damaging to the negotiation process, although the differences between this approach and the usual blaming approach may be subtle, making degeneration into the latter approach conceivable.

When compensation, that is, value distribution, is the goal, these alternatives may also be useful. Contribution or personal control versions of responsibility, with their gradations of contribution or perceived control, can be translated into suitable objective criteria, which, as we saw, are preferably of a continuous and two-sided nature.¹⁷⁷ However, for distribution purposes, objective criteria can be used that distance themselves even further from the evaluation of conduct. Such alternatives are already present in the legal system. Although largely unnoticed by mainstream academics and lawyers, many subdivisions of private law are indeed in the process of developing criteria that withdraw from the blame frame. In divorce law, and in the wider area of family law, many jurisdictions have adopted rules that deal with issues like financial support or custody on the basis of future needs, personal skills or other resources. In some countries, wrongful dismissal laws take the form of schedules for compensation of workers that take into account factors like age and years with the company, factors that are a good proxy for the relation specific investments made by

¹⁷⁴ Compare on this ex post perspective Louis Kaplow and Steven Shavell, *Fairness Versus Welfare* (Harvard University Press, Cambridge, Mass., 2002) 147.

¹⁷⁵ Stone, Bruce Patton and Sheila Heen, *Difficult Conversations* (Penguin, 2000) ==.

¹⁷⁶ See M. D. Alicke, ‘Culpable control and the psychology of blame’ (2000) 126 *Psychological Bulletin* 556. The power of this model is that it has a place for all the different factors. For which of these an actor should be responsible, and what the relative weight of each factor should be, is a value judgment that can easily be incorporated in this approach.

¹⁷⁷ See Paragraph III.D.3.

the worker, the way in which investments like specific skills and dedication contributed to the activities of the employer, and the future employability of the employee. In these systems, an employee can be dismissed for almost any reason and reasons are only marginally examined. By still allowing compensation in these cases, they are different from systems in which rules of conduct have to be deduced from doctrines like discrimination or good faith in order to obtain access to compensation. Could these developments lead to identification of blame-free areas in the law? Areas where referring to standards of conduct is not the normal way of dealing with differences, but an exception, for which special reasons have to be invoked? Areas where blaming is actively discouraged by the dispute resolution professionals that reside in it and their practices?

G. Cooperation

1. 'Be cooperative, and do not overestimate your autonomy.'

Negotiation research has also identified less tangible factors that contribute to favorable outcomes of negotiations according to the integrative method.¹⁷⁸ Other factors are thought to inhibit problem-solving.¹⁷⁹ Some of these factors can easily be linked to topics already discussed, like 'Faith in one's problem-solving ability' and 'A belief in the validity of one's own position and the other's perspective', which are very close to empowerment and recognition.¹⁸⁰ The other factors also sound familiar. The importance of 'Some common objective or goal' is easily understandable because the problem-solving method loses much of its attraction when the interests of the parties are totally opposed, and the gains of the method will increase when there is a joined perspective. 'Motivation and commitment to work together' obviously contribute to better communication and overcoming of barriers to dispute resolution. 'Trust' helps people to be open about their interests, about possible solutions, and about their batnas. These latter factors are also related in one way or another, however, to autonomy and cooperation, the subject of this chapter.

The essence of problem-solving is that it is a cooperative process linking autonomous parties. Their autonomy resides in the formulation of their own interests and the way they value these, as well as in their freedom to choose between various outcomes, whether they are options generated in the negotiations or alternatives available to

¹⁷⁸ Roy J. Lewicki, David M. Saunders and John W. Minton, *Negotiation* (3rd ed., Irwin/McGraw-Hill, Boston, 1999) 129-135 mentioning: 'Some common objective or goal', 'Faith in one's own problem-solving ability', 'A belief in the validity of one's own position and the other's perspective', 'The motivation and commitment to work together', 'Trust', 'Clear and accurate communication' and 'An understanding of the dynamics of integrative negotiations' as factors that facilitate successful integrative negotiation.

¹⁷⁹ Ibid. 135-137 mentioning: 'The history of the relationship between the parties', 'A belief that an issue can only be resolved distributively' and 'The mixed motive nature of most negotiating situations' as reasons why integrative negotiations are difficult to achieve.

¹⁸⁰ See Paragraph III.E.1 about the process of negotiation where 'Clear and accurate communication' was discussed and Chapter II.A discussing the tension between value creation and value distribution which is another expression of the mixed-motive nature of most negotiation situations.

them outside the negotiation arena. The other elements of the problem-solving method are a matter of cooperation, however. The parties are told to communicate about their interests, to search for value-creating solutions together, to jointly collect relevant objective criteria, and to communicate again about ways to resolve impasses. They are even advised to assist each other with uncovering interests and evaluating batnas, in particular when the negotiations stall.¹⁸¹ This is not to say that cooperation is always easy, or even possible. A factor that may inhibit cooperation is a relationship that ties the parties together because they have no viable alternatives.¹⁸² Although a relationship is thus a standing invitation to cooperate, it may be loaded with negative experiences from the past. One or both parties may find it difficult to believe that the other now genuinely wants cooperation or that cooperation would stick, if tried. However difficult it may sometimes be, cooperation is still a very important underpinning of problem-solving.

2. Autonomy

The system of private law is built on autonomy. Both in contract law and in the law of civil procedure, the traditional view is that each party determines its own strategy, independent of the other party. Where cooperation is deemed necessary, the freedom to act is restrained by rules of conduct and sanctions, which change the expected outcomes for the parties and give them incentives to cooperate. We saw that this is in line with the dominant approach of economics that also tries to influence individual choice through incentives and hopes to induce cooperation in this manner.¹⁸³

Autonomy is an immensely important principle. It supports choice and each person's pursuit of its own interests, which is a powerful drive to create value, individually, or through concerted action with others. It can hardly be the overarching principle, however, in more complex contractual dealings in which the parties have to interact intensively in an environment of changing and developing interests, preferences, feasible solutions, and external circumstances. Coping with these countless and ever changing-components by a series of autonomous decisions by individual parties, where the expected follow-up decisions of the other party are just another class of contingencies, may not be the most efficient approach. Still, this is the kind of interaction contract law assumes, with its rules that enable the parties to choose their positions or remedies within the margins set by these rules. Sometimes the rules stimulate cooperation because they require the parties to take some of the interests of the other party into account, like the doctrine of good faith.¹⁸⁴ However, the interests of the parties, and the ways the interests of both parties should be maximized, differ

¹⁸¹ William Ury, *Getting Past No: Negotiating with Difficult People* (Bantam Books, New York, 1991).

¹⁸² Roy J. Lewicki, David M. Saunders and John W. Minton, *Negotiation* (3rd ed., Irwin/McGraw-Hill, Boston, 1999) 269-275.

¹⁸³ See Chapter I.C.

¹⁸⁴ See Thomas A. Diamond and Howard Foss, 'Proposed Standards for Evaluating When the Covenant of Good Faith and Fair Dealing Has Been Violated: A Framework for Resolving the Mystery' (1996) 47 *Hastings Law Journal* 585 for a useful overview of the categories of situations in which the doctrine of 'good faith' imposes such a duty.

from case to case and are not even fully known by the parties themselves, unless they cooperate. So rules forcing parties to take some interests into account will either be too lenient for many situations where they do not create maximum value, or overshoot in many other situations where they unnecessarily restrict freedom of choice.

The rules of contract law thus give an impression of autonomy, whereas a successful contractual cooperation is often only possible through cooperation. Certainly, cooperation is practicable within the architecture provided by contract law. Its structure is just not very supportive, and sometimes even at odds with the conditions for optimal value creation through cooperative processes like problem-solving. Stressing autonomy and individualistic party choice is not the most appropriate way to foster a collaborative relationship. The dichotomy of obligations that parties assume towards each other is not easy to reconcile with a 'Common objective or goal' that is so essential for a cooperative venture. There is little in a handbook on contract law that inspires 'Motivation and commitment to work together'. And how exactly does contract law create or support 'Trust'? Could it do more to build trust than providing enforcement of assumed obligations so that certain relation-specific investments can be protected?¹⁸⁵

This inordinate stress on autonomy is even more problematic in disputes. In dispute resolution, the autonomy that is implied in the basic rules of civil procedure law not only discourages cooperation, but is even likely to generate escalation. Each party determines its own strategy. Litigation, as it has developed in practice, is far from a cooperative process. The ground rule of the game is to get the other party doing what one wants, by requests and claims backed up by threats and commitments. Threats occasionally have to be carried out. Commitments should be lived up to in order to be credible. Moreover, threats and commitments may lead to escalation. When you actually impose sanctions on the other party, it is unlikely that you will still be seen as a negotiating partner in a relationship that both parties see as collaborative, with a common goal, wherein the parties are motivated to cooperate, and in which they trust each other. Finally, the legal system induces the parties to see issues as being distributive: taking positions and finding a compromise between them is what the law of civil procedure suggests.

Although few disputes end up in court, many more of them go through one or more preparatory steps. Consequently, the negotiations preceding and accompanying litigation are likely to be permeated by the beliefs and practices underlying litigation. Lawyers send out letters summarizing the position they will take in a court case and threaten with concrete steps to move towards a court decision. Draft writs are shown to the other party in order to negotiate from a strong position. Information is gathered by procedures like discovery. Assets that are the subject of the dispute may be frozen. The problem with all these steps is that they not only serve the legitimate interests of the parties in improving their position in a court action, but also seriously damage the other party. Claims issued by lawyers, even if just formulated in a letter, invoke a range of internal measures to be taken by the defendant: informing lawyers, collecting

¹⁸⁵ See for a discussion of these issues and an overview of prior literature =====.

evidence, and informing shareholders or other interested parties like banks, spouses, other relatives, and auditors. Answering a discovery request is costly. When your assets are frozen, they are worth less than when you can dispose of them freely. All these steps are not only an invitation to take costly damage-limiting measures, but also to react in a ‘tit for tat’ manner, so that yet other costs are made.

We still do not know whether some degree of escalation is sometimes a useful phase in dispute resolution. But it is likely that higher degrees of escalation will lead to higher costs of dispute resolution. And it is very unlikely that a relationship affected by the attitudes and rules of litigation can at the same time be collaborative and full of trust. Being able to simultaneously play two games that are so different in essence, in a dispute situation that is already characterized by a loss of control, seems to require almost superhuman capabilities.¹⁸⁶ Clients do not usually possess these, nor will many lawyers. This is reflected in recommendations to hire not only a litigator but also a specialized ‘settlement counsel.’¹⁸⁷ As long as the legal system and the efficiency of negotiations put different challenges to disputants, they will have to cope, but many of them will long for more coherence between the legal system and the requirements of efficient dispute resolution.

3. A Cooperative Legal System

How could things like a collaborative attitude, a common goal, a commitment to work together, and trust be built into the legal system? Could the legal system de-emphasize the idea that a dispute can only be solved distributively? Let us speculate about these issues for a few more moments. Governments and courts may be able to stimulate people to think in terms of some common objective or goal: a neighborhood or a working environment where living or working is optimal for all people, for instance; or a goal of solving conflicts optimally and fairly.¹⁸⁸ With respect to faith in one’s problem-solving ability, legal and other institutions can have an ‘I know you can do it’ attitude, and may offer assistance to the parties instead of taking the problem from their hands. Likewise, these institutions can support a belief in the validity of one’s own position and the other’s perspective, a healthy, active self-interest and recognition that parties are in a collaborative relationship. Moreover, the legal system

¹⁸⁶ Compare Robert H. Mnookin, Scott R. Peppet and Andrew S. Tulumello, *Beyond winning: negotiating to create value in deals and disputes* (Belknap Press of Harvard University Press, Cambridge, Mass., 2000) for the best attempt to date to reconcile both approaches, with a warning for the complexity at p. 242.

¹⁸⁷ See William F. Jr. Coyne, ‘The Case for Settlement Counsel’ (1999) 14 *Ohio St. J. on Disp. Resolution* 367.

¹⁸⁸ Compare Article 1 of the UK Civil Procedure Rules 1998, stipulating: ‘(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly. (2) Dealing with a case justly includes, so far as is practicable – (a) ensuring that the parties are on an equal footing; (b) saving expense; (c) dealing with the case in ways which are proportionate – (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party; (d) ensuring that it is dealt with expeditiously and fairly; and (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.’

can contribute by not offering a right/wrong or win/lose perspective on issues that can more productively be framed otherwise.

Most importantly, the rules of the legal system and the courts can strengthen motivation and commitment to work together by systematically rewarding such behavior and discouraging one-sided steps. The law of civil procedure could, in theory, be recast into a system where every next step that substantially affects the other party should be taken in cooperation between the parties, with third party assistance if the parties fail to agree. Clear goals of the dispute resolution process, such as recognition of interests, maximum value creation and fair distribution in accordance with accepted legal criteria could steer the process. Secondary goals like efficiency with respect to dispute resolution costs in relation to error costs could help as well. Situations in which the cooperation breaks down, in cases where there is a serious suspicion of fraud, for instance, should probably become the exception, rather than the rule.

Finally, we could try to move towards a dispute resolution system that inspires trust.¹⁸⁹ Trust, rather than fear, we might add. When people do not trust each other, they will not accept information at face value but look for hidden or even deceptive meanings. The factors that contribute to or endanger the building of trust are manifold.¹⁹⁰ People are more likely to trust someone who has a positive attitude toward them, who depends on them, who initiates cooperative, trusting behavior, which serves as an invitation to act likewise, and who makes concessions in a commitment to his or her own needs as well as to working toward a joint solution.¹⁹¹ Institutions dealing with dispute resolution could be designed to stimulate trust by rewarding and protecting such behavior and reliance on it. They might even sanction parties who try to take advantage of those who are trusting, and especially those who give information about their worries and fears in order to find better solutions, only to find the other party trying to capitalize on these weaknesses.

Such a program to promote cooperation might go some way into the direction of reinterpretation of autonomy, a basic pillar of the system of private law. The principle of autonomy resides in the basic choice an individual party always has between a cooperative solution and an alternative like another deal or a decision by a court in a dispute. Talking about autonomy with respect to the processes of creating a deal, or finding a solution for a dispute is confusing, and maybe even misleading. Moreover, stressing autonomy easily generates an attitude in the parties that is at odds with many of the ingredients of a negotiation environment that make problem-solving more likely to work.

¹⁸⁹ Compare Hugh Collins, *Regulating Contracts* (Oxford University Press, Oxford, 1999) 122 regarding to legal rules instilling trust and cooperation when law facilitates.

¹⁹⁰ Roy J. Lewicki, David M. Saunders and John W. Minton, *Negotiation* (3rd ed., Irwin/McGraw-Hill, Boston, 1999) 131-133.

¹⁹¹ *Ibid.*

IV. DISCUSSION

A. *Most Important Results*

Problem-solving is a negotiation method that describes in concrete terms how people can optimally cooperate. Optimal cooperation could be turned into a goal, and problem-solving as a more concrete benchmark for evaluation of the legal system. The two main questions explored in this paper are whether such cooperation is a valuable goal and how it can be put into action in contract law, tort law, and the law regarding resolution of disputes.

Part II of the article deals with the first question. We saw that supporting problem-solving negotiations is likely to create value in terms of the preferences of the parties. It may reduce the costs of dispute resolution and probably also those of transacting, at least for more complex situations. It is too early to say how it interferes with other goals of private law, such as prevention and distribution (compensation), but this initial investigation yields no clear indications that having cooperation in the problem-solving manner as an additional goal would endanger those objectives. In particular this goal seems to be consistent with the perspective of welfare economics, in which the well-being of individuals is the criterion for normative evaluation. This is not surprising because the concept of interests used in the problem-solving method is very close to the concept of preferences used in welfare economics.

The amount of extra value created and costs saved, as well as the possible adverse effects on the other goals of private law, will depend on how the goal of supporting problem-solving is implemented and on the effects of these measures on the actual conduct of negotiating parties. Part III discussed seven possible areas of implementation, inferred from five basic elements of the problem-solving method, and supplemented by two issues where problem-solving and the values embedded in the legal system seem to clash. The road to change that transpired has many known stretches that can be joined in a coherent perspective by the objective of cooperation in the problem-solving way. An example is the need to improve access to court arising from the aspiration to reduce bargaining ranges in order to make value distribution easier and to diminish the influence of bargaining power. Another such insight is that the rule systems of contract law, tort law, and civil procedure neglect the processes of negotiating contracts and disputes.

Other elements are more novel. The problem-solving method, stressing the use of objective criteria, also invites us to redesign the rules of substantive private law in such a manner that they optimally help the negotiating parties whilst they search for satisfactory outcomes. Better criteria for distributive issues are presumably two sided, have a continuous character instead of an all-or-nothing one, and avoid an evaluation of the past conduct of the parties. Negotiation theory suggests that it is not necessary to have an exclusive rule, giving one right answer, for distributive issues, because it can be left to the parties, and eventually to the court, to compare the outcomes under several different objective criteria and find a decision that fits the pattern. Likewise, criteria do not have to be binding, but can be adjustable to individual differences in valuation of interests, different ways of creating value, and dissimilar external circumstances. The perspective of problem-solving also invites us to rethink the role of blaming and of the principle of autonomy.

B. Possible Limits of Usefulness: Pure Enforcement and Fraudulent Conduct

The usefulness of problem-solving theory in evaluating and improving the legal system also has its limits, although it is as yet unclear where exactly they are located. That the method has been less successful in situations where the distributive issues are prevailing, like in personal injury cases, where the parties often use the method and tactics of purely distributive bargaining, is a fact, but probably not a natural limit. This might have to do with the kind of objective criteria tort law has to offer and with the extreme size of the bargaining range, which lures parties into trying to grab the biggest part of it and thus induces them to be cautious or even to strike preemptively instead of being cooperative, open and trust-inspiring.

The real limits may lie in the important areas of private law, where the traditional goal of prevention should be predominant. Private law should also help people to enforce unambiguous obligations. People who do not pay their bills should be forced to do so. In cases where fraud is suspected, the problem-solving method has also little to offer. In this area, we certainly need to know more about the interference between the goals of prevention and problem-solving.

C. Possibilities for Further Research

What more could be expected for different areas of private law if evaluation of legal rules in terms of the problem-solving method were a program for further research? Here are some possible directions this research could take.

1. Contract Law

Contract law now provides the parties with tools to define their obligations and, if necessary, to enforce them. Some of its rules also support open communication about interests and a cooperative attitude. The doctrines of contract law could be rethought along the lines of problem-solving negotiations. Instead of just imposing duties to inform on one party, contract law could offer the parties guidelines for organizing their negotiation process in such a manner that information is exchanged in a fruitful manner.

More in general, the legal system could form a primarily facilitating attitude towards contracting and other transactions. The processes of negotiating transactions, the performance of such transactions, the adjustment of contracts in the course of a relationship, and the termination thereof could be facilitated. The doctrine of remedies for non-performance, to give another more concrete example, is now based on one of the parties, mostly the creditor, choosing a remedy within some restraints that protect the other party against substantial harm to its interests. In a legal environment that supports problem-solving, the parties would probably be stimulated to communicate about the situation of non-performance and to negotiate the best solution in relation to their respective interests. Contract law can contain rules that guide the parties through this negotiation process.

Further research should also reveal how legal institutions supporting cooperation in the problem-solving manner can at the same time, or through different channels, provide sufficient enforcement of contractual obligations. This is one of the busiest

areas of Law and Economics research and this research is already increasingly linked to Negotiation Theory. The main challenge will be to find new approaches for situations where the cooperation between the parties broke down. The traditional approach, in which the obligations of the parties under the contracts are first determined and then enforced, may not always be the optimal one.

2. Tort Law

If the system of tort law were systematically evaluated against the objective of problem-solving, one of the possible outcomes is that a more open mind would be warranted toward substantive interests other than monetary ones, as well as to procedural interests. People experiencing serious adverse outcomes have needs, wishes, and fears that can sometimes be addressed directly, and often without much cost to the other party.

Tort law can also be adjusted in order to stimulate the process of problem-solving when disputes arise. In tort law, though, value creation is less important, so that the bigger gains of adopting this approach may be expected where it contributes to more appropriate distribution against lower transaction costs. Providing good access to court and to sufficiently informative objective criteria of the kind that is helpful in negotiations may have to become priorities. A major challenge is to find approaches in which blame for not living up to rules of conduct is less central. The complications associated with attribution of blame may provide new input for legislators that have to choose between fault liability, strict liability, or other more novel methods of prevention and risk allocation.

3. Rules Regarding Dispute Resolution

Pre-trial dispute resolution can also be organized in a manner that supports problem-solving. Courts and the practices of lawyers influence the conduct of disputants before they bring their disputes to court. The same goes for procedures set up by corporations and other organizations for dealing with complaints and other common sources of disputes. These procedures can be tested on their compatibility with problem-solving and adjusted if necessary.

A very interesting perspective is the one of letting courts adopt the problem-solving approach, at least for some types of disputes. The picture that then emerges is that courts – judges, possibly even jury-like entities, or whoever is entrusted with neutral and state-backed dispute resolution – would first facilitate negotiations following this method. If necessary, they could also decide disputes in the problem-solving manner; mostly by providing evaluations of the distributive issues that separate the parties using suitable objective criteria, but if necessary also by imposing other elements of a solution that optimally serves the underlying interests of the parties. By letting adjudication become problem-solving, the system would also change the shadow that hangs over negotiations about disputes, and, thus, the basic game of these negotiations. Problem-solving courts could be a powerful example for the parties that may come to court, so that they start to problem-solve long before they end up before this court.

Another issue that did not get much attention in this article is how much fact-finding is necessary for effective problem-solving negotiations and for the purposes of

efficient prevention. Many jurisdictions, the Anglo-Saxon ones in particular, give the parties access to extensive fact-finding procedures. Could fact-finding, where necessary, also become a cooperative process? And in which situations should a party have access to more extensive fact-finding procedures, for instance because it suspects fraud?

4. Problem-Solving Lawyers?

A final issue is the role of lawyers in a system that has a more prominent place for the problem-solving method. The tension between principals and agents is the third tension negotiators have to manage¹⁹² and it has not been discussed in this study. Many lawyers already use problem-solving skills. If the legal system gradually increased its support for problem-solving negotiations, the legal profession would probably change more fundamentally.¹⁹³

The incentives on lawyers in a problem-solving legal environment have to be explored, however. The Law and Economics research on settlement usually models positional bargaining as this takes place in a more traditional legal setting.¹⁹⁴ Studies that include agents and take into account the complexity of cooperation are rare.¹⁹⁵ One of the issues that deserve more attention is the incentive under a contingency fee arrangement to strive for monetary compensation and not for other types of solutions, because it is difficult to measure the value to the client of an element like an apology.

D. Conclusion

Most people will not immediately associate the legal system with cooperation. They mainly see law as an enforcement tool for situations in which cooperation did not work. The legal system, however, is also the institutional framework that supports contractual relations and dispute resolution. We live in a society where every individual has its own unique preferences and where relations with others are almost always necessary to realize those preferences. Under these circumstances, contracts and differences between people often lead to the best results in terms of value created and transaction costs, if the parties cooperate.

¹⁹² Robert H. Mnookin, Scott R. Peppet and Andrew S. Tulumello, *Beyond winning: negotiating to create value in deals and disputes* (Belknap Press of Harvard University Press, Cambridge, Mass., 2000) 69-91.

¹⁹³ See Jacqueline M. Nolan-Haley, 'Lawyer, Non-Lawyers and Mediation: Rethinking the Professional Monopoly' (2002) 7 *Harv. Negotiation L. Rev.* 235.

¹⁹⁴ Andrew F. Daughety, '7400 Settlement' in Bouckaert and De Geest (eds), *Encyclopedia of Law and Economics* (Edward Elgar, Cheltenham, 2000) .

¹⁹⁵ See Ronald J. Gilson and Robert H. Mnookin, 'Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation' (1994) 94 *Columbia Law Review* 509 and the essays in Robert H. Mnookin, Lawrence Susskind and Pacey C. Foster, *Negotiating on Behalf of Others: Advice to Lawyers, Business Executives, Sports Agents, Diplomats, Politicians, and Everybody Else* (Sage Publications, Thousand Oaks, Calif., 1999).

The problem-solving method can be seen as a model of optimal cooperation that includes the choice individuals must make between advancing their interests through cooperation with another person or through pursuing an alternative strategy (a batna). Comparing this model with the legal system as it exists now, leads to many suggestions for improvement. If successfully implemented, these innovations hold the promise of extra value to be created and lower costs of transacting and dispute resolution.

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