

**To what extent should mediators be responsible
for freeing mediation process from logical
fallacies' possible harms?**

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Dedication

*To my late father;
“Maulana”
for his moral legacy,
unwavering love,
and ultimate devotion he generously gave to our family,
village,
and community.*

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My professors and supervisors especially Hussein Sabry, Abdalnasser Alattar, Bryan Clark, and Charlie Irvine, for their indefinite support, vital help, and caring guidance, without which I would not have been able to achieve anything throughout my learning journey since 1996.

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Glasgow, the generous, friendly, and welcoming city, that welcomed me as a great host is expected to do.

Abstract

This study tries to revisit, reconceptualise, and recategorise the main topics integrated with mediation scholarship and practice, including negotiation, mediation itself, disputes, and disputants. The aim is to examine the sufficiency and adequacy of the existing ADR studies and educational provision regarding answering one simple question: what should mediators do when one or more of the parties commits, either intentionally or unintentionally, a logical error during her endeavours to persuade the other party of her position, demand, or offer? Reaching a relatively satisfying answer required a thoroughly comprehensive interrogation of the dispute resolution scholarship.

This interrogation culminated in emphasising the significance of logical integrity in parties' discourse during mediation contexts in a manner that would arouse the curiosity of researchers and practitioners in the mediation field towards this topic. To achieve this, the thesis highlights the possible harms of logical fallacies, as one of the thinking errors negotiators might commit, and that could lead to unwanted results including reaching unfair mediation outcomes, distorting the image of mediation as a safe zone, one which parties shouldn't be taking advantage of, and affecting the reputation of mediators as efficient helpers who are expected to save parties from such harms.

Throughout this thesis, the research follows a deductive methodology, in which the first four chapters investigate a number of axioms, theories, and hypotheses in order to examine their validity, sufficiency, and suitability in answering the main research question. Then, the final three chapters, building on the proposed new definitions and classifications given by the first chapters, try to present a framework that shall help mediators achieve the mission this thesis supposes that they are responsible for: helping parties avoid the possible harms logical fallacies can cause to mediation, and bring more reasonableness to the process and its outcomes.

Preface

In July 2003, I joined the Egyptian Judiciary as a public prosecutor, then as a judge at the family court, and now as an appellate court judge. For more than twenty years, my continuous unanswered question was about the responsibilities of judges towards achieving justice and maintaining balance between the disputants. The situation that kept triggering this question for two decades was very simple, yet very tricky to handle; when one party is more capable of presenting her claim, defending her positions, and producing more persuasive arguments, even if these arguments are fallacious or logically incorrect. How shall I, as a judge in a country with a civil law system, help the weaker party - who can't see the flaw in her countering argument - without infringing my impartiality and without breaching procedural law? This question stayed with me, still without a satisfying answer.

In 2013, I finished my LLM from SOAS, University of London where I engaged, for the first time, with colleagues and friends in long discussions about evaluating mediation as a flexible and relatively creative alternative dispute resolution. Shortly afterwards, I indulged my curiosity by reading about this field, which was somehow new to the legal community in Egypt at this point. This curiosity was not unrelated to the old ongoing concern regarding how to help the less logically-capable party in court rooms; I hoped that alternative dispute resolution could address this concern, and answer this question, even in a different venue. Accordingly, I rearticulated the question to be: if the judge can be seen - to some extent – to be unable to assist the party who has a lesser arguing ability and protect her from the fallacies committed by her opponent, shall the mediator be more successful in this mission? This became the question for my thesis, and I believed - and still believe- that it deserves a deeper investigation and methodological research.

Revisiting mediation scholarship

The readings I found about the current mediators' roles and responsibilities emphasised the need for a satisfying answer to the question, as the current scholarship didn't give a comprehensive, exhaustive answer. However, the flexibility and creativity of mediation as a practice and as scholarship encouraged me to investigate

the possibility of developing a framework that allows reaching a proper acceptable answer to this question. The investigation required revisiting all accessible scholarship about the main concepts of importance to the elements in question. These elements include negotiation, mediation, conflict, and logical abilities/disabilities that create the possible unfair/imbalanced situations in the mediation room. However, the revisiting process for each of these four major concepts was influenced, inspired, and even framed by the central role of logical reasoning as a common theme that linked all these elements together throughout the whole thesis.

The first element, negotiation, has been revisited in Chapter One of this thesis in the light of logic and reasoning. This led to envisaging negotiation as a “*Persuasion Game*” in which each party seeks to convince her counterpart to accept her argument and to behave in accordance with this acceptance. By perceiving persuasion as a synonym of negotiation or at least envisaging them as significantly overlapping, reasoning and logic become essential in understanding negotiation scholarship including its elements, styles, skills, motives, and limitations. Thus, we track each of these subjects and try to explore the space that logic and reasoning might occupy in it. According to this endeavour, the lack of persuasion abilities “and the misuse of them”, appear as a significant part of the main challenges negotiators might face. However, these challenges can be handled by proper assistance offered by a professional neutral third party who has the necessary ability and capacity regarding dealing with the lack of logical/reasoning abilities and the misuse of them. However, this assistance needs to be explored deeper, as Chapter Two of this thesis attempts.

The second element, mediation, appears in Chapter Two as a sequel/advanced edition of negotiation, in which negotiating parties are expecting assistance from the mediator. The extent and type of this assistance constitutes one of the major criteria that differentiate one mediation style from another. The way this chapter explores mediation ends with seeing it as a rationalised/minded persuasion game. However, the thesis postpones elaborating on the meaning and elements of this role until Chapters Six and Seven, where this thesis reaches a more informed answer regarding the mediator’s responsibility towards logical flaws that take place in the mediation room.

However, these answers depend on and engage with the mediation scholarship as featured and presented in Chapter Two, especially mediation values. Among these, the parties' autonomy and substantial fairness emerge as main values that are susceptible to the harms which might be caused by logical fallacies, as Chapter Four of this thesis subsequently explores.

Regarding the third element, conflict/dispute, the main features of this concept, especially the aspects from which the conflict can be perceived and analysed are explored in Chapter Three. The significance of analysing these aspects of conflict arises from the fact that people usually resort to negotiation and mediation in situations where they are having a dispute/conflict. We attempt in this chapter to explore the theories that investigate the various aspects of conflict in order to figure them out and to suggest appropriate approaches with which to handle them. We then attempt in this chapter to explore the definition, nature, and dimensions of disputes. Discussing the different given frameworks that attempt to analyse disputes/conflicts and discovering different aspects pave the way to suggest our approach to conceiving the dimensions of the dispute, or what we call the "Dispute's Triangle". Having this kind of clear and simple framework in understanding disputes is a core element in assisting mediators in their job as negotiation "minders/rationalisers". However, proposing a workable framework for understanding disputes only permits us to focus on one side of the coin, the dispute itself, which does not help us to understand how "disputants" envisage these disputes, how they handle them, and how they make decisions towards resolving them. This shall be as important as understanding disputes. In Chapter Three we proceed by exploring different given frameworks that have attempted to analyse people's decision-making processes and understand the components that shape people's behaviours, especially during conflicts/disputes, in both prescriptive and descriptive approaches. Subsequently, we attempt to build our own framework benefiting from, engaging with, and reflecting on explored approaches from Aristotle to Shapiro. We label this proposed framework the "Disputant Triangle." Therefore, we have two triangles; the dispute, and disputant triangles. The dialogue between these two triangles can present more insights about the types of aid that negotiating parties might need from a mediator. This thesis names this dialogue "*The Containment*

Game.” The chances of reaching a resolution of a dispute may depend on the course and results of this game, and the negotiating parties’ awareness of its occurrence. Moreover, and more importantly for our thesis, the success of the mediator in helping negotiating parties reach a mutually accepted resolution of their conflict can highly benefit from noticing, understanding, and directing the course of this containment game towards the direction that gives a higher likelihood of resolution.

The two persuasion routes

In Chapter Four, we discuss the two persuasion routes¹: the central route that follows logic and reason, and the peripheral route that follows heuristics and biases. This distinction between the two routes has a fairly similar application to Daniel Kahneman’s famous concept² of “System 1 and System 2”, where our brain moves between System 1 thinking which is fast, intuitive, and emotional, and System 2 thinking, where reasoning, self-awareness, and logical deliberate thinking are in charge. We start this chapter by exploring System 2 or the Central Route’s main discipline, logic. This entails exploring its meaning, history, significance, and its relationship to other disciplines, in order to explore in the following chapters how it shall promote mediation and boost its quality and efficiency.

In contemporary studies of logic, it is widely recognised that logic has influenced many other disciplines and life aspects. Politics, media, marketing, and many other subjects have engaged with logic and perceived it as very useful scholarship that should not be treated as a dry academic subject anymore, but rather one that people should engage with in daily life issues. Therefore, we explore the relationship between logic and law, the changes that have occurred in this relationship, and its influence in logic teaching in law schools. Such teaching shall build a bridge between logic and mediation, as mediation should be one of the major subjects that uses logic as a valuable resource. Such an initiative - this thesis suggests - shall put new tools in mediators’ hands and help them develop their practice, as it offers them new roles and allows for a better

1 R E Petty and J T Cacioppo, *Communication and Persuasion: Central and Peripheral Routes to Attitude Change* (Springer 1986a), R E Petty and J T Cacioppo, ‘The Elaboration Likelihood Model of Persuasion’ in: L Berkowitz (ed), *Advances in Experimental Social Psychology* (vol. 19, Academic Press 1986b), and compare: S Chaiken, Heuristic Versus Systematic Information Processing and the Use of Source Versus Message Cues in Persuasion’ (1980) 39 *Journal of Personality and Social Psychology* 752 <<https://doi.org/10.1037/0022-3514.39.5.752>> accessed 11 Feb 2024.

2 D Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux 2011).

understanding of most given disputes. Next, we explore what we call “substitute logic” by exploring System 1, or the Peripheral Route, through demonstrating the three main mental deviations that replace traditional logic. These three deviations are heuristics, biases, and fallacies. Heuristics are the main umbrella that touch upon and correspond with the other two mental processes. We explore the various given definitions of heuristics, the manner in which they work, a number of examples of heuristics and their possible harmful influences on peoples’ decisions. Secondly, we discuss biases: their meaning, typology, and their influences on the mediation process. Finally, we set out a brief introduction to fallacies, as the third main type of mental errors negotiating parties might be expected to experience. This introduction to fallacies is a link between this chapter and the next one, Chapter Five. However, we don’t leave Chapter Four without highlighting the significant dialogue between the two routes/systems. This dialogue is another variation of the one we present in Chapter Three; the containment game. However, the game between the two routes, logic and substitute logic, is a “*Displacement Game*”. Each system has its own rules and steps, and the question here is about which system/route/set of rules shall succeed in displacing the other, whether logic and reason or the substitute logic deviations including fallacies? However, the more important question is: what can a mediator do towards this game? Chapters Six and Seven engage directly with this question after the comprehensive preparation and indirect involvement this thesis applies in the first five chapters.

In Chapter Five, we proceed further with exploring fallacies scholarship. This endeavour leads to a deeper examination of their definition, and better understanding of their nature, types, mechanism, and anticipated harms they might cause to mediation as a process, as well as to mediators as practitioners. However, there are several challenges in studying fallacies. One of these hurdles is the obvious lack of a comprehensive theory of fallacy similar to the ones we have of correct inference. Furthermore, most existing books and papers in the scholarship on fallacies are influenced by each other and repeat the same old approaches since Aristotle.³ However, exploring this long history of fallacies studies indicates that this topic enjoys a remarkable extent of continuity, which indicates the significance of this topic. In

³ C L Hamblin, *Fallacies* (Methuen 1970) 9.

spite of this importance, scholarship on dispute resolution has not paid enough attention to fallacies. When it comes to the presence of comparing fallacies to biases in the mediation library, we can easily notice how rarely, if ever, a researcher can find a book or a paper that discusses the scenario of fallacies being present in the mediation room. While, similar to both heuristics and biases, fallacies are deviations from logic and they are more closely attached to the formulation of the argument, as they directly defy the necessary logical steps in reasoning and building arguments. Furthermore, while biases are subjective inclinations which lead us to make a given decision, fallacies are faults in reaching this decision; faults which can be tracked and assessed objectively. In Chapter Five of this thesis, after exploring the concept of fallacies, their definition, types, common examples, and mechanisms, we elaborate on the possible effects of fallacies on mediation and mediators. These effects are the main trigger of this thesis, as fallacies, we believe, can harm the whole process in a way that threatens the credibility and trustworthiness of both mediation process and mediation practitioners.

Mediator's job description

In Chapter Six, we investigate our premise that the mediator is the one who should take action towards dealing with the anticipated harms fallacies might cause to mediation and mediators. This investigation is initiated by reviewing the mediator's known lists of duties and responsibilities, in order to examine their suitability and capability in helping with this necessary action towards fallacies. This review is based on understanding mediators' roles and labels in two different categories. The first one is the metaphorical and the second is factual. Metaphorical roles/labels are articulated in order to capture the main theme of the roles we expect from mediators. As there may often be a number of readers and students in mediation scholarship who haven't tried mediation themselves, or even shadowed any mediation session before, presenting explanatory metaphoric labels might help in encapsulating the core nature of each role and make it more recognisable and perceivable. On the other hand, factual roles tend to be more attached to academic wording and more devoted to presenting an accurate actual description of mediator roles. They resort to more precise and concise terms and do not tend to use rhetorical expressions. Factual labels can either

be central or minor, which makes a total number of three categories. The central factual ones highlight the core role expected from the mediator. However, these core roles do not exclude each other, as the mediator can apply more than one in the same session. The subordinate minor roles complement the central ones and shall assist the mediator in her job. While some of these minor roles might suit most mediation styles, others may be limited to specific approaches. We explore some of these roles in order to pave the way to our proposed model. This proposed model includes three labels that reflect on and engage with one of the three given categories of role labels. This reflection can describe our approach towards, not only handling fallacies, but also providing mediators with a comprehensive approach that shall help them to perform their duties through the whole process. The proposed metaphorical role is intended to simplify the idea behind the proposed role, and to make it realistic, by avoiding strict academic wording or the precise researchers' terminology. For instance, labels like 'coach', 'traffic warden', and 'play director' are from outside the academic world, but mediation scholars use them as we shall see in Chapter Six, in order to make this relatively new practice familiar and recognisable. By contrast, the central factual role is another edition of mediation styles/approaches that aim to use and apply academic, concise and precise descriptions that target specialists rather than laypersons. Finally, our proposed minor roles are tailored to support and help the mediator while applying her central factual role.

The metaphorical role which this thesis presents is the "Game Master". We present mediators in our thesis as masters of three games; the containment game in Chapter Three, the displacement game in Chapter Four, and the persuasion game in Chapters One and Two. These three games share the same content, but each one approaches this content from a slightly different angle. The containment game is an insider game where each party tries, internally, to win the dispute via the conversation she is having between the two triangles she has; the dispute triangle and the disputant triangle. In the disputant triangle, there are three dimensions: the personality, the identity, and the mentality. The disputant behaviour is an output of these three dimensions. However, in time of disputes/conflicts, this disputant triangle meets another triangle that forms most given disputes: the emotional, the social, and the factual side/dimension. The

containment game evolves from this question “Do I have a conflict?”- Or ‘Does the conflict have me?’”.⁴ If reasonableness has little to do with conflicts, as Daniel Dana confirms,⁵ this is because disputants let conflicts “have them”. This is not a play on words, but rather a simple differentiation between two modes that a disputant can be in; “‘The conflict has me’ means that I have lost self-control and self-direction. I can consciously enter a disagreement, but at a certain level I am no longer able to keep an overview of the situation and to influence it in such a way that, and by large, only the things I intend actually occur. And if the conflict has me I am no longer able to step out of the situation and switch off; I am ‘other directed’, i.e. controlled from the outside.”⁶ If the conflict *has* a disputant, then her perception becomes noticeably distorted. She will be plagued by thoughts and ideas that she can’t shake off. In such a situation, emotions can emerge and obsess her completely. Consequently, her behaviour becomes inflexible and stereotyped, and her will shall be narrowed to a limited number of goals.⁷ This is the core of the containment game, and the mediator’s role is to help each party win her inner game.

The displacement game is more concerned with the applicable set of rules in the process, and whether those are the logical rules or the substitutes (heuristics, biases, and fallacies). The mediator’s role here is to create an atmosphere where logic can stand a better chance. This atmosphere can’t be created without arming mediators with knowledge, tools, and skills that enable them to switch the context in which negotiation takes place into a logic friendly one. To allow logic to displace substitute logic, we present in Chapter Seven several tools that mediators can use while coaching parties on how to communicate without being trapped in the logical deviations, including heuristics, biases, and most importantly, fallacies.

The persuasion game, presented in Chapter One, encompasses the back-and-forth arguments parties send and receive (like a table tennis game) while negotiating. In this game, every party tries to persuade the other one that her position is reasonable and fair. The mediator’s role in this persuasion game is, again, to help parties present less

⁴ F Glasl, *Confronting Conflict: A First-Aid Kit for Handling Conflict* (Hawthorn Press 1999) 22.

⁵ D Dana, *Managing Differences: How to Build Better Relationships at Work and Home* (4th ed, MTI Publications 2006) 86.

⁶ Glasl (n 4).

⁷ *ibid.*

flawed arguments by helping each party get over her own unaddressed concerns, uncontrolled emotions, unmoderated biases, and unhandled fallacies. Once the mediator manages to help each party to get her concerns addressed, her emotions handled, her biases mitigated, and her fallacies dealt with efficiently, then the way to resolution with the other party becomes easier. However, the proposed central role, The Rationaliser, focuses more on the real job expected, or that shall be expected, from the mediator.

We believe that one of the most vital jobs which mediators need to master is bringing more rationality to the mediation room. By rationalising we mean attempting to find/create an explanation/justification/excuse for something using logical reasons or making an effort to influence a process/company/industry into a more efficient condition, especially by getting rid of unnecessary elements and components. This last factor is mainly a British concept, and widely used in the business sector.⁸ The rationaliser core role in mediation is used in conditioning parties to consider thinking logically, while negotiating by redesigning the mediation atmosphere to make it “logic friendly”, in order to switch the participants’ attitude and thinking from the peripheral route of persuasion to the central one, from system one (fast thinking) to system two (slow thinking), or from what we characterised in Chapter Four as from substitute logic to original logic. This mission/role can’t be achieved without several subordinate actions/jobs/roles, in which the mediator needs to help parties get rid of the hurdles that face them during the process. As discussed above, in Chapter One of this thesis, we explore the concept of negotiation and conclude this investigation by stating that persuasion is the key word to perceive and understand the essence of negotiation. The reason behind this conclusion is that negotiation involves parties’ use of logic, reason, and judgment, as it is a decision-making process at the very end. Therefore, parties might need to be empowered regarding their persuasion/argumentative practices, but without challenging or exposing their lack of logical abilities or reasoning skills as it becomes a matter of dignity and respect for parties to prove that their reasoning was correct.⁹ Being logical is an advanced human ability that people are usually confident

⁸ See: <https://dictionary.cambridge.org/dictionary/english/rationalize> , <https://www.merriam-webster.com/dictionary/rationalize> , and <<https://www.collinsdictionary.com/dictionary/english/rationalize>> accessed 14 Feb 2024.

⁹ L. Loevinger, ‘An Introduction to Legal Logic’ (1952) 27 Indiana Law Journal, 471, 471.

in obtaining, even if it's not exactly the case, and this ability is the prime tool, or should be the prime tool, of most decision-making processes, and a central skill at persuasion or influence attempts. Nevertheless, being a Rationaliser Mediator, (however,) despite its independent structure and nature, still needs a series of minor roles that shall help mediators assisting parties in the three games above.

The CEBF Model

The list of the proposed minor roles we suggest in this thesis is a reflection of the journey we believe substitute logic goes through when a negotiator commits a fallacy. This journey forms what we call the CEBF Model “Concerns-Emotions-Biases-Fallacies”. The CEBF model starts with the Core Concerns System, presented by Roger Fisher and Daniel Shapiro¹⁰, in which they investigate the *Concerns* that invoke negative emotions in negotiation, and the possible ways to change these negative emotions to positive ones, in order to produce better communication contexts. Failure in addressing these concerns shall result in generating *Emotions* that might hinder any healthy discussion, either directly by ending the conversation, or indirectly by creating *Biases* towards the other party, which makes the biased one prejudiced, prone to react deceptively, and think rigidly, instead of being ready to cooperate, work collaboratively, and behaving trustworthily. These biases create inclinations to adopting specific viewpoints, even if there are no sufficient arguments to support these inclinations or to convince the other party. Ultimately, in order to make these viewpoints/positions seem persuasive, the biased party, whether consciously or unconsciously, resorts to *Fallacies* in order to make her false arguments look true. This journey from concerns to fallacies forms the suggested CEBF Model. And for each stage of this journey, mediators can use one or more of the minor roles presented in this thesis.

The first minor role mediators can apply within the journey is to work as Concerns Managers. This role requires mediators to explore parties' concerns and needs in sufficient depth, a depth that can address the real forces that drive the conflict.¹¹

¹⁰ R Fisher and D Shapiro, *Beyond Reason: Using Emotions as You Negotiate* (Viking Penguin 2005).

¹¹ B Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide* (John Wiley & Sons 2000) 201, 207.

Mediators shall help each party explore matters at the grade of depth which is relevant to her, and then attempt to find the best approach to discuss every party's needs, one that includes all aspects that are of relevance to each party.¹² Digging to reach an acceptable depth shall allow mediators to discover concerns that can be emotionally or strategically sensitive, rather than being limited to relatively public and predictable ones.¹³ Mediators are expected here to figure out what is happening underneath, searching further to what could be the ignition point.¹⁴ This *walk back* process needs a workable plan to be carried out systematically.

This systematic approach can reflect on the Fisher and Shapiro Core Concerns Model¹⁵ by starting with recognising/identifying the object of concern/interest, then deciding the suitable level of the parties' awareness of their own concerns, and engaging them in the process of diagnosing and acknowledging these concerns, determining the necessary degree of the other party's awareness/recognition of her opponent's core concern/s, preparing a list of possible addressing moves that shall be used in order to achieve satisfaction of the identified unaddressed concerns, and, finally, applying/deploying the most appropriate move that can address the concern. The second minor role is the Emotional Handler. In this role, mediators are expected to attempt several approaches - independently or jointly – in order to achieve this goal. These approaches might include recognising and identifying emotions, understanding and analysing emotions, managing and regulating emotions, and finally investing emotions in enhancing reasoning abilities. This enhancement can be carried out by arming mediators with tools that aid in using emotions to effectively redirect parties' attention to significant events, generating emotions that can facilitate judgment and decision making, using changes of parties' moods in appreciating the existing multiple viewpoints, and finally using different emotions to encourage creativity in problem-solving.¹⁶ The third minor role is the Debiasing Assistant. Debiasing is a common term

¹² *ibid.*

¹³ J E Beer, E Stief, and Friends Conflict Resolution Programs, *The Mediator's Handbook* (New Society Publishers 1997) 146.

¹⁴ D Calloway, 'Using Mindfulness Practice to Work with Emotions' (2010) 10 Nevada Law Journal 338 <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?params=/context/nlj/article/1012/&path_info=10_2_calloway_using_mindfulness_practice_2010.pdf> accessed 12 Feb 2024, 339.

¹⁵ Fisher and Shapiro (n 10) 15.

¹⁶ P Reilly, 'Mindfulness, Emotions, and Mental Models: Theory that Leads to more Effective Dispute Resolution' (2010) 10 Nevada Law Journal 433 <<https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1017&context=nlj>> accessed 15 Feb 2024, 436-437.

in the field of judgement errors and decision-making studies.¹⁷ There are two general pathways towards applying debiasing during the mediation session; first by trying to modify the parties' behaviour, and second, to modify the negotiation environment¹⁸ in order to help parties become freed from their own prevailing biases and controlling tendencies. These two approaches include various tools and tactics we present and examine in Chapter Seven of this thesis.

These three minor roles towards concerns, emotions, and biases shall - this thesis proposes - help parties and mediators enjoy a mediation context that fosters rationality and allows more systematic thinking. In this environment, system 1 - or what we call substitute logic - should be less evident, while system 2, or logic, shall be activated. In this context, the mediator shall be able to use the lessons she has learned from managing parties' concerns and from handling parties' emotions. Furthermore, working within the CEBF framework makes the mediators' role more integrated, unifies her efforts, and adds a more purposeful nature to it. However, adopting all these well-structured titled roles cannot guarantee that fallacies will not take place in the mediation room. Fallacies shall always be expected, and mediators have to be constantly ready to deal with them. We believe that when parties commit fallacies during mediation, mediators have to respond in order to fulfil their main role as rationalisers. The above three roles regarding concerns, emotions, and biases are preventative but can't guarantee a fallacy free conversation. Accordingly, when the fallacy manifests its presence, mediators need to step in. Therefore, this thesis proposes new mediators' roles towards fallacies once they occur, as the final part of our proposed CEBF Model, and as a more direct and well-tailored layer of protection against fallacies' possible harms.

Mediator's proposed roles towards fallacies

Once a fallacy is conveyed, the mediation process and mediation values can be susceptible to possible harms. These harms come from the fact that failing to produce

17 See: B Fischhoff, 'Debiasing' in: Kahneman, D, P Slovic P, and Tversky A (eds), *Judgment Under Uncertainty: Heuristics and Biases* (Cambridge University Press 1982), H R Arkes, 'Costs and Benefits of Judgment Errors: Implications for Debiasing' (1991) 110 *Psychological Bulletin* 486 <<https://doi.org/10.1037/0033-2909.110.3.486>> accessed 15 Feb 2024, and J B Soll, K L Milkman, and J W Payne, 'A User's Guide to Debiasing' in: Keren G and Wu G (eds), *The Wiley Blackwell Handbook of Judgment and Decision Making* (John Wiley & Sons, Ltd 2015).

18 See Soll, Milkman, and Payne (2015), *ibid*, 11.

and exchange solid, flawless arguments in mediation, and allowing fallacies to exist, shall incite unwanted concessions and impact parties' autonomy, which directly contradicts the meaning of the process itself, and threatens the main feature of mediation as a fair, balanced, and supposedly rational pursuit, by turning it into a manipulative, deceptive, and unjust process. Such threats would be evident in most fallacy occurrence scenarios, whether in the case of not seeing the flaw in the argument but still not being persuaded, which might lead to an impasse, in the case of perceiving the fallacious argument as a deceitful move, which might escalate the conflict and create distrust, or, finally, in the case of not seeing the flaw in the argument, accepting its logic and giving in, which might result in an unjust settlement, one which the accepting party could either realise later, or remain unaware of the bogus nature of the argument concerned. Such scenarios shall require a comprehensive set of intervention tools/minor roles that are tailored specifically to deal with fallacies. These roles are proposed in this thesis in the final chapters, in order to offer an answer and a solution for the main research question, regarding the mediator's responsibility towards fallacies that might take place in mediation sessions. In order to help mediators on this mission, this thesis proposes a series of roles that are solely built to deal with fallacies. Each role reflects a grade of responsibility towards keeping mediation free from the harms fallacies might cause. Deciding the suitable role shall depend on several elements, including mediator style and mediation context.

The first proposed role is The Fallacy Detector. The fallacy detector is a basic rationaliser mediator who analyses parties' arguments, distinguishes good arguments from fallacious ones, and keeps a record of any fallacy that takes place in mediation, yet does not intervene, unless this fallacy is at risk of clearly putting one of the parties at the risk of accepting an offer, or giving a concession that she would not accept or give if her opponent's argument was clear and fallacy-free. Simply put, the Fallacy Detector recognises fallacies, memorises them accurately, and gets prepared to either switch to a more interventionist approach and protect the vulnerable party from getting misled, or acts to end the mediation session, if she finds that she can neither change her style, nor protect the mediation process and mediation values.

The second grade of intervention is presented by The Fallacy Defuser. Defusing a fallacious argument is a more interventionist move. The mediator here does not limit herself to discovering the fallacy and waiting for the possible consequences, but rather, once she realises - from the context of the conversation - that the committed fallacy might affect the targeted party's position, she steps in and comments on the fallacious argument in a manner that shall help the fallacy committer realise that her argument shall not pass. However, this goal must be achieved in a way that doesn't frame this argument as a deceptive move or an unethical tactic. The defuser targets the argument, not the arguer, by deconstructing the fallacy itself, just after realising its possible harmful influence on the receiving party's decision. While targeting the argument not the arguer, the mediator has to keep her neutrality intact by using cautious language that avoids any move or expression that might endanger this value. To achieve this, she resorts to the fallacy mitigation strategies this thesis presents in Chapter Seven for each known fallacy type, which offers a systematic tool in dismantling the fallacy and defusing it without harming neutrality or causing face loss.

The ultimatum role towards fallacies in the mediation room is The Fallacy Demolisher. The mediator here doesn't need to identify any possible influence of any party's fallacious argument on her counterpart's position; she intervenes immediately once the fallacy is detected, without waiting for any investigation. This mediator adopts the role of the Assistant Referee (the linesman) in association football. She uses the flag every single time one of the parties tries to exploit a fallacy. Her role is to capture any fallacy committed without waiting for the result, quite similar to the assistant referee who raises her checked flag regardless of what might occur afterwards. This is exactly what the fallacy demolisher does; she has to intervene irrespective of the result of the fallacy, and without consideration of the response of the other party. This approach might save time, as it doesn't require the mediator to invest any time to examine the possible harms of the fallacy, since once she recognises a fallacy, she has to step in and deal with it. This confronting nature of the fallacy demolisher's intervention might guarantee a better protection from the fallacy harms; however, it might affect the rapport mediators need to build with both parties, as this confrontation might lead to a loss of face, or at the very least, an uncomfortable situation.

These three new proposed roles are all under one main role, that of rationalising mediation, and they all testify to the importance of protecting mediation from the possible harms of fallacies. However, this thesis suggests that these roles should all be preceded by and accompanied by a unified conditioning role that shall take place in the opening/introductory phase/stage. On this stage, we propose, parties might need a Decision Coach. The decision coach, originally, is a health care provider who is professionally trained to aid and provide patients with all necessary support that aims to develop their abilities in: thinking about the available options they might have, using and understanding all necessary evidence-based health care data, and being prepared to discuss and implement the chosen decision.¹⁹ However, decision-coaching parties in mediation as a part of rationalising the process is a generic role that has to be associated with the three new roles of “Fallacy Detector, Fallacy Defuser, and Fallacy Demolisher.” Yet, the mediator here is a thinking-coach or a decision-assistant rather than a decision-coach. The difference here is that our mediator doesn’t aid parties in choosing between already available options as a medical decision coach does for patients, but rather helps negotiating parties develop their ability to make choices and articulate sound arguments while discussing these choices. Developing parties’ abilities to make choices doesn’t mean changing their way of thinking or restructuring their thinking methodologies. Such an endeavour might not be achievable, due to the limited time that mediation offers and the nature of mediation itself, which is mainly concerned with assisting parties in their ongoing mutual persuasion process. However, mediators can still equip parties with the proper guidance that shall help them produce better arguments and commit fewer mistakes in thinking. One of the guidance tools mediators can offer here, we suggest, is resorting to the framework presented by Eemeren and Grootendorst who designed a well-defined guiding principle that shall form a clear outline for a recommended reasonable discussion.²⁰ They formulated a full detailed list of thinking rules that shall help negotiators discuss their differences of opinion by proposing an accessible “code of conduct for reasonable discussants.”

¹⁹ J Jull and others, ‘Decision Coaching for People Making Healthcare Decisions’ (2021) 11 Cochrane Database of Systematic Reviews n/a <<https://doi.org/10.1002/14651858.CD013385.pub2>> accessed 16 Feb 2024.

²⁰ F Eemeren and R Grootendorst, *A Systematic Theory of Argumentation: The Pragma-Dialectical Approach* (Cambridge University Press 2003) 189.

This code addresses discussants who want to find a resolution for their differences of opinion in a reasonable manner. This unique code consists of ten rules, or what they referred to as “ten commandments” which are basically a list of essential requirements for discussions reasonable behaviour. We present this code in the final chapter as we believe that this code can be a useful tool for mediators in terms of supplying negotiating parties with standards and guidelines they might agree upon in order to help them speak a relatively unified language. Such rules were tailored by Eemeren and Grootendorst after examining a wide range of fallacies that usually occupy ordinary conversations.²¹ They tackled in their proposed code of conduct the possible roots of thinking errors and fallacious argument in order to equip ordinary discussants with a ready-to-use framework. Equipping parties with such guidance can be a part of the mediation process by embedding it in one of the mediation phases; namely, the opening/introductory phases/stages. However, these new proposed roles, shall not contradict parties’ self-determination or form any kind of threat to it. In all cases, as we shall see in this thesis, parties’ autonomy has to be kept intact as it represents the core value that distinguishes mediation from other alternative dispute resolutions.

Expected challenges

However, introducing all these new roles to the mediation practice triggers a number of challenges that we explore in this thesis. Moreover, deploying these roles requires a number of steps in order to prepare mediators and condition parties to adopt these proposed changes. We investigate in the last chapter the possible challenges and obstacles that might face such changes, and the best enabling moves mediators might need to handle them smoothly. These moves include revising and updating law schools’ curriculums and negotiation/mediation training programs content in terms of giving logic and reasoning studies the recognition they deserve in the legal field in general, and in the negotiation and mediation scholarship and practice in particular. Such updates shall target equipping law school graduates and mediation program trainees with appropriate knowledge and skills regarding recognising good arguments

²¹ *ibid* 158-186.

from bad ones, identifying and labelling fallacies once they take place in any legal context, handling reasoning mistakes in a way that help towards reaching a mutually accepted settlement...etc.

These abilities do need previous systematic knowledge and well-prepared training materials in order to guarantee a standard quality for mediation practitioners in terms of keeping mediation logic friendly and a safe place in guarding fairness and parties' autonomy. Furthermore, we propose that parties need to see mediation as a deception free zone, through adding some changes on mediation marketing materials. Furthermore, mediation rooms should be explicitly labelled as places where no one can take advantage of the parties who engage with them. This safety is one of the new advantages rationaliser mediators can offer to parties. Publicising the safe/harm-free notion to the parties can be achieved in several ways, including the websites of mediation centres, illustrated simplified leaflets, and short introductions about the benefits of rationalisation approaches, delivered by case managers and conveners.

Once the mediators are educated/trained about their expected roles as rationalisers, and once the concept and process of rationalisation are clearly explained and appealingly introduced to the expected negotiating parties, the implementation of these roles shall be feasible. However, there are a number of expected obstacles that might hinder the proper execution of the rationalisers' role. These obstacles include time limitations, parties' autonomy, the mediator's neutrality, non-lawyer mediators' anticipated resistance as the well-established association between logic and law might send a message to non-lawyer mediators that rationalisation approaches are not friendly models for them, and the possible resistance from negotiating parties who are accustomed to using deceptive moves and ethically questionable tactics, as they might not be happy with facing these new roles that shall detect and hinder their moves. However, we discuss these challenges thoroughly, and present a number of possible ways to handle them.

The research methodology

Through the whole seven chapters, we resorted to deductive reasoning as a research methodology in which we tried to dismantle and reconstruct the main concepts including the essential four topics: negotiation, mediation, conflict, and logic. On this approach we tried to revisit all these topics in order to investigate the possible spaces for intervention mediators can apply on their journey to answer the main research question: To what extent they should be responsible for freeing mediation process from logical fallacies' possible harms? Such a journey went through a series of axioms, theories, and hypotheses, followed by examining the available scholarship regarding the main four topics and their subordinate subject matters. This construction embraced the following:

- Negotiation is a conversation between two parties - or more - in which each party tries to persuade her counterpart of her viewpoint.
- This persuasion endeavour can be envisaged as a game with rules to be respected, and various approaches and paths to choose among them.
- Persuasion can follow either a central route where reason and logic are evident, or a peripheral route where heuristics, biases, and fallacies are expected.
- Resorting to the central route of persuasion shall make the persuasion game occur in a context that can enhance reasonableness and fairness.
- Participants of the persuasion game can be in a better situation if they have received proper assistance from a third party who can help them following the central route of persuasion.
- Mediation can offer assistance, and the mediator can be the one who aids negotiating parties by enhancing reasonableness and fairness in their conversation and its outcome.
- The expected enhancement shall be achieved through rationalising the persuasion game and adding more logic to the context in which negotiation takes place.
- The negotiation context usually takes place in the occasion of two - or more - parties having a disagreement/dispute/conflict.

- The third party/mediator who wants to assist in this context shall be able to thoroughly understand the two main themes: the parties of the dispute, and the dispute itself.
- Each party/disputant, can be seen from different angles/aspects/dimensions that construct collectively how this party behaves, makes decisions, and handles her dispute.
- One of the angles/aspects/dimensions of each party is her mentality/reason/logical ability, which has a vital role in making decision towards disputes.
- Logic is the scholarship that studies and presents sets of rules regarding this ability to reason, build arguments, and successfully persuade others with a person's viewpoint.
- Logic is the ultimate guide for the central route to persuasion, by presenting utilisable frameworks towards building good arguments and avoiding thinking errors.
- Thinking errors can be linked to three main deviations from logic: heuristics, biases, and logical fallacies.
- These three deviations from logic can harm the mediation process, and lead to unfair outcomes that parties might not want to experience.
- Mediation scholarship has a relatively sufficient body of studies regarding dealing with heuristics and biases when they interrupt negotiation or distort the persuasion process.
- Logical fallacies as a topic haven't been studied sufficiently in mediation scholarship, leaving questions about their possible harms and handling strategies unanswered.
- Because mediators are in charge of assisting negotiators by enhancing reasonableness and fairness in mediation, they are the ones who shall help in avoiding fallacies' possible harms.
- The main question on this research gap is: To what extent should mediators be responsible for freeing the mediation process from logical fallacies' possible harms?

- The initial answer to the research question is: it depends on how far the mediator is capable of and willing to intervene and assist regarding fallacies in the mediation room.
- The capability of the mediator in handling fallacies depends on her knowledge and skills, while her grade of intervention depends on her style and approach.
- The expected help from mediators regarding fallacies might require them to acquire new skills, attain further knowledge, and adopt new roles.
- Negotiating parties might need to be prepared to embrace these new roles from mediators, to avoid misunderstanding them, and to obtain the utmost benefit from them.
- The new roles mediators might need to adopt shall be tailored in a way that suits the way fallacies evolve, manifest themselves, and affect the ongoing negotiation.
- Practicing these roles shall be performed in a way that doesn't violate any mediation values or distort the nature of the process itself.
- Examining the credibility, feasibility, and usefulness of these new roles can be achieved through further research, and this thesis can be a start point for these studies.

On this series of hypotheses, the thesis followed a gradual logical order to move from one axiom to another, from one theory to another, and from one proposition to another. Each concept is investigated and examined by visiting the scholarship of the discipline to which it belongs, by tracking its history, nature, and varied landscape of definitions and terminology. This investigation covers main topics including negotiation, mediation, dispute, logic...etc. Moreover, it comprises subordinate concepts including interests, heuristics, biases, fallacies...etc. Yet, most of these visits don't go far in reconceptualising or recategorising these notions unless there is sufficient evidence for this, and there is an evident sensible use in doing so. For instance, the thesis investigates a wide range of definitions given to negotiation, in order to capture the main elements of its concepts and pointing out the common denominator(s) that can bring these investigated definitions together. For negotiation, it was the ongoing mutual persuasion attempts, disagreement/conflict/dispute in which

these attempts take place, and the parties/disputants who attempt these persuasion endeavours. The same approach applies to mediation definitions where the assistance given by the mediator for the negotiating parties appears to be the common denominator demonstrates. The questions about the nature and extent of this assistance have occupied a significant standing in mediation scholarship in general, and in this thesis in particular. Proceeding with the same deductive approach and pursuing investigating and analysing the definitions and dimensions of the above common denominators, namely disputes and disputants, the significance of reasoning and logic for disputants in handling disputes as reason/mentality/logical ability is a core element/dimension for each party/disputant who tries to make a decision regarding her dispute, and to persuade her counterpart of this decision. This use, or misuse, of logic/reason is one of the areas where mediator can, and shall, offer help to both negotiating parties, especially when the misuse of logic can be recognised, labelled and dismantled. Here comes the addition/assistance we believe mediators can and shall offer to negotiating parties: dealing with reasoning/thinking/decision-making mistakes that might hinder their ongoing persuasion endeavours.

Following this cautious approach in dealing gradually with the research question, and in studying the available relative studies, allowed us to confront the main challenge this thesis was expected to face. From the first day we initiated the research proposal and outlined the research question, it was obvious that there is a lack of studies about handling thinking errors, especially logical fallacies, when they occur during mediation. Paradoxically, there was a sufficient volume of research that covered the main related disciplines including negotiation, mediation, conflict analysis, decision making, and logic, while there was a real need for bridging the gap between the first three disciplines, and last one. The gradual, self-evident approach this thesis followed was its Trojan Horse in dealing with this obstacle and facing this paradox. However, this endeavour has a possible Achilles heel that shall challenge its validity and usability.

To elaborate, the conclusions and answers this thesis claims to reach would require further theoretical delineation and parallel empirical validation. However, the need for

these further validations, additional examinations, and continued investigation shall be seen as a part of the nature of any research. We don't believe that any study can claim to give the final word or to have the monopoly on truth. Such a claim is against the essence of scientific research in general, and the essence of humanities and social science research in particular. Moreover, with the relatively novel character of mediation scholarship, the continuous new approaches to restructure, reconceptualise, and redefine its topics are likely to be expected. In this context, the thesis comes as a trial to envisage the whole mediation process through a new lens. Finally, we hope that upcoming studies would pursue this path, as it has rich potential to add more aspects to the knowledge and practice of mediation.

Chapter One

Negotiation:

The Persuasion Game

This chapter aims to explore the significance, meaning, goals, styles, motives and limitations of negotiation as an alternative method of dispute resolution. As an ongoing process of persuasion, negotiation has to work within reason and to use, among other factors, rules of logical reasoning, in order to persuade the other party of a given claim. Exploring several definitions of persuasion and examining the core elements of this concept shall describe the obvious similarities between persuasion and negotiation. This exploration shows that the core element of both negotiation and persuasion is influence. Parties to these two processes exchange messages in order to convince their counterparts to change their positions and influence them to accept their offers or demands. These mutual messages, in both negotiation and persuasion, shall be sent and received in a coercion-free context. Both courses of processes and messages assume that the participating parties have different views on the matter they argue about and suppose that a well-organised conversation can mitigate these differences. In this chapter, we believe that seeing negotiation and persuasion as synonyms/significantly overlapping, according to the various similarities mentioned below in this chapter, will add significant value to negotiation literature. Moreover, we believe that this linking will help us later in this thesis understand the roles of mediators from a new angle, which allows for a more thorough examination of the main research premises in this thesis.

In exploring and studying the art of negotiation from the angle of persuasion scholarship, this thesis shall attempt to help us understand its nature, by examining different elements and approaches, and the reasons behind failures in negotiation. For example, regarding negotiation approaches, persuasion motivation can explain why one negotiator may tend to adopt a competitive approach, where fallacies and biases are expected, while another negotiator may prefer the cooperative approach, where open minded communications and joint forces are evident. In a competitive negotiation approach, the negotiator will do her best to persuade the other party that she is entitled to have the largest share of the pie, or even the whole pie, while in a cooperative approach, she has to persuade herself first that she should work jointly to solve the problem with the other party, and then persuade this party to do the same. The same

application can be tracked with two persuasion routes: the central route and the peripheral one, which has impact, not only in understanding negotiation better, but can be useful in perceiving both the nature of mediation and the mediator's role, as we shall explore in the following chapters of this thesis.

1.1 Negotiation significance

*Like it or not, you are a negotiator.
Negotiation is a fact of life.*²²

Regardless of whether we classify negotiation as an autonomous process or as a phase of another process, and irrespective of whether we define it as an interactive activity, human communication, persuasion game, or a decision-making practice, the key question here is: Should we care that much about studying and understanding negotiation as laymen and as researchers? And if so, why?

Negotiation is a daily activity, “whether you run a corporation, buy a used car, or sometimes disagree with a colleague or your spouse, you need to know how to negotiate.”²³ This is a constant, and indispensable to negotiating daily life.²⁴ As long as we have differences, we will have conflicts, and we will need negotiation as “most actors in conflicts will find themselves in need of negotiations at one time or another.”²⁵ It is, certainly, “one of the most basic forms of interaction, intrinsic to any kind of joint action.”²⁶

This significance of negotiation as a fact of life carries more implications in the workplace where it has become a critical skill.²⁷ This is because of the massive changes in the economy, and the enormous shifts in organisational structures, which make negotiating an essential part of almost everyone's job. Within organisations, the shift

22 R Fisher, W Ury, and B Patton, *Getting to yes* (2nd ed, Penguin Books 1991) XVII.

23 H Bazerman and M Neale, *Negotiating Rationally* (free Press 1992) vii.

24 J Breslin, J Rubin, and Program on Negotiation at Harvard Law School, *Negotiation Theory and Practice* (2nd ed, Program on Negotiation at Harvard Law School 1993) 1.

25 P Wallensteen, *Understanding Conflict Resolution* (6th ed, Sage 2023) 25.

26 B Patton, ‘Negotiation’ in: M L Moffitt, R C Bordone, and Program on Negotiation at Harvard Law School (eds), *The Handbook of Dispute Resolution* (1st ed, Jossey-Bass 2005) 279.

27 D M Kolb, L Linda, and L L Putnam, ‘Negotiation Through a Gender Lens’ in: M L Moffitt, R C Bordone, and Program on Negotiation at Harvard Law School (eds), *The Handbook of Dispute Resolution* (1st ed, Jossey-Bass 2005) 135.

from traditional hierarchical structures to more democratic ones has made them more networked, and mainly team based. In order to function in these decentralised systems and self-managed teams, people will undoubtedly need to negotiate with a wide range of external and internal stakeholders “to get their budgets approved, secure commitments for project staffing, and get buy-in on scheduling, among other tasks.”²⁸ This growing significance of negotiation in the new world workplace has dramatically “increased the educational demand for negotiation skills. A significant field of research, guided by a pragmatic concern for practice, has developed to meet that demand.”²⁹

This is about negotiation in daily life as a fact, a natural human activity and a workplace skill, but what about negotiation as dispute resolution? As a way of reaching settlements, negotiation is the preferred resolution, as “It is the most flexible, informal, party-directed, closest to the parties’ own circumstances and control, and can be geared to each party’s own concerns. Parties choose location, timing, agenda, subject matter and participants.”³⁰ In negotiation as a dispute resolution, parties decide for themselves, take control, keep their issues confidential, and save the third party’s intervention costs, irrespective of the third party’s role as judge, arbitrator, or even a mediator. Negotiation parties wish to gain the best use of all these benefits of negotiation and to, ideally, achieve all negotiation goals. However, this doesn’t ignore negotiation limitations and challenges, which we shall discuss at the end of this chapter.

1.2 What is negotiation?

*Negotiation is all about dealing with people, getting along with them, and persuading them.*³¹

²⁸ *ibid.*

²⁹ *ibid.* 136.

³⁰ K Mackie, *The ADR Practice Guide* (3rd ed, Tottel 2007) 11.

³¹ Sh Heen and J Richardson, “‘I See a Pattern Here and the Pattern is you’: Personality and Dispute Resolution’ in: M L Moffitt, R C Bordone, and Program on Negotiation at Harvard Law School (eds), *The Handbook of Dispute Resolution* (1st ed, Jossey-Bass 2005) 35.

Among numerous perceptions, angles, and definitions of negotiation, those focused on influence, argumentation, convincing, and persuasion as noticeable element are the main focus of this research. Even the most common definitions of negotiation, in general dictionaries, usually start with referring to negotiation as “discussions”³² which, again, are repetitive attempts to reach persuasion. Furthermore, mutual agreement, the final target of the negotiation process can be characterised in most academic papers as mutual persuasion³³, as we will observe in this chapter. In other words, mutual agreement is a declaration that parties are “convinced” with each other’s arguments and claims, and “persuaded” by their evidences and proofs. This chapter seeks to shift attention from the most examined theme of negotiation; human interaction, personal communication, and live dialogue to the other aspect of every negotiation, persuasion and changing the other party’s position as a final destination. But how do negotiation studies define this?

Usually, academic studies seek to articulate a definition “in a way that does not violate everyday usage and yet is sufficiently precise to permit theoretical and experimental work.”³⁴ Inevitably, this will be affected by the research area and the subject of the author’s major, from law to social psychology, and from conflict resolution to peace studies. However, there are two main common themes on most given definitions of negotiation. The first one regards negotiation as a human interaction: “Negotiation is an *interaction* in which people try to meet their needs or accomplish their goals by reaching an agreement with others who are trying to get their own needs met. Whether we call it problem solving, bargaining, cooperative decision making, or communicating, when two or more people try to reach a voluntary agreement about something, they are negotiating.”³⁵ Essentially, it’s a form of communication: “Negotiation can be defined as back-and-forth *communication* designed to reach an

32 In the Cambridge Dictionary, to negotiate is “to have formal discussions with someone in order to reach agreement” and/or “to deal with something difficult.” And in the Oxford Dictionary, to negotiate is to “to try to reach an agreement by formal discussion” and it’s “to successfully get over or past a difficult part on a path or route.” See:

<<https://dictionary.cambridge.org/dictionary/english/negotiate>> accessed 25 Aug 2019.

Additionally, <https://www.oxfordlearnersdictionaries.com/definition/english/negotiate>, accessed 25/8/2019. We will revisit these dictionary definitions later on this chapter.

33 See for example: Mayer (n 11), Patton (n 26) 279, D G Pruitt, *Negotiation Behavior* (Academic Press 1981) 10, and M Liebmann, *Mediation in Context* (Jessica Kingsley 2000) 10.

34 M Deutsch, *The Resolution of Conflict: Constructive and Destructive Processes* (Yale University Press 1973) 213.

35 Mayer (n 11) 142.

agreement between two or more parties with some interests that are shared and others that may conflict or simply be different... It can be verbal or nonverbal, explicit or implicit, direct or through intermediaries, oral or written, face-to-face, ear-to-ear, or by letter or e-mail.”³⁶ The focus here is on the nature of negotiation as a communication/interaction activity.

The other theme depends on seeing negotiation as a mental activity that involves a series of convincing, influencing, and decision making processes. The focus here is on what parties actually do or have to do during the process, which mainly triggers conscious intentional moves. This theme includes definitions such as; “Negotiation is a form of *decision making* in which two or more parties talk with one another in an effort to resolve their opposing interests,”³⁷ ; “Negotiation is an interpersonal *decision-making process* necessary whenever we cannot achieve our objectives single-handedly,”³⁸ ; “[A] problem-solving enterprise in which *mental models* guide behavior,”³⁹ and “[T]he use of information and power to *affect behavior* within a “web of tension.””⁴⁰

In both groups, the main aim is reaching a mutual agreement, but in the second group, there is reference to what a negotiating party has to do to reach this agreement. This refers to the *aim* and the *means*, and sometimes the means becomes the aim, or they merge as one, as we can observe in this definition; “[T]he use of information and power to *affect behavior* within a “web of tension.”” The rationale behind seeing the process and its aim as one is simple: if I am convinced/affected/persuaded/changed by the mental model/position of the other party, then mutual agreement is being reached and the dispute is being resolved. Thus, negotiation can be perceived as a process of mutual influence, or a mutual persuasion activity. It is a game in which the mean and the aim are one, namely - negotiation and persuasion become, to some extent, synonyms, but this will become more evident later in this chapter.

36 Patton (n 26) 279.

37 Pruitt (n 33) xi.

38 L Thompson, *The Mind and Heart of the Negotiator* (5th ed, Pearson Education 2012) 2.

39 L Van Boven and L Thompson, ‘A Look into the Mind of the Negotiator: Mental Models in Negotiation’ (2003) 6 Group Processes & Intergroup Relations 387 <<https://doi.org/10.1177/13684302030064005>> accessed 25 Aug 2019, 378.

40 H Cohen, *You can Negotiate Anything* (Bantam Books 1982) 16.

In this negotiation/persuasion process, parties try to reach agreement between themselves, either through direct interaction or with the aid/representation of agents, but in all cases, without the intervention of any third party.⁴¹ Otherwise, it will be a different strategy and another method of dispute resolution, as we will see in the next chapter, where we will explore mediation in which negotiation is not an autonomous process, but a phase that “take place within other forms of ADR.”⁴²

In this persuasion game, which “is sometimes referred to as ‘give-and-take’ or ‘give-and-get’,”⁴³ each party makes decisions to influence the other party and change her position. This includes demands, offers, concessions, and any other move using verbal or nonverbal signs. It is an ongoing activity to “cause (someone) to do something by means of *argument*, *reasoning*, or *entreaty*. To win over (someone) to a course of action by *reasoning* or inducement. To make (someone) believe something; convince.”⁴⁴

Are there any more reasons behind figuring negotiation as a series of persuasion processes, not simply as quotidian human communication or a regular basic life activity? Another question: does such perception help us in understanding how people feel about negotiation and how they perceive it? I do believe that picturing negotiation in a way that is not too far from the way people see it is useful for better understanding, studying, and practicing negotiation. Finally, another question to consider: do people regard negotiation only from the angle of “human interaction”, or this is too simplified and interim for them?

1.2.1 How people perceive negotiation?

Negotiation is a basic life skill that we use every day in many ways. We use it in making business arrangements, family decisions, plans with friends, and commercial transactions. When we

41 Liebmann (n 33)10, and S Stewart, *Conflict Resolution: A Foundation Guide* (Waterside Press 1998) 21, 22.

42 Stewart, *ibid*.

43 *ibid*.

44 This is a definition for persuasion articulated by Hogan and Speakman, and it fits our perception about negotiation, see: K Hogan and J Speakman, *Covert Persuasion* (John Wiley & Sons 2006) 3. However, the similarities between negotiation and persuasion will be explored in depth later in this chapter.

*work out special arrangements about bedtimes and chores with our children, we are negotiating. When we decide which movie or restaurant we will go to with our spouse, we are negotiating. When we agree on a division of work responsibilities with our colleagues, we are also negotiating. Why is it then that when people think of an interaction as a negotiation it suddenly seems more tense, challenging, or tricky?*⁴⁵

While Bernard Mayer may have raised the question, he did not answer it. However, he explained, precisely, what happens when people realise that the ongoing activities they are participating in are negotiation “Labelling an interchange as a negotiation seems to take it out of the everyday kind of transaction that everyone is used to and at which we are mostly competent. Suddenly, people start thinking that there are going to be winners and losers, that a game is being played, and that people are out to take advantage of one another. People believe they will have to compromise on issues that are important to them, and they suddenly become concerned about how open to be about their needs and alternatives.”⁴⁶ This elaboration seems to be accurate, but still begs the question; why do people have such feelings?

The answer can be found in the general meaning of “negotiation” in dictionaries; in the Cambridge Dictionary, to negotiate is “to have *formal* discussions with someone in order to reach agreement” and/or “to deal with something *difficult*.”⁴⁷ While, in the Oxford Dictionary, to negotiate is to “to try to reach an agreement by *formal* discussion” and it’s “to successfully get over or past a *difficult* part on a path or route.”⁴⁸ It is, then, either a “formal” discussion or dealing with a “difficult” situation, and usually formal and difficult events trigger concern, and even anxiety.

45 Mayer (n 11) 140.

46 *ibid.*

47 See: <<https://dictionary.cambridge.org/dictionary/english/negotiate>> accessed 25/8/2019.

48 See: <<https://www.oxfordlearnersdictionaries.com/definition/english/negotiate>> accessed 25/8/2019.

Furthermore, we can regard this from a different angle, as “discussions” usually involve mental activity, associated with expected gains. These discussions, because they are formal, are associated with gains, accompanied - by their nature - with exposure to people we disagree with, and most importantly, in the case of having negotiation on the occasion of a dispute, take place between disputing parties. Because of all these reasons, negotiating parties are eager to “save face”, collect gains, and simply “win”.

Another aspect is that because negotiation involves each party’s use of logic, reason, and judgement, as these affect the decision making process to the very end, it becomes a matter of dignity and respect to prove that their judgement was correct, as “most men will admit that they are not handsome. Many will concede they are not strong. But none will acknowledge that he is not logical. This is no peculiarity of our own age, for three centuries ago La Rochefoucauld remarked that men will often apologize for their memory, but never for their judgment.”⁴⁹ Being logical is an advanced human ability that most people are confident of obtaining, even if this isn’t exactly the case, and this ability is the prime tool, or should be a prime tool of any decision making process, as a central necessary skill in any attempt at persuasion or influence.

If “persuasion” is a key word to perceive and understand the essence of negotiation, , we should then explore persuasion in more depth, in order to examine this premise thoroughly.

1.2.2 Can persuasion be a synonym of negotiation?

*Persuasion is part of the fabric of everyday life, so much so that it is hard to escape its tentacles.*⁵⁰

Persuasion used to be regarded as rhetoric until the early years of the 20th century,⁵¹ when it shifted to be regarded as a “part of the fabric of everyday life,” which is, again,

⁴⁹ Loevinger (n 9) 471.

⁵⁰ R Perloff, *The Dynamics of Persuasion: Communication and Attitudes in the 21st Century* (4th ed, Routledge 2010) 6.

⁵¹ G Jowett and V O'Donnell, *Propaganda and Persuasion* (3rd ed, Sage Publications 1999) 39.

very similar to what was discussed above while discussing the significance of negotiation.⁵² Perloff explored several definitions of persuasion.⁵³ Some of these definitions regard persuasion as “a *conscious* attempt by one individual or group of individuals through the transmission of some messages,”; “a *symbolic activity* whose purpose is to effect the internalisation or voluntary acceptance of new cognitive states or patterns of overt behaviour through the exchange of messages,”; or “a successful intentional effort at *influencing another’s mental state* through communication in a circumstance in which the persuadee has some measure of freedom.” From these definitions he concluded that persuasion has five components:⁵⁴ 1- Persuasion is a symbolic process (verbal and nonverbal signs). 2- Persuasion involves an attempt to influence (which means it is intentional, it is not just simple talking or gossiping, it is an intentional effort to change another person’s mind⁵⁵) 3- People persuade themselves (and this is the main idea behind negotiation also, as in both persuasion and negotiation, we give the other party the argument/the reason/the rationale, and she persuades herself with it, as a party’s self-determination value in negotiation and complies with the fifth condition of persuasion: to be free of coercion). 4- Persuasion involves the transmission of a message. 5- Persuasion requires free choice.⁵⁶ The second element of persuasion states that it involves an attempt to influence, and “If you mention to a real-world negotiator that you are a negotiation researcher, his or her first impression is that you are in the business of teaching people how to influence

52 See 1.1 in this chapter, and this is meaning has been highlighted by Jeffery Gitomer quote “Getting others to see your perspective, agree with your ideas, do what you want them to do, or just simply agree with you is a skill and a science. Persuasion is not just a selling skill. Persuasion is a life skill” see D Lakhani, *Persuasion: The Art of Getting what you Want* (John Wiley & Sons 2005) ix, x from the forward by Jeffery Gitomer, and a similar note by Lakhani on the same book “Virtually every element of human interaction involves some level of persuasion, but particularly sales, negotiation, copywriting, advertising, and media relations. Many scholars, philosophers, and scientists have explored the process, yet few get it right consistently. They dismiss the fundamental survival requirement of persuasion.” Xii, xiv.

53 Perloff (n 50) 11-12.

54 *ibid* 12-16.

55 *ibid* 13.

56 This triggers a question: what are the differences between persuasion and coercion? Perloff summarises the differences as follows: “Coercion occurs when the influence agent: (a) delivers a threat of some consequence, (b) attempts to include the individual to act contrary to her preferences, and (c) deprives the individual of some measure of freedom or autonomy. Persuasion, by contrast, occurs in an atmosphere of free choice: it assumes the individual is capable of resisting an influence attempt or of willingly persuaded him or herself to alter an attitude about an issue.” see: Perloff, 19. The difference can be articulated even more clearly; “persuasion is distinct from coercion in that persuasion involves influence designed to change people’s minds, whereas coercion involves influence designed to change people’s behaviour (with little regard for whether they have actually changed their minds). For example, in a conflict between labour and management, company employees might attempt to persuade the managers to raise wages by pointing out that higher wages will increase motivation and commitment among workers, thereby benefiting the company as a whole. Alternatively, they might attempt to coerce the managers to raise wages by threatening to strike if their demands are not met.” See: A Ledgerwood, S P Callahan, and S Chaiken, ‘Changing Minds: Persuasion in Negotiation and Conflict Resolution’ in P T Coleman, M Deutsch, and E C Marcus (eds), *The Handbook of Conflict Resolution: Theory and Practice* (3rd ed, Jossey-Bass 2014) 533. But we can see that even with this use of “coercion” in the last example, the management still has the freedom to take the risk and defy the worker’s threats, or to comply and surrender.

others. Indeed, real-world negotiators often regard negotiation as being synonymous with influence.”⁵⁷ The core is the same: influence.⁵⁸ This element, influence, can be linked to the power-based negotiation and mediation models which we shall discuss later on this chapter and the next chapter where we explore negotiation and mediation styles/approaches. In power-based negotiation, power can be a hidden leverage, while influence is how the negotiator actually deploys it. In this model, the party does not try to make friends; she is mainly trying to win. Influence is the essential tool she uses to shift the balance in the room. Ultimately, influence in persuasion, is the other term of power in negotiation and they can be used interchangeably.

Persuasion then refers to the processes and principles by which people’s attitudes, behaviours, and beliefs are formed, altered, or repel change in the face of the other party’s attempts to affect and influence. Indeed, “these attempts are designed to *convince* targets of persuasion to accept a position on some issue that *differs* from their current position.”⁵⁹ It is, as in negotiation, an attempt to change the other party’s position, because it is *different* or *opposing* my position. Since differences in positions and interests happen all the time, it is not an option to use persuasion, as “persuasion isn’t a tool we use optionally; it is one we are required to use in order to survive. The essence of life itself is persuasion, how well we persuade ourselves, how well we persuade those around us, and how we are ourselves persuaded by those who persuade us.”⁶⁰ It is not an activity or a process that we can use if necessary, it is rather a requirement for survival and a fact of life. However, the role of the parties’ attitudes and how they actually communicate, can also be linked to behavioural negotiation which we shall explore later on this chapter and the next one where we shall know how the human element can have a great impact on negotiation by focusing on parties’ psychology, emotions, relationships, and motivations to build trust, mitigate differences, and create sustainable agreements.

57 D Malhotra and M H Bazerman, ‘Psychological Influence in Negotiation: An Introduction Long Overdue’ (2008) 34 *Journal of Management*, 509 <<https://doi.org/10.1177/0149206308316060>> accessed 30 Aug 2019, 509.

58 Similarly, “affect” as a core of negotiation, see Cohen (n 40) 16.

59 Ledgerwood, Callahan, and Chaiken (n 56) 533.

60 Lakhani, D. (n 52) xiii-xiv.

Mayer's remark about the discomfort we feel regarding negotiation, despite the fact that it is a quotidian life activity, rises again here, regarding persuasion in a similar manner; "Everyone wants it their way. You have been trying to persuade people since you were a baby. Crying, smiling, banging your hands on the table. Primitive, to be sure - but persuasive. Remember the aisle of the grocery store with your mom? Begging for that candy bar? That was persuasion. Remember high school dating? That was persuasion. But it seems after you got your business cards printed, some of the tenacity associated with your persuasion skills has been missing."⁶¹ The explanation of this remark, again, can be quite similar; as we were kids we didn't realize, while we were crying or smiling, that we were intentionally trying to influence our parents' mental state, we just did that spontaneously.⁶² When we realise that we are about to intentionally convince our target, alter their position, or influence their mental mode, it seems to make them more challenging, and tricky, "the brain sends out powerful messages that something's wrong."⁶³ We feel suddenly that we need to be prepared, attentive, and careful. We don't need the other party in persuasion/negotiation to win in the game of "Who affects who?" or "Who will manage to change the other's position?", but this will become more evident when we discuss negotiation approaches later in this chapter.

One more similarity between negotiation and persuasion is that "persuasion is reciprocal process in which both parties are dependent on one another. It is a situation of interactive or transactive dependency."⁶⁴ It is a game to be played, or a dance that has to be performed by two parties, at least. There is no negotiation that can be carried out by one person only. As the phrase "it takes two to tango" implies, it takes two parties to negotiate/persuade. While the two (or more) parties use agility, rhythm, powers of observation and spirit of participation to perform a dance or engage in a game, they use reasoning, arguments, and influence to persuade or negotiate. This reciprocal nature of persuasion can be linked to the relational model which views

⁶¹ *ibid*, ix, from Gitomer's forward.

⁶² See: L Carmichael and P H Mussen, *Handbook of Child Psychology: Formerly Carmichael's Manual of Child Psychology* (4th ed, Wiley 1983), N Eisenberg, W Damon, and R M Lerner (eds), *Handbook of Child Psychology: Social, Emotional, and Personality Development* (6th ed, John Wiley & Sons, Inc 2006), and M E Lamb and R M Lerner (eds), *Handbook of Child Psychology and Developmental Science: Socioemotional Processes* (7th ed, John Wiley & Sons 2015).

⁶³ V Pynchon and J Kraynak, *Success as a Mediator for Dummies* (Wiley 2012) 124.

⁶⁴ Jowett and O'Donnell (n 51) 33.

negotiation -as we shall see later on this thesis- as a collaborative continuous dialogue that is rooted in shared values, mutual trust, and open communication. However, while this relational model encourages parties to cultivate better relationships, the main theme of the reciprocal nature of persuasion does not stress this feature as it mainly focuses on the interactive nature of the process without requiring an ongoing relationship as an essential element of it.

For all of these reasons “persuasion theory has been increasingly incorporated into research on the processes underlying negotiation and conflict resolution.”⁶⁵ However, in spite of the fact that the “theory and research on persuasion have been brought to bear on the study of negotiation, mediation, and conflict resolution, they remain largely disconnected fields.”⁶⁶, it seems that “the vast majority of writing on negotiation has ignored the element of interpersonal influence”⁶⁷ and it’s evident that “this disjunction is a barrier to creating the most effective and useful negotiations literature.”⁶⁸ Consequently, any attempt “to bridge this gap by describing relevant theory and research in persuasion,”⁶⁹ will raise useful and important implications for both research and practice in dispute resolution field. Therefore, if an “increased understanding of the principles and processes that underlie persuasion can help improve the processes and outcomes of a negotiation,”⁷⁰ then we propose that seeing negotiation and persuasion as significantly overlapping, according to the similarities mentioned above, will add a significant value to negotiation literature.

One further significant advantage of highlighting the similarities between the two concepts, we suggest, is the role of logic and reason in persuasion, as the role of mind, judgement, reasoning, and logic in persuasion is vital. Thompson’s interesting book⁷¹ about the distinction between the mind and heart of the negotiator describes this central role of reason in persuasion/negotiation, by relying on the Petty and Cacioppo Elaboration Likelihood Model (ELM)⁷², which draws a line between two routes to

65 Ledgerwood, Callahan, and Chaiken (n 56) 542.

66 *ibid* 542.

67 Malhotra and Bazerman (n 57) 510.

68 *ibid* 510.

69 Ledgerwood, Callahan, and Chaiken (n 56) 534.

70 *ibid* 533.

71 Thompson (n 38).

72 Petty and Cacioppo (n 1).

persuasion; the central route and the peripheral one. The central route to persuasion is mindful, direct, information-based, and “likely resulted from a person’s careful and thoughtful consideration of the true merits of the information presented in support of an advocacy.”⁷³ In contrast, the peripheral route requires little mindful or cognitive work when trying to persuade others, as it has “more likely occurred as a result of some simple cue in the persuasion context.”⁷⁴ Thompson suggests that the central route can be “ideal when dealing with analytical people who focus on information, facts, and data,”⁷⁵ while the peripheral route is more common “when the negotiator is distracted or highly emotionally involved in the situation.”⁷⁶ He used these two routes to meet the negotiators’ two desires; “the need to be liked and approved of, and the need to be *rational* and *accurate*. Savvy negotiators prey upon people’s need to be approved of and respected by others and their need to believe they are *rational* and *logical*.”⁷⁷ Negotiation definitions that are focused on human interaction or communication⁷⁸ correspond mainly to one desire and one route: that of likeability desire and through the peripheral route, which tells us very little about the central route, that involves mind, reasoning, and logic. On the other hand, adopting our premise, which understands negotiation as a persuasion game, shifts attention from the peripheral route, without ignoring or minimising it, to the central route, where logic takes the place of a significant player. This shift will make a significant contribution to our understanding of negotiation studies as an autonomous ADR choice, and more importantly, as a phase that occurs during mediation, as we shall see in the following chapters; before moving to mediation, we have to explore the other aspects of negotiation.

Envisaging negotiation as a persuasion process bridges the gap between simply winning a discussion and building a sustainable agreement. While other styles might focus mainly on who has the most leverage or how people act/react, the persuasion lens primarily focuses on changing minds. Such Cognitive Change allows negotiators

73 *ibid* 125.

74 *ibid*.

75 Thompson (n 38) 156.

76 *ibid*.

77 *ibid* 156. However, negotiators’ desires/motives, will be explored thoroughly later on this chapter.

78 See 1.2 above.

to alter/adjust/enhance their counterpart's perception of their own interests. This shall lead to more sustainable and enforceable outcomes. Thus, while other conceptions of negotiation may prioritise harmony or self-image, persuasion, however, is more about reframing. By using logic and reason, the negotiator can move a counterpart from a fixed standpoint that might have been adopted without sufficient deliberation or planning, to a more constructive position that has well-established arguments and validations. Thus, seeing negotiation from the lens of persuasion shall add more objectivity to the process and allow improving the chances of the durability of its outcomes while power-based wins might lead to buyer's remorse or future compunction.

However, picturing negotiation as a persuasion endeavour shall be viewed as both descriptive and normative at the same time. It describes how negotiation actually works and concurrently guides the researchers and practitioners to the way and the lenses they should see negotiation through. When this thesis analyses negotiation using persuasion and argumentation scholarship, it shifts attention to an existing concept. They both share similar features and target same aims. This similarity is evident not only from the simple definitions of the two concepts, but also from way each process works and tools each process uses. However, the treatment of negotiation as persuasion shall not exclude the role of relations or emotions. We shall see in Chapter Three of this thesis how logic/reason and emotions are not separated. Logic can be seen as a main player in every argument either through the central route or the peripheral route as we have seen above. Yet, this descriptive and simple claim has not been thoroughly discussed or taken into account while teaching or practicing negotiation.

1.3 Negotiation goals

In his study⁷⁹, Patton states five expected goals for a successful negotiation process:

- 1- A creative, elegant, no-waste solution that captures as much available value as possible—among the best of possible options.
- 2- A legitimate solution—no one feels taken advantage of.

⁷⁹ Patton (n 26) 285-286.

- 3- A firm, implementable, and sustainable commitment.
- 4- A process that is as efficient as possible, the product of good communication.
- 5- A process that helps to build the kind of relationship we want with this or other parties.

It is important, he elaborates, to have a checklist for the various criteria, as we have to avoid any “trade-offs that need to be made”⁸⁰ between them, in order to maintain a balance and “not to overlook any potentially important aspect of our goal.”⁸¹

Adopting our suggestion, which understands negotiation as a persuasion game, and shifting attention from the persuasion peripheral route - without ignoring or minimising it - to the central route, where logic takes place as the main player, can help maintain this balance. This is because it guarantees, or should guarantee, that decisions taken during persuasion/negotiation are products of logical thinking.

Such organised reasoning shall be the first player in any negotiation context, if we begin to conceive of it as a process of persuasion, as we elaborated above,⁸² which magnifies the roles of mind, logic, and reasoning. On the other hand, keeping the prime focus of negotiation studies on the human relation/interaction aspect of the process does not guarantee protection of the balance between these goals, and the trade-offs can take place at any time, as Patton mentioned above.

1.4 Negotiation elements

The Harvard Negotiation Project developed ‘The seven-element framework’ as a means of understanding and analysing negotiation. These elements - interests, legitimacy, relationship, alternatives, options, commitments, and communication - are described below.⁸³

⁸⁰ *ibid.*

⁸¹ *ibid.*

⁸² See above 1.2.2.

⁸³ *ibid* 280.

- 1- **Interests:** Refer to the prime needs and wants aimed at by the parties. This could be a wish to get your money back as soon as possible, to save face, or to maintain a good relationship with the other party. Interests are the central drivers of any negotiation process, and are the main criteria we use to make comparisons and choices between all possible outcomes. The notion of interests “encompasses a wide range of possibilities, from substantive goals such as money, deadlines, or guarantees to emotional desires such as respect, recognition, feeling fairly treated, or even seeing another person happy.”⁸⁴ Interests can be viewed as the “needs that motivate the bulk of people’s actions, and they can be viewed simply and superficially or in great depth,”⁸⁵ or we can make a distinction between both interests and needs, since interests can be viewed as “more transitory and superficial, needs as more basic and enduring.”⁸⁶ Mayer suggests a useful choice here by thinking of a “continuum of human needs, roughly paralleling Maslow’s hierarchy (1954). Interests then become a category of human needs that exist between the basic concern for survival at one end of the continuum and the striving for identity at the other.”⁸⁷ Such distinctions may seem arbitrary, as dictionaries sometimes refer to needs and interests on different occasions as alternatives.⁸⁸ However, these occasions are rare, if not exceptional, as most dictionaries consider needs to be urgent, even indispensable, while interests are regarded as advantages, benefits, and strong desires that can make your life better.⁸⁹
- 2- **Legitimacy:** Fairness is one of the dominant human drivers, and one of the main interests of the negotiating parties. It is very common for negotiations to reach an impasse, because they do not feel just to one of the negotiating parties. If the offer, demand or suggested solution is illegitimate, parties

84 *ibid.*

85 Mayer (n 11) 17.

86 *ibid* 16.

87 *ibid* 16-17, and see: A H Maslow, *Motivation and Personality* (Harper Collins 1954).

88 According to the Cambridge Dictionary, interest is: “something that gives you what is important or necessary or helps you in some way.” See: <<https://dictionary.cambridge.org/dictionary/english/interest>> accessed 3 Sep 2019.

89 See *ibid*, Merriam Webster Dictionary: <<https://www.merriam-webster.com/dictionary/need>> accessed 3 Sep 2019, and Oxford Dictionary: <https://www.oed.com/search?searchType=dictionary&q=need&_searchBtn=Search> accessed 3 Sep 2019.

will avoid taking it, even if it causes a higher cost to themselves, an element some may overlook.⁹⁰

- 3- **Relationship:** The relationship that a negotiator has or wishes to have with the other party is, usually, a very important element of the negotiation process; “this includes the negotiator’s relationship both with those across the table and with anyone else who might affect the negotiation or be affected by the negotiator’s reputation coming out of it.”⁹¹
- 4- **Alternatives and BATNA:** The concept of BATNA (Best Alternative To Negotiated Agreement) developed by Roger Fisher and William Ury in their Harvard Project book *Getting To Yes*,⁹² means “a course of action that the negotiator can implement without the consent of the other negotiator(s). In trying to negotiate the resolution of a business dispute, for example, one party’s alternatives might include doing nothing, suing the other party, trying to sell out to a third party, holding a press conference, and so on.”⁹³
- 5- **Options:** This element refers to anything that parties might decide to agree on in order to help to satisfy their own interests.⁹⁴
- 6- **Commitments:** These are not just available or possible options parties can agree on, but rather “Actual decisions and agreements, even offers and demands ... commitment is an agreement, demand, offer, or promise by one or more parties, and any formalization of that agreement.”⁹⁵
- 7- **Communication:** This is the “process by which parties discuss and deal with the preceding six elements of negotiation.”⁹⁶ The salient fact here is that “humans are very imperfect communicators. Sometimes this imperfection generates conflict, whether or not there is a significant incompatibility of interests, and it almost always makes conflict harder to solve.”⁹⁷ Conflict repeatedly escalates, because parties behave according to the hypothesis that they have accurately communicated when, actually,

90 Patton (n 26) 281.

91 *ibid* 282.

92 Fisher, Ury and Patton (n 22).

93 *ibid* and Patton (n 26) 283.

94 Patton, *ibid* 283.

95 *ibid* 284.

96 *ibid*.

97 Mayer (n 11) 9.

they may well have not.⁹⁸ We engage in disputes and in their resolution “through communication processes that are direct and indirect, purposeful and accidental, verbal and nonverbal, symbolic and concrete, interactive and one way.”⁹⁹

How should we communicate? What determines our style, behaviour, and decisions? It is a composite of mixing competing aspects which will be discussed thoroughly in Chapter Three. How do we recognise our interests? The other party’s interests? Our options? How do we realize if a given solution is fair and legitimate or not? How do we decide, if we do decide, to accept an offer or to make a counteroffer? How we make our decisions? What is our main assessment tool to find and weight our BATNA? Is it our personality type and traits? Our identity, values and morals? Or our reasoning capacities, and organised thinking abilities? We shall explore this, again, in Chapter Three, but now we will proceed to the styles which negotiators adopt while perceiving, handling, and processing the above elements.

1.5 Negotiation approaches/styles

Because differences in context, personalities, knowledge, and skills make every negotiation to some extent unique, there is no one “right” way to negotiate.¹⁰⁰

Everyone has her own way of how to reach what she wants, and negotiation is not an exception. There are two major approaches in negotiation,¹⁰¹ the competitive approach and the cooperative approach.

98 ibid 10.

99 ibid 119.

100 Patton (n 26) 286.

101 However, some studies suggest that there are four major approaches: 1-Positional Bargaining: The Dance of Concessions “One party stakes out a high (or low) opening position (demand or offer) and the other a correspondingly low (or high) one. Then a series of (usually reciprocal) concessions are made until an agreement is reached somewhere in the middle of the opening positions, or no agreement is reached and the parties walk away to pursue their respective BATNAs.” 2- Favours and Ledgers “to agree to a one-sided outcome now—a “favour”—in exchange for a reciprocal favour in the future.” 3-Chicken “the game of chicken: Give in to my demands, or I will kill us both. There will be more mourners at my funeral than at yours and more flowers on my grave.” and 4-Problem-Solving “Circle of Value” Negotiation, where negotiators work together as colleagues to determine whether an agreement is possible that is better for both than no agreement, and postpone commitments

1.5.1 Competitive/distributive/zero-sum/positional/adversarial approach

*Competitive bargaining covers a continuum of behaviours from the simplest, unreflective adversarial actions to highly conscious and virtually scripted contests. As such, competitive bargaining moves are natural responses in some negotiation situations and advantageous or profitable actions in others.*¹⁰²

We begin with this approach “because it is frequently encountered in everyday bargaining.”¹⁰³ This approach supposes that the main purpose of bargaining is to achieve the maximum possible economic outcome, typically at the expense of the counterpart.¹⁰⁴ The negotiator in this approach tends to believe that negotiation always involves a limited fund or resource which must be distributed among the competing parties. It is one limited/fixed pie, and the more one party takes the more the other loses. The parties’ relationships and all other intangibles are not the main players in this approach. The negotiator’s main goal here is to “pay as little as possible (as a buyer or defendant) or obtain as much as possible (if a seller or plaintiff), as a dollar more for your opponent, is necessarily a dollar less for you. A competitive bargainer, in other words, sees negotiation much as a litigator sees a trial: Someone must win and someone must lose, and her central mission is to win.”¹⁰⁵ This explains why this approach is known as “zero-sum” or “distributive”, as the negotiating parties regard their main task as being to distribute a limited and fixed resource between them.¹⁰⁶ The main negotiation element¹⁰⁷ for both parties here is commitment. The real offer or

while exploring how best to maximise and fairly distribute the value of any possible agreement. See: *ibid*, 288. However, we believe that positional bargaining is a variation, form, or close cousin of the competitive approach, while a problem-solving negotiation style is a variation, form, close cousin, or even a different term for a cooperative negotiation approach. We also believe that “favours and ledgers” and “chicken” approaches are just forms or other means of practising the competitive approach, as we shall see later in this chapter.

102 G Goodpaster, ‘Primer on Competitive Bargaining’ (1996) 2 *Journal of Dispute Resolution* 325, 377
<<https://scholarship.law.missouri.edu/jdr/vol1996/iss2/2/>> accessed 20 Sep 2019.

103 J Folberg and D Golann, *Lawyer Negotiation: Theory, Practice, and Law* (3rd ed, Aspen 2016) 33.

104 *ibid* 14.

105 *ibid* 33.

106 *ibid*.

107 See 1.4 above.

demand on the table, namely, the “Position”, is expressed and defended, which is why this negotiation approach can be labelled “positional” bargaining. Each side here in this negotiation “may posture about the dimensions of the issue or conflict, make a specific proposal to resolve the dispute, and bargain over that proposal. A competitive negotiator will attempt to persuade the other side that its case is weaker and worth less than it thought, and that her case is stronger than previously recognised. Incremental concessions are usually made, which narrow the bargaining range. Finally, a compromise settlement may be agreed upon. This approach to negotiation centres on predetermined positions and maximising individual gains.”¹⁰⁸ Persuading the other party of the competitive negotiating party’s position, demand or offer becomes the central activity for this negotiator. This explains why we experience a repetitive use of words like ‘persuade’, ‘convince’, ‘influence’, and ‘affect’ in most negotiation studies.¹⁰⁹ However, this does not mean that persuasion is not the main objective in the cooperative approach; it is exactly the opposite, as we shall explore later.

The competitive approach is simple, generally expected, and universally understood. However, the overwhelming focus on commitments in this competitive/positional approach “has substantial drawbacks. Perhaps most significant, by discouraging the exploration of interests, it makes it difficult to find creative, value-maximizing options.”¹¹⁰ Furthermore, the negotiation process here “tends to be slow and inefficient. Each party tries to make the smallest concessions possible, and even then only when necessary to avoid a failed negotiation.”¹¹¹ Moreover, both parties’ feeling of fairness might be harmed here, as “positional bargaining tends to produce arbitrary “split-the-difference” outcomes that poorly satisfy either party’s interest in fairness, are hard to explain to constituents, and do little to set a precedent that reduces the need for additional (time-consuming) negotiation in the future,”¹¹² which means that the time concern becomes more evident and pressing. Finally, this approach “tends to promote an adversarial relationship. It tends to focus on the areas of conflict between the parties and establish a distributive “win-lose” frame—who can more skilfully take

108 D Golann and J Folberg, *Mediation: The Roles of Advocate and Neutral* (2nd ed, Aspen 2011) 15.

109 See for example: *ibid* 15, Folberg and Golann (n 103) 32-38, and Patton (n 26) 288-290.

110 Patton, *ibid* 288.

111 *ibid*, 289.

112 *ibid*.

advantage of whom?”¹¹³ This adversarial version occurs when the competitive negotiator strives to “push the boundaries of the competitive approach and bleed into a style of negotiating which is a more aggressive or extreme version.”¹¹⁴ These negotiators perceive negotiation as a battle, a fight, a kind of war, where all strategies are fair, in order to win. In such a war, negotiating tools such as bluffs, misleading clues, distorted facts, fallacies, even threats and deceiving tactics are expected. If such a style is adopted during a negotiation that takes place at a mediation session, the mediator faces a real challenge, as we will see in the coming chapters.

1.5.2 Cooperative/integrative/value-sharing/principled/interest-based/problem solving approach

*Since the publication of getting to yes in 1981, readers all over the world have been persuaded that negotiators are more effective when they move away from adversarial posturing and instead work jointly to satisfy the interests of both sides.*¹¹⁵

Contrary to the role of the competitive negotiator, the cooperative negotiator “does not view negotiation “pies” as fixed.”¹¹⁶ Cooperative negotiators’ main objectives are to collaborate to specify their underlying interests and look at differences in how they value items, then to “reach jointly with the other negotiator - viewed more as a partner as an opponent - for a solution that will best satisfy both party’s interests.”¹¹⁷ This approach is frequently labelled as “integrative” negotiation, because “it emphasizes integrating the parties’ needs to find the best joint solution. It is also referred to as “interest-based” negotiation because it sees the goal of bargaining as satisfying people’s underlying interests.”¹¹⁸ Negotiators here, instead of practicing “the dance of concessions”¹¹⁹ are used to participating in competitive bargaining, operating by

113 *ibid.*

114 Folberg and Golann (n 103) 36.

115 D Stone, B Patton and, Sh Heen, *Difficult Conversations* (Penguin Books 2000) I.

116 Folberg and Golann (n 103) 39.

117 *ibid.*

118 *ibid.*

119 Patton (n 26) 288.

“moving from positions to counter-positions to a compromise settlement”¹²⁰, and have rather to try to explore a variety of alternatives that can optimise the interests/needs they have prioritised. Negotiators, then, can create an outcome “from a combination of generated options so that a joint decision, with more benefits to all, is achieved.”¹²¹ Such a collaborative style does not automatically generate straightforward compromises between two competing positions. Rather, it seeks a creative resolution which is not limited to the parties’ predetermined positions.¹²²

The intensively cooperative nature of the cooperative negotiation approach is essentially a “problem solving approach”,¹²³ where the negotiators “focus almost exclusively on finding solutions that will maximize the value of the deal for both parties.”¹²⁴ Such an approach can be a reaction to the drawbacks of the competitive/positional negotiation/bargaining, as recognised by the parties here:¹²⁵

- 1- Rather than focusing on offers and demands “positions”, negotiators focus on the parties’ interests, searching for ways to maximise the fulfilment of their interests.
- 2- Instead of making early commitments followed by back and forth concessions, which, as noted in competitive/positional negotiation, would limit creativity and could slow progress, they adjourn all commitments to the end — “nothing is agreed until everything is agreed.”¹²⁶ Demands and offers are postponed or sidelined in order to give opportunities for brainstorming and improving available options, then commitments will begin to form gradually, as negotiators become increasingly aware of their mutual interests, and confident about what options should make the most sense. As Patton notes, “they become firm commitments, usually fairly quickly, only at the end of the negotiation when there is a complete package.”¹²⁷

120 Folberg and Golann (n 103) 39.

121 *ibid* 39.

122 *ibid*.

123 This style is sometimes called the “circle of value” approach “because the core of the process involves negotiators exploring options for creating and distributing value (through an iterative discussion of interests, options, and standards of legitimacy) with a collaborative, side-by-side, problem-solving mentality. This way of working together has to be carefully created and maintained, like a special space or “circle.” Negotiators create the circle by managing how they communicate and managing the working relationship that nurtures and is nurtured by that way of interacting.” See: Patton (n 26) 294.

124 Folberg and Golann (n 103) 42.

125 Patton (n 26) 292-293.

126 *ibid* 293.

127 *ibid*.

- 3- Instead of arbitrary, split-the-difference outcomes, negotiators here inspire explicable, reasonable results that shall establish authentic reliable and sustainable precedents, as they are built on independent principles and standards of fairness agreed by the parties themselves.
- 4- Finally, instead of endangering parties' relationships in the intensively competitive negotiation approach, cooperative negotiators build and maintain their relationship, "even as they disagree by uncoupling the quality of the relationship from the degree of agreement."¹²⁸

From a persuasion perspective, "The discussion of underlying needs and interests makes it increasingly possible to persuade one another both that these needs are legitimate and that sacrificing some things of lesser interest may allow each side to gain what is more important to them. It is only through this sort of persuasion—rather than coercion—that successful and lasting resolution can be achieved."¹²⁹ This approach might require the negotiating parties to be able and willing to transmit and receive information. In other words, "negotiators must be willing and able to persuade and to be persuaded."¹³⁰ Moreover, they should have be willing to investigate and face data that might challenge them, as well as data that might confirm their prior perspectives about their opponents' interests. Then, If the negotiating parties begin to modify one another's opinions about the nature of their conflict, the matters at stake, and the extent to which their underlying interests are compatible, then cooperative moves can proceed.¹³¹ In the cooperative approach, persuasion takes on a deeper level, as each negotiator needs to persuade first herself that she should cooperate with the other party and work with her jointly, and then, she needs to take a further step by persuading the other party to adopt the same approach, and to join the "circle of value" together. This double persuasion process is encouraged or discouraged by the parties' own motives.

This process paves the road to another two critical questions, the first of which can be articulated as follows: What are the motives that drive negotiators, and push one

128 *ibid.* This is described as "separating the people from the problem" in: Fisher, Ury and Patton (n22).

129 Ledgerwood, Callahan, and Chaiken (n 56) 548.

130 *ibid.*

131 *ibid.*

negotiator to adopt a cooperative, prosocial, open minded, concession making and positive attitude, targeting a maximised joint outcome and well-integrated solutions, while the other negotiator might prefer an egotistic, defensive, competitive attitude and engage in biased information processing that push the party to use fallacies and deception in order to defend her position and compete with the other party? The second question is: Can the mediator bolster, encourage or strengthen motives that encourage cooperative approaches, and to defy, face, and even fight the motives that encourage competitive, adversarial, aggressive approaches, in order to (pre-protect) the party from tending to use fallacies as an egotistical defensive technique? The first question will be discussed next, and the second will be discussed in Chapter Six, where we will explore mediator roles in depth.

1.6 Negotiation motives

Researchers have identified three types of motives that influence how individuals process information. An accuracy motive is geared toward discovering what is correct. But thinking is not always accuracy driven and objective. Two other, “directional” motives are geared toward validating a particular judgment or stance: defense motivation is self-focused and egoistic, whereas impression motivation is other focused and relational.¹³²

Besides the ELM presented by Petty and Cacioppo which we introduced above,¹³³ we need here to refer to another member of the “growing family of dual-process theories in social psychology,”¹³⁴ namely, the heuristic-systematic model HSM, presented by Shelly Chaiken since 1980, and revisited by herself and other colleagues from different perspectives, especially in her significant study in 1999¹³⁵ with Ledgerwood Callahan,

¹³² *ibid* 539.

¹³³ See above 1.2.2.

¹³⁴ S Chen, K Duckworth and S Chaiken, ‘Motivated Heuristic and Systematic Processing’ (1999) 10 *Psychological Inquiry* 44 <<http://www.jstor.org/stable/1449522>> accessed 23 Sep 2019, 44.

¹³⁵ *ibid*.

where they made a clear distinction between two approaches negotiators adopt in processing available information to make decisions in negotiation: systematic processing and the heuristic¹³⁶ one. The first can be linked to the central persuasion route, as it is a systematised, accurate, mental activity, and the second one can be linked to the peripheral persuasion route, as it encourages parties to deviate from rationality and a logical reasoning path to a track that allows biases, fallacies, and irrational choices. Parties' tendency to follow either the systematic or the heuristic route relies on how strongly they hold these three motives; Accuracy Motivation, Defense Motivation, and Impression Motivation¹³⁷:

Accuracy motivation: Negotiators' motivation to reach accurate judgments is pervasive in everyday life, because people need to accurately understand the world around them to be able to behave efficiently. When accuracy motivation is low, people incline to taking heuristic cues that signal accuracy, for example source credibility. By contrast, if negotiators want to be highly confident that a judgment is accurate, they will be "uncomfortable making a snap decision based on a simple heuristic."¹³⁸ The tendency to make decisions based on simple heuristics increases in conflict situations, as in negotiations "anxiety or time constraints could decrease the capacity for systematic processing."¹³⁹ Therefore, in conflicts accuracy motivation becomes modest, and heuristic cues such consensus opinion may exercise a noticeable influence on judgement, "regardless of persuasive arguments or other information that might otherwise temper or reverse the heuristic based judgment."¹⁴⁰ In contrast, sufficient systematic processing takes place only if accuracy motivation is powerful for example in situations that has "great personal importance."¹⁴¹ However, even when negotiators believe that they are "motivated to reach accurate judgments, they can also be motivated (usually without realizing it) by defense and impression concerns."¹⁴² This motivation can be increased by several strategies. One of them is unexpected or

136 We shall explore heuristics and heuristic thinking in Chapter Four.

137 For more about the three motivations and their role in decision making, see: S Chaiken and Y Trope (eds), *Dual-Process Theories in Social Psychology* (The Guilford Press 1999).

138 Ledgerwood, Callahan, and Chaiken (n 56) 539.

139 *ibid.*

140 *ibid.*

141 *ibid* 540, and even in these situations, the accuracy-motivated systematic processing might still be affected by initial heuristics which lead to biases and fallacies, as we shall explore in Chapter Five.

142 *ibid.*

surprising Information, as it “can increase accuracy motivated, systematic processing, leading to a revision of assumptions and an open-minded consideration of all available information.”¹⁴³ One more strategy is adopting moderate rather than extreme positions, which can help “increase accuracy-driven, open-minded processing.”¹⁴⁴ Ultimately, increasing accuracy motivation in order to encourage systematic processing will always require a capacity to do so; namely, logical reasoning capacity.¹⁴⁵

Defence motivation: The second motivation forces parties to “process information in ways that protect and validate their own beliefs and interests. These beliefs could be about a person’s own valued qualities (“I’m intelligent”), ideological values (“Government should be as limited as possible”), or identity in valued groups (“Being Jewish is important to who I am”). These self-interests or self-definitional beliefs are defended because the perceiver feels, at least unconsciously, that overall personal integrity and well-being would be threatened if they were challenged.”¹⁴⁶ In such situations, competitive/adversarial behaviour is highly expected, because defence-motivated systematic processing is “biased by a person’s favored position. For example, people tend to counterargue information that threatens their preferred position.”¹⁴⁷ Negotiating parties tend here to “defend their resources and identities and to engage in biased information processing to bolster their positions.”¹⁴⁸ That explains why some studies¹⁴⁹ suggest that “accuracy motivation is unlikely to naturally dominate in conflict situations, especially in the early stages of a negotiation. At least in Western cultures, parties often assume that their interests are diametrically opposed.”¹⁵⁰

143 *ibid* 551.

144 *ibid* 552.

145 *ibid* 539. However, logical reasoning capacity shall be explored elaborately in Chapter Four, where we shall explore the importance of studying logic and its central role in information processing and decision making.

146 *ibid* 540.

147 *ibid*.

148 *ibid* 546.

149 See for example: M W Morris and M J Gelfand, ‘Cultural Differences and Cognitive Dynamics: Expanding the Cognitive Perspective on Negotiation’ in: Gelfand M J and Brett J M (eds), *The Handbook of Negotiation and Culture* (Stanford Business Books 2004) 45.

150 Ledgerwood, Callahan, and Chaiken (n 56) 546.

Impression motivation: The third motivational concern is impression motivation, which operates in early stages of negotiation, as negotiating parties are usually eager to establish a specific impression. This motivation “involves considering the interpersonal consequences of expressing a particular judgment in a given social context (such as in an interaction between two negotiators). Here, the target’s goal is to express positions that are socially acceptable to other people in their environment.”¹⁵¹ This clearly implies how such motivations can encourage a cooperative approach that promotes positive attitudes, and targets a maximised joint outcome and well-integrated solutions.

However, in spite of the fact that “accuracy motivation, defense motivation, and impression motivation may sometimes operate in isolation from one another, it is likely that multiple motives may be relevant in any given setting.”¹⁵² A party in negotiation, for example, “may be motivated both to attain an accurate understanding of the opposing party’s needs and demands and to present an image of herself as tough and assertive. Which motivation exerts a stronger impact on heuristic and systematic processing may change depending on what concerns are most important to a particular person in a particular setting.”¹⁵³ Because systematic processing of information, influenced by accuracy motivation, through deep thinking and careful attention, is comparatively time-consuming and effortful, negotiating parties prefer to apply heuristic processing if they are not both motivated and have the capacity to think accurately about information. This distinction between an accurate systematic approach on one hand, and heuristic processing, either influenced by defence or impression motivations, has significant implications for persuasion in dispute and negotiation, as “by facilitating mutual persuasion, participants in conflict resolution can increase the likelihood of identifying win-win solutions and creating long-lasting agreements.”¹⁵⁴

Therefore, when negotiating parties have only low levels of systematic processing motivation, or insufficient logical and cognitive capacity, they tend to rely on

151 *ibid* 540.

152 *ibid* 541.

153 *ibid* 542.

154 *ibid*.

heuristics, such as fixed-pie and zero-sum assumptions, which lead to a competitive attitude in negotiation, encouraging the use of fallacies and the presence of biases. However, when motivation and cognitive capacity are high, dependence on these heuristics usually decreases.¹⁵⁵ Nevertheless, these motivations are influenced by parties' desires and needs; for example, negotiators who have an evident desire to jump to a judgement quickly are expected to depend solely on heuristics, while parties who have the desire to justify the way any decision has been made usually increase the level of systematic processing that allows for integrative potentials. Furthermore, these motivations are highly influenced by negotiation circumstances such as pressure of time, which "reduces systematic processing, heightening reliance on heuristic cues like fixed-pie assumptions, and preventing negotiators from capitalizing on integrative potential."¹⁵⁶ Any available information about the other party will also influence these motives, as noted by Ledgerwood et al.: "when a negotiator is accountable to an audience whose views are unknown, he is likely to process information in an open-minded fashion."¹⁵⁷

Ultimately, the persuader/negotiator motivation will affect her approach and her tendency to adopt a cooperative, problem solving approach where creative solutions and long lasting settlements are expected, or to be constrained in a competitive approach, or even adversarial aggressive mode, where biases and fallacies are to be expected, and where reaching impasse or ending up with no settlement are predictable outcomes. However, this is just one of the reasons behind negotiation failure, and is just one aspect of negotiation limitations.

1.7 Negotiation limitations

The essential features of a bargaining situation exist when:

1-Both parties perceive that there is the possibility of reaching an agreement in which each party would be better off, or no worse off, than if no

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid* 543.

¹⁵⁷ *ibid* 545.

*agreement is reached; 2-Both parties perceive that there is more than one such agreement which could be reached; and 3-Each party perceives the other to have conflicting preferences or opposed interests with regard to the different agreements that might be reached.*¹⁵⁸

This ideal negotiation situation described by Deutsch assumes that both parties act rationally and analyse their positions, interests, and relationship in a “healthy” atmosphere, where a tendency to cooperation, joint forces, and open minded communications are expected. However, this is not unfortunately always the case. Negotiating parties act irrationally in many cases, even against their own interests, without realising they are harming their positions, worsening their choices, and creating impasses and deadlocks. It is essential to examine why negotiators deviate from the recommended rational routes and become irrational in their decision-making processes, or, in other words, “If the negotiator and his or her opponent act irrationally, what systematic departures from rationality can be predicted?”¹⁵⁹ The answer can be found in several published works by behavioural decision theorists that identify a number of divergences from rationality as follows:¹⁶⁰

- 1- Framing: the effects of the way the information about the decision is presented on the negotiator’s decision can highly influence her behaviour as a negotiator.¹⁶¹
- 2- Overconfidence: where the negotiator’s confidence in her abilities, judgements, legitimacy, and knowledge is higher than their strength and

158 Deutsch (n 34) 215-216.

159 M A Neale and M H Bazerman, ‘Negotiator Cognition and Rationality: A Behavioral Decision Theory Perspective’ (1992) 51 *Organizational Behavior and Human Decision Processes* 157, 160 <[https://doi.org/10.1016/0749-5978\(92\)90009-V](https://doi.org/10.1016/0749-5978(92)90009-V)> accessed 5 Sep 2019.

160 These papers findings are mentioned in brief at: Neale and Bazerman, *ibid*, 160.

161 For example: “positively framed negotiators (“What will be my net profit from the transaction?”) complete more transactions than negatively framed negotiators (“What will be my expenses on this transaction?”)” see: M H Bazerman, T Maglioni, and M A Neale, ‘Integrative Bargaining in a Competitive Market’ in: M H Bazerman (ed), *Negotiation, Decision Making and Conflict Management* (Edward Elgar Publishing 2005) 3.

accuracy, influencing her negotiator behaviours to deviate from the rational path.¹⁶²

- 3- Representativeness, availability of scenarios or instances, adjustment from an anchor, which lead to systematic and predictable errors in decision making and the persuasion/negotiation process.¹⁶³
- 4- Over reliance on readily accessible information.¹⁶⁴
- 5- Assuming that the negotiation outcome is necessarily fixed-sum, therefore they lose potential mutually valuable trade-offs between parties.¹⁶⁵
- 6- Misperceptions about the other negotiator's interests primarily causes suboptimal outcomes.¹⁶⁶
- 7- Devaluating, retroactively, all concessions made by the other party.¹⁶⁷

These deviations are just examples of negotiators' behaviours, perceptions, and attitudes that can extremely limit useful outcomes that both parties can reach by being rational, accurate, and consistent decision makers.¹⁶⁸ When negotiation takes place in a mediation process, there is an opportunity to help parties to be rational and accurate negotiators, enable them to process information systematically and avoid deviations and diversions such as biases and fallacies. In the next chapter we shall explore the task that mediation, as a process, can perform in mitigating negotiation limitations, and in Chapter Six we shall explore in depth the varied landscape of mediator roles in order to examine their efficiency in helping negotiators play the persuasion game in a more logical, reasonable, systematically accurate context.

162 M A Neale, V L Huber, and G B Northcraft, 'The Framing of Negotiations: Contextual Versus Task Frames' (1987) 39 *Organizational Behavior and Human Decision Processes* 228 <[https://doi.org/10.1016/0749-5978\(87\)90039-2](https://doi.org/10.1016/0749-5978(87)90039-2)> accessed 6 Sep 2019, and M A Neale and M H Bazerman, 'The Effects of Framing and Negotiator Overconfidence on Bargaining Behaviors and Outcomes' (1985) 28 *Academy of Management Journal* 34 <<https://doi.org/10.5465/256060>> accessed 6 Sep 2019.

163 A Tversky and D Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185 *Science* <<https://doi.org/10.1126/science.185.4157.1124>> accessed 6 Sep 2019.

164 A A Stone and J M Neale, 'New Measure of Daily Coping: Development and Preliminary Results' (1984) 46 *Journal of Personality and Social Psychology* 892 <<https://psycnet.apa.org/doi/10.1037/0022-3514.46.4.892>> accessed 6 Sep 2019.

165 G B Northcraft and M A Neale, *Organizational Behavior: A Management Challenge* (Chicago: Dryden Press 1990).

166 L Thompson and R Hastie, 'Social Perception in Negotiation' (1990) 47 *Organizational Behavior and Human Decision Processes* 98 <[https://doi.org/10.1016/0749-5978\(90\)90048-E](https://doi.org/10.1016/0749-5978(90)90048-E)> accessed 10 Sep 2019.

167 Neale and Bazerman (n 159) 160.

168 *ibid.*

Chapter Two

Mediation:

**The Rationalised
Persuasion Game**

Building on the concept suggested in the previous chapter of negotiation as a “persuasion game”, the current chapter aims to explore the meaning, characteristics, and potentials of mediation, that the “persuasion game” is a prime aspect of mediation in most models.

Although it is relatively new field of scholarship, mediation enjoys a rich and diverse literature. A range of studies that have discussed mediation as an alternative method of dispute resolution have reflected on various aspects of mediation, from its definition¹⁶⁹ to values¹⁷⁰, and from the objectives¹⁷¹ to individual phases¹⁷². In spite of this evident variance, there is, of course, space for agreement on common elements and aspects. In most mediation studies, negotiation is a vital aspect of any mediation process, and most existing definitions refer to it. The mediator’s role in its minimum interpretation is another space of agreement, as the mediator is always expected to “assist” parties, but when it comes to the extent and tools of this assistance, disagreement begins. Therefore, it is significant to explore the different aspects of mediation to grasp how, and how far, mediators can assist negotiating parties in mediation as a core theme in this thesis.

With a view to discuss the significance of mediation, it is necessary to first agree on the meaning of mediation, then to explore the objectives which mediation attempts to achieve. Knowing exactly what mediation is requires a review of the given definitions in the field in order to accept the one that explain it the best. Once agreed on the definition, this thesis will explore both the significance and premises of the process in order to recognise the assistance which mediation can afford, and the help they endeavour to offer. This kind of assistance and that extent of aid can demonstrate the significance of mediation and might answer the question: Why mediation?

169 See 2.1 below.

170 See 2.7 below.

171 See 2.9 below.

172 See 2.6 below.

Mediation, as a process, takes different styles and goes through specific phases that differ from one style to another. The mediator can either be very interventionist or can be very cautious and delicate in her interference. Mediators may take care of all aspects of the dispute, or they may choose to engage only with specific elements. In all their various styles and shapes, there are usually steps and phases that the mediation process has to go through, although, apparently, these phases and steps vary from one style to another from the opening to closing steps, while passing through negotiation, the core of most mediation process.

During mediation's journey through all its phases, in order to meet its objectives, there are values which mediators and parties should respect, and there are deficiencies that the process suffers from. Mediation values are the principles and theories that shape the foundations for the practice of mediation. These values draw borders and limitations for mediation practitioners in order to protect the process, parties, and mediators themselves. Alongside these values as borders and boundaries for mediation, there are other factors that place limitations on the process. One of these factors is the mediator's scope; how does she perceive the dispute? What are the various aspects of the dispute in her view? How far can she go to analyse and understand it? What capacities can she use to assist negotiating parties? The following chapters shall discuss these questions further.

2.1 Mediation¹⁷³ definition

*Mediation is a flexible process, defined and re-defined by the disputants and the mediator in each case. This flexibility is one of the strengths of mediation - and it also creates considerable challenge for anyone trying to describe mediation broadly.*¹⁷⁴

173 Mediation and conciliation are often used as synonyms, see: M Noone, *Mediation: Essential Legal Skills* (Cavendish Pub 1996) 15. However, some works draw a thin line between these two terms, but these lines "are quick to blur in practice." See: N Alexander, *Global Trends in Mediation* (2nd ed, Kluwer Law International 2006) 2.

174 K Kovach, 'Mediation' in: M L Moffitt, R C Bordone, and Program on Negotiation at Harvard Law School (eds), *The Handbook of Dispute Resolution* (1st ed, Jossey-Bass 2005) 304.

In spite of these considerable challenges, authors in the field of alternative dispute resolution keep trying to describe mediation in various ways, in almost all given definitions, they involve participation from a third party.¹⁷⁵ However, this is not the only common element. Exploring definitions of mediation given by the writers in the field of ADR demonstrate that the definition of mediation encompasses five essential components; the process, the trigger, the participants, the conductor, and the product¹⁷⁶.

The *process* itself is usually referred to as a facilitated communication,¹⁷⁷ “assisted negotiation,”¹⁷⁸ “assistance with negotiation,”¹⁷⁹ or in more elaborative description as “a procedure based on the voluntary participation of the parties,”¹⁸⁰ “voluntary and confidential method,”¹⁸¹ and “a process of negotiation, but structured and influenced by the intervention of a neutral third party.”¹⁸² The mediation process then is a structured process that facilitate/assists an ongoing communication/negotiation. Such facilitation/assistance is tailored to “help disputants overcome obstacles in negotiation.”¹⁸³ This process takes place because there is a *trigger* that caused this action.

The *trigger* is the usually referred to as “conflict,”¹⁸⁴ “dispute,”¹⁸⁵ or even “differences.”¹⁸⁶ This trigger pushes involved parties to seek assistance/facilitation that might help them overcome this obstacle as they can’t do it themselves through

175 Dana (n 5) 109.

176 Compare Hopt and Steffek who state that “the comparative view of definitions of mediation reveals a broad consensus in terms of (1) dispute, (2) voluntary nature, (3) systematic promotion of communication between the parties and (4) resolution for which the parties bear responsibility and where there is no decision-making power on the part of the intermediary”, see K J Hopt and F Steffek (eds), *Mediation Principles and Regulation in Comparative Perspective* (Oxford University Press 2013) 12, 13.

177 *ibid* 11.

178 Golann and Folberg (n 108) 89.

179 D G Pruitt and S Kim, *Social Conflict: Escalation, Stalemate, and Settlement* (3rd ed, McGraw-Hill 2004) 232.

180 Hopt and Steffek (n 176) 11.

181 B Vestergaard, E Helvard, and A Sorensen, *Conflict Resolution: Working with Conflicts* (Danish Centre for Conflict Resolution 2011) 11.

182 Mackie (n 30) 11.

183 A Stitt, *Mediation: A Practical Guide* (Cavendish 2003) 25.

184 M Liebmann, ‘The Future of Community Mediation’ in: R Smith & Legal Action Group (eds), *Achieving Civil Justice: Appropriate Dispute Resolution for the 1990s*. (Legal Action Group 1996) 161, Stewart (n 41) 17, and Liebmann (n 33) 10.

185 Hopt and Steffek (n 176) 11, and Noone (n 173) 31.

186 K Kressel, ‘The Mediation of Conflict, Context, Cognition, and Practice’ in P T Coleman, M Deutsch, and E C Marcus (eds), *The Handbook of Conflict Resolution: Theory and Practice* (3rd ed, Jossey-Bass 2014) 817.

direct negotiation.¹⁸⁷ However, these parties *participate* in the process with significant privileges that distinguish mediation as a dispute resolution from any other process.

The *participants*, usually referred to as “parties”¹⁸⁸ or “disputants”¹⁸⁹, come to the mediation process equipped with two protections¹⁹⁰; first one is the voluntary nature of their participation¹⁹¹ as they are not and can’t be, compelled to stay at the mediation room until the end of the mediation session if they don’t want to. Second is the party self-determination privilege as any outcome the mediation process might reach must be “satisfactory,”¹⁹² “mutually agreeable,”¹⁹³ and, simply, “acceptable”¹⁹⁴ to them.

The *conductor* of the process, namely the “mediator,” is usually described as a “neutral third party,”¹⁹⁵ “impartial third party,”¹⁹⁶ or sometimes just as a “third party”,¹⁹⁷ without referring to her neutrality/impartiality, in order to avoid contradicting the fact that “mediators are not always entirely neutral. A corporate lawyer, for instance, can apply mediative techniques to help colleagues resolve an internal dispute, despite the fact that she is in favour of a particular outcome.”¹⁹⁸ However, the mediator is sometimes just referred to as an “intermediary (or multiple intermediaries) with no adjudicatory powers”¹⁹⁹ to stress the parties’ self-determination as a guarantee for the parties and a challenge for the mediator, as we shall explore later in this chapter.

Ultimately, the *product* of the mediation process comes as a final outcome that the “participants” wish to reach through the “process”. This product is sometimes referred to as a resolution of the dispute or the conflict,²⁰⁰ or in other words, which seem more cautious, the product of the mediation process is simply a matter of reaching a mutually

187 We shall explore this in depth later in this chapter.

188 Mackie (n 30) 11, Golann and Folberg (n 108) 89, Pruitt and Kim (n 179) 232, Vestergaard, Helvard and Sorensen (n 181) 11, and Kovach (n 174) 304.

189 Dana (n 5) 109, Stewart (n 41) 17, Liebmann (n 33) 10, Noone (n 173) 31, and Stitt (n 183) 25.

190 The limitations of these two protections, or “Guarantees”, shall be explored later on this thesis.

191 Hopt and Steffek (n 176) 11.

192 Vestergaard, Helvard and Sorensen (n 181) 11.

193 Kovach, (n 174) 304.

194 Kressel (n 186) 817.

195 Kovach (n 174) 304, Dana (n 5) 109, Stewart (n 41) 17, and Mackie (n 30) 11.

196 Liebmann (n 184) 161, Liebmann (n 33) 10, Vestergaard, Helvard and Sorensen (n 181) 11, and Noone (n 173) 31.

197 Pruitt and Kim (n 179) 232 and Kressel (n 186) 817.

198 Golann and Folberg (n 108) 9, however, mediator’s neutrality shall be explored later on this chapter.

199 Hopt and Steffek (n 176) 11.

200 Liebmann (n 33) 10, Hopt and Steffek (n 176) 11, Liebmann (n 184) 161 and Stewart (n 41) 17.

accepted agreement²⁰¹ regardless of the terms of this agreement, which can be a resolution of the conflict/dispute, or just a better understanding of each party's position, even without reaching a settlement, as "no agreement" is also a product of mediation.

One of the shortest given definitions for mediation is defining it as "nothing more and nothing less than facilitated negotiation."²⁰² We suggested in the previous chapter a similar definition for negotiation, as we perceived it to be a "persuasion game." It can be classified as persuasion because every party wants to persuade the mediator and the other party to adopt her position or, at least, understand her interests and concerns. And it is a game because it is (at least in theory) a voluntary, flexible, and informal process. Indeed, it is more like a dance or a game more than a battle or conflict, as the litigation process is usually perceived. This game can be played without third party interference, and this is where "direct negotiation" takes place. However, in mediation, there is a third party intervention that is usually described as "assistance" or "facilitation", which makes mediation a "facilitated/assisted negotiation." We can consider this process as "minded negotiation" or a "minded persuasion game", as it offers a clear articulation that stresses the central role of the mind in the persuasion/negotiation game. However, 'mind', as a verb, describes very well the mediator's role. To mind something is to give it attention, take care of someone or something,²⁰³ or to look after someone or something for a short time.²⁰⁴ However, because "mind" might have a contested meaning, we suggest using "rationalised negotiation" instead. In Chapter Six of this thesis, we shall explore how "rationalising" negotiation can describe the main mediator's job.

This short definition does not replace the thorough five element definition analysis suggested above. These five elements of the known mediation definitions can lead us through this chapter by referring to the "process" encompassing phases of mediation and treating confidentiality as mediation's essential value, while addressing the role of

201 Pruitt and Kim (n 179) 232, Noone, (n 173) 31, and Mackie (n 30) 11.

202 Stitt (n 183) 25.

203 Cambridge dictionary at: <<https://dictionary.cambridge.org/dictionary/english/mind>> accessed 2 Oct 2019, and Merriam Webster dictionary at: <<https://www.merriam-webster.com/dictionary/mind>> accessed 2 Oct 2019.

204 See: Macmillan dictionary at: <https://www.macmillandictionary.com/dictionary/british/mind_2> accessed 2 Oct 2019.

the “conductor” in an open discussion of mediation styles, the mediator’s expected roles, and neutrality as one of the most controversial values in mediation. Finally, exploring the “participants” element will lead our way through both the parties’ voluntariness and autonomy as fundamental values that make mediation a unique resolution, as we shall see below in this chapter. However, before we proceed to these discussions, we shall shed some light on the history and significance of mediation as a dispute resolution, before exploring its content and aspects as a process, bearing in mind that mediation’s history and significance will allow further exploration of the meaning and potential of mediation.

2.2 Mediation history

In ancient civilisations and Abrahamic religions mediation can be found as a recommended dispute resolution.²⁰⁵ These include “ancient China and Japan, countries in which religion and philosophy have always placed strong emphasis on cooperation and consensus.”²⁰⁶ The same concept was evident in ancient Greece, as “conflicts between city states were settled through the intervention of other cities.”²⁰⁷ The same tendency can be tracked in many African tribes, where people’s assemblies have been established, where “Anyone has the right to call such an assembly, in which a respected individual acts as mediator, helping the parties resolve their conflicts.”²⁰⁸ In Jewish history and culture, rabbis used to intermediate in disputes,²⁰⁹ while in the Bible, the intervention of a neutral third party as an advisable resolution is evident,²¹⁰ and finally, in Islamic Culture and history, Muslims are encouraged to use mediation, or *Solh*, in their disputes, as the Quran addressed Muslims saying: “Be mindful to Allah [God], and settle your differences.”²¹¹

205 Ch Guthrie and J Levin, ‘A “Party Satisfaction” Perspective on a Comprehensive Mediation Statute’ (1998) 13 Ohio State Journal on Dispute Resolution 885 <<https://scholarship.law.missouri.edu/facpubs/566/>> accessed 2 Oct 2019, and S Silbey and A Sarat, ‘Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject’ (1989) 66 Denver University Law Review 437.

206 S Proksch, *Conflict Management* (Springer 2016) 46.

207 *ibid* 46-47.

208 *ibid* 47.

209 *ibid*, and J T Barrett, *A History of Alternative Dispute Resolution: The Story of a Political, Cultural and Social Movement* (Jossey-Bass 2004) 10.

210 The Book of Matthew (18:15–17), and for more about the church’s role in mediating conflicts, see Proksch, *ibid* 47.

211 Quran, Surat 8, verse 1.

In early modern history, we can see that Elizabeth I herself practiced mediation,²¹² and there is more evidence that mediation has been evident in most of European history.²¹³ However, when it comes to contemporary history, the Pound Conference tends to be the benchmark and the main milestone in the temporary development of mediation. In Minnesota, the United States, 1976, the “National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice” was held to discuss difficulties within the justice system. At this conference, “Professor Frank Sander introduced his now well-known concept of the multi-door courthouse in which the doors represent a spectrum of dispute resolution options from which disputants entering the courthouse can choose.”²¹⁴ Since then mediation has grown rapidly in the United States and other common law countries including Australia, England Wales and Canada, in community justice centers, the private sector, and in various court-related programs.²¹⁵ In contrast, Nadja Alexander noted that:

“civil law countries have displayed a greater reluctance to embrace the practice of mediation to settle legal disputes. Compared with the common law experience, mediation in jurisdictions such as Germany, Austria, Denmark, Scotland, Italy, France and Switzerland has travelled, and is still travelling, a more difficult path to recognition as a legitimate and valuable alternative to litigation. Recently, however, the European Commission has signalled a strong focus on interest-based ADR.”²¹⁶

This recent rapid widespread of mediation culture, which resembles an international wave or global trend should trigger questions regarding the reason behind this expansion in the use of mediation; is it a wise movement? Why do legal systems encourage, (or should encourage) mediation as a dispute resolution?

212 D Roebuck, ‘Mediation and Arbitration in the Reign of Elizabeth’ (2014) 30 *Arbitration International* 577
<<https://doi.org/10.1093/arbitration/30.3.577>> accessed 2 Oct 2019, 577.

213 See: D Roebuck, ‘The Myth of Modern Mediation’ (2007) 73 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 105
<<https://kluwerlawonline.com/journalarticle/Arbitration:+The+International+Journal+of+Arbitration,+Mediation+and+Dispute+Management/73.1/AMDM2007014>> accessed 2 Oct. 2019.

214 Alexander, (173) 4-5

215 *ibid* 7.

216 *ibid*.

2.3 Mediation significance: Why mediation?

*Mediation offers a number of potential benefits that are unavailable in traditional methods of dispute resolution.*²¹⁷

Mediation is a flexible and informal process allowing parties and the mediator to try various approaches to creative solutions. In these approaches, mediation claims to save participants money and time, respect their privacy, and, most importantly, keep the final decision in their hands, as it “provides the potential for parties to exercise self-determination. In mediation, the parties are the final decision makers, whereas in adjudicative procedures, such as trials, arbitration, or administrative hearings, a third party makes the decision for them.”²¹⁸ Moreover, mediation advocates claim that “in reaching a resolution, mediation parties can often avoid much of the emotional drain from engagement in continual conflict. Mediation also provides a different kind of forum for communication between the parties.”²¹⁹ This different form of communication should maintain the ongoing relationship between the negotiating parties, whereas courts can’t perform this same function.²²⁰ This ongoing relationship will not only be maintained, but rather can be transformed, as “Mediation in particular has the power to transform the way people relate to each other and to a conflict.”²²¹ The list can be endless, but Liebmann summarised mediation advantages in a precise inventory:

- *It encourages disputing parties to focus on the problem rather than on each other. ... Mediators help to identify common ground between the disputants and help them look for the way forward.*
- *It gives both parties an opportunity to tell their side of the story.*

²¹⁷ Kovach (174) 305.

²¹⁸ *ibid* 305.

²¹⁹ *ibid*.

²²⁰ Liebmann (n 33) 9.

²²¹ Mayer (n 11) 110.

- *It provides a setting in which both parties can listen to and hear the other party's story.*
- *People are more likely to change their actions if they hear how their behaviour is affecting the other person.*
- *People are more likely to keep a solution they have been involved in reaching than one imposed by one outside person.*
- *A solution imposed by a court generally makes one party a winner and the other party a loser. Mediators help parties to look for a 'win-win' solution.*
- *People are able to reach agreements which can take their particular situation into account.*
- *Mediators encourage people to identify what they really want from the situation.*
- *Mediation is a confidential process- this enables people to speak without the fear that their words will be taken down and used in evidence against them.*
- *Mediation is more likely to get to the root of the problem.*
- *Disputes have many strands or aspects to them. Courts can only deal with matters of law, which means in many cases they cannot deal with the whole picture.*
- *Although mediation looks at the past, its focus is on the future - how do the parties want the situation to be from now on? This is important where there is a continuing relationship.²²²*

On the other hand, these advantages can be perceived as problematic for mediation. Privacy and confidentiality might raise questions regarding fairness and compliance to the law, as this confidentiality shall lead to lack of scrutiny²²³. Furthermore, providing parties with the potential for exercising self-determination and offering them the ultimate decision-making powers can be a threat to parties who are less powerful or

²²² Liebmann (n 33) 11.

²²³ S Golberg, E Green, and F Sander, *Dispute Resolution* (Little Brown & Co 1985) 113.

less well represented, to the extent that they might be taken advantage of.²²⁴ As well as these anticipated shortcomings that can be associated with mediation, in Chapters 6 and 7 of this thesis we will be exploring a wide range of potential harms which critics claim mediation users should expect, alongside proposing our approach to dealing with them.

However, in spite of the fact that mediation's advantages are significant and outweigh the expected disadvantages, it can equally be claimed that negotiation is capable of helping negotiating parties discuss their differences in a flexible, confidential, self-determined, and money/time saving atmosphere, as we have learned in the previous chapter. Why mediation then?

Mediation aims to lessen largely psychological hindrances that prevent hostile parties from reaching an agreement or finding common ground for constructive negotiation. However, while it can be argued that direct negotiation and face to face encounters between negotiating parties without a mediator's assistance can enable the disputants to retain their independence and privacy, such methods might face significant challenges. The confrontation created by face-to-face discussions and unmediated negotiation processes can increase power gaps and put the decision-making process entirely upon the parties themselves, which causes a real threat "once the level of conflict has escalated in intensity."²²⁵ In contrast, Augsburgers asserts,²²⁶ mediation is capable of arming negotiating parties with an external assistant who has additional and alternative information, expertise and experience. Mediation can generate alternatives that can go beyond what those disputants themselves can suggest. Mediation pays attention to the visible values, prejudices, stereotypes, needs, and fears of both negotiating parties in a way that none of them might be able to do on their own. Mediation shall equalise power imbalances and open the gates to the maximum available opportunities for them both.²²⁷

224 K Feinberg, 'Mediation: A Preferred Method of Dispute Resolution' (1989) 16 *Pepperdine Law Review* 5 <<https://digitalcommons.pepperdine.edu/plr/vol16/iss5/2>> accessed 5 Oct 2019, 28.

225 D W Augsburgers, *Conflict Mediation Across Cultures: Pathways and Patterns* (1st ed, John Knox Press 1992) 193.

226 *ibid* 194.

227 *ibid*.

These added values offered by mediation are what create and establish the “mediator’s job”, her assistance through the process, and the help she equips the parties with by “rationalising” them and the process.

2.4 The Mediator’s job

It is easy to forget that the mediator is a neutral and not a knight errant ready to lend horse, shield, and lance to protect against the other side.²²⁸

Mediators may undertake a wide range of roles in one mediation process. These roles diverge in intensity and balance according to the nature of the dispute, the needs of the parties,²²⁹ and the mediator’s persona, qualifications, and the regulations that she is to abide by.

Discussions, debates, and schools of thought that were channelled into different mediator roles, responsibilities, and approaches shall be examined thoroughly in this chapter,²³⁰ then, in Chapters Six and Seven, we shall investigate the existing mediator roles, and examine their efficiency in protecting parties from the anticipated harms that might be caused by fallacies and the absence of rationality in the mediation room.

However, regardless of the mediator’s adopted style - or the regulations she abides by - are there any existing lists of minimum skills, knowledge or abilities that every mediator should master before initiating her practice, in order to allow her to fulfil her job duties and be accepted by the disputants as their neutral third party?

To be accepted by both parties, a mediator has to be:

- *Totally impartial, showing no preference or favours to either side*

228 E Waldman, *Mediation Ethics: Cases and Commentaries* (John Wiley & Sons 2011) 156.

229 Mackie (n 30) 285.

230 See below, 2.7, Mediation styles.

- *Fair and non-judgmental, treating each side equally; and*
- *Empathetic, showing respect to each side by total understanding of their point of view and total confidentiality with regard to information and feelings revealed.*²³¹

Mediators' qualifications and required professional training shall be discovered in Chapter Seven of this thesis, where we shall explore the necessary knowledge the mediator ought to obtain before entering the field. In Chapter Seven we shall additionally discuss the regulations that organise mediation practice, which might differ from one legal system to another, from one service provider to another, and from one academic viewpoint to another.

Nevertheless, obtaining these qualifications and organisational requirements comes after basic skills in mediation, which we can't usually find in regulations or laws. These skills are essential for mediators, which is why they "seek to progressively sharpen their basic skills of empathy, active listening, sensitivity to needs of parties, sense of timing, verbal and nonverbal communication skills, capacity to maintain neutrality while remaining in contact, and ability to understand the stages of negotiation and conflict resolution."²³²

The significance of mastering mediation skills and obtaining mediation qualifications comes from the systematic nature of the mediation process. Mediation is neither an extemporaneous process nor a spontaneous procedure, but a systematic performance that takes a specific shape, respects a particular structure, and follows a series of pre-determined phases. But what does this process look like? Is there a certain procedure which mediators usually follow? Is there a list of steps which mediations often go through?

²³¹ Stewart (n 41) 18.

²³² Augsburg (n 225) 197.

2.5 Mediation phases

*Observers of mediation vary in the way they outline the mediation process, and no consensus exists on even the number of stages involved. In many cases, mediation stages overlap or fold into one another, evidencing the fluidity of the mediation process.*²³³

There is no doubt that each dispute is unique, and mediators are dissimilar. Accordingly, “every mediation is at least somewhat different from every other mediation.”²³⁴ However, relying on this fact all the time can be unhelpful for researchers and practitioners who wish to learn more lessons about the mediation process.²³⁵ Meanwhile, regulating and organising the process to make it a systematic procedure creates a dilemma for the policymakers and regulatory entities. On one hand, the central cause of the high settlement rate mediation achieves is its flexible nature, in which mediators and parties are not forced into following a preconceived, rigid series of steps and procedures, but rather able to structure the whole process flexibly themselves, in accordance with their individual circumstances and their perceptions of the ongoing dispute. On the other hand, regulating the mediation procedure by outlining its phases can secure some quality standards that shall provide both the mediators and the parties with an efficient dispute resolution tool.²³⁶ This dilemma might explain the rationale behind the wide variations in legal systems’ positions towards regulating mediation as a process.

Hopt and Steffek²³⁷ explored variations of the suggested phases of the mediation procedure. and ended up with three representative examples:

In France, mediation is often divided into three phases: (1) determining and clarifying the parties’ standpoints; (2) ascertaining and

²³³ Kovach (n 174) 306.

²³⁴ *ibid* 306.

²³⁵ *ibid*.

²³⁶ Hopt and Steffek (n 176) 53.

²³⁷ *ibid* 59-60.

communicating the interests, wishes and needs of the parties; (3) identification of a common solution which addresses all party interests. In contrast, four phases are reported from the Netherlands: (1) opening phase: information of the parties and conclusion of the agreement to mediate; (2) exploratory phase: investigation of the conflicts and interests; (3) negotiation phase: determination of solution criteria and attempt to develop a solution; (4) concluding phase: recording the results of negotiations in a concluding agreement. Finally, mention shall be made of the five phase model, widely practised in Germany in particular in the field of family mediation: (1) introductory and commencement phase: clarifying procedure, roles of the participants, remuneration and particular issues (confidentiality, etc.); (2) recording information: investigation and clarification of the negotiation subject matter, the topics and the conflict; (3) investigating participant interests; (4) developing solutions: (primarily) party solution attempts, with a possible evaluation by the mediator; (5) conclusion of a settlement or similar agreement: recording and legally implementing the achieved (partial) solution.²³⁸

In another study, Stewart²³⁹ suggested that the classic mediation process shall involve:

- Initial interviews with each party separately
- The arrangement of a face-to-face meeting at which each party tells his or her story and articulates feelings and aspirations
- The discovery of options
- The finding of common ground and common interests; and
- The framing of an agreement.

In one final study, Kimberlee Kovach²⁴⁰ divided mediation into more detailed stages to highlight the importance of things that she believes happen in most mediation processes, as follows:

²³⁸ *ibid.*

²³⁹ Stewart (n 41) 19.

²⁴⁰ Kovach (n 174) 306.

1. Preliminary arrangements
2. Mediator's introduction
3. Opening remarks/Statements by parties
4. Venting (optional)
5. Information gathering
6. Issue and interest identification
7. Agenda setting (optional)
8. Caucus (optional)
9. Option generation
10. Reality testing (optional)
11. Bargaining and negotiation
12. Agreement
13. Closure

In order to allow the parties and mediators to freely and flexibly structure the mediation procedure according to the individual circumstances of every dispute, most legal systems are agreed on the fact that regulating the mediation process should be in the hands of “mediators, their associations, academia, the parties and their counsel.”²⁴¹ This approach should develop a convenient set of quality standards that combine practical experience with the creative and systematic search for suitable solutions.²⁴² However, if the formal division has no significant role, what is the use of discussing, studying, and analysing the mediation process's structure and phases? The reason is ostensibly securing quality standards in order to provide parties and their lawyers with “an effective means of dispute resolution.”²⁴³ But what are these standards? What are the principles or values mediators have to respect in order to secure quality standards?

2.6 Mediation values

We want mediation to yield substantively good outcomes, and we want to honor disputants' rights to choose the best outcomes for

²⁴¹ Hopt and Steffek (n 176) 59-60.

²⁴² *ibid.*

²⁴³ *ibid* 53.

*themselves. In hard cases, it may not be possible to do both. We often can't pursue one value without forfeiting another.*²⁴⁴

According to Nadja Alexander, mediation values are the “the theories, principles, world-views and cultural orientations that provide the foundations for the practice of mediation.”²⁴⁵ These principles state the principles that distinguish mediation from any other practice. We might have noticed above²⁴⁶ that some of the given mediation definitions have encompassed one or more values, such as parties’ self-determinations, neutrality, and voluntary nature. We need to know here what the full list of mediation values should look like. Ellen Waldman answered this question by stating three main values:²⁴⁷

- Disputant autonomy: A disputant’s right to make choices based on personal beliefs and values, free of coercion and constraint
- Procedural fairness: The fairness of the process used to reach the mediated result
- Substantive fairness or a good-enough outcome: The acceptability of the mediated result

2.6.1 Disputant autonomy (party self-determination)

A disputant who values neighborly relations more than monetary comfort might choose to waive a significant legal entitlement in order to preserve peace. An aesthetically discerning business partner may choose to pay out a large slice of yearly profits in order to maintain authority over the visual details of the partnership logo. While perhaps not what everyone would do, these decisions are

²⁴⁴ Waldman (n 228) 1.

²⁴⁵ N Alexander, *The Mediation Manual: Hong Kong Edition* (1st ed, LexisNexis 2014) 50.

²⁴⁶ See above 2.1 mediation definitions.

²⁴⁷ Waldman (n 228) 3.

*emphatically in line with these individuals' sense of what is fair and satisfying, and helping disputants arrive at internally coherent decisions is at the core of what mediation is all about.*²⁴⁸

One of the essential characteristics of mediation as a successful dispute resolution is that the mediator has no decision-making authority. This makes parties themselves responsible for the aimed agreement to settle their dispute.²⁴⁹ This core value has been reflected in some definitions of mediation, which call the mediator “[an] intermediary (or multiple intermediaries) with no adjudicatory powers.”²⁵⁰ Parties’ self-determination, “disputant autonomy”, or “self-rule” is the value that provides participants with one of the “potential benefits that are unavailable in traditional methods of dispute resolution.”²⁵¹ Parties in mediation are the final and only decision makers, while in adjudicatory procedures, such as arbitration or trial, a third party decides for them.²⁵² The benefits which this value brings to mediation include strengthening parties by allowing them to retain evident control over the way their disputes are discussed, presented, and resolved.²⁵³ Moreover, this value adds flexibility and agility to the mediation process, by evading the rigidity which parties might face in litigation. Furthermore, it can be stated that main advantage of parties’ self-determination lies in giving parties the authority to discover and apply their concept of fairness, as they are “urged to look to their own personal norms of fairness”²⁵⁴, whereas in litigation “fairness is discovered by looking to existing law,”²⁵⁵ and the judge is the one who locates, interprets, and applies this law.

2.6.1.1 Parties’ autonomy and informed consent

Parties’ autonomy exceeds the traditional privilege of guaranteeing that the mediator will not practice adjudicatory powers, and expands to “help ensure that parties make knowledgeable choices about using the mediation process and about accepting the

²⁴⁸ *ibid* 27.

²⁴⁹ Hopt and Steffek (n 176) 12.

²⁵⁰ *ibid* 11.

²⁵¹ Kovach (n 174) 305.

²⁵² *ibid* 305.

²⁵³ Waldman (n 228) 3.

²⁵⁴ *ibid*.

²⁵⁵ *ibid*.

terms of proposed resolutions”,²⁵⁶ or what’s known as “informed consent”. This understanding can be viewed as the first standard of the model standards of conduct for mediators that both the American Arbitration Association and American Bar Association adopted in 2005, which states that “A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.”²⁵⁷

Informed consent is a fundamental principle that helps promote fairness, as it prepares the parties to participate intelligently and voluntarily in mediation, and makes them ready to accept the process outcome, as fairness “requires that parties know what they are doing”²⁵⁸. Informed consent serves here as a “check on the mediator's power, a way of making sure that the mediator has not used her position of authority to cajole or bamboozle parties into consent. In short, informed consent matters because the potential for coercion, incapacity, and ignorance can impede the consensual underpinnings of the mediation process.”²⁵⁹

Beside promoting fairness in mediation, assuring the principle of parties’ informed consent supports respect for the essential value of human dignity. This respect shall be achieved by applying the concept of informed consent, which “contributes to a mediation process that is free of fraudulent and coercive influences.”²⁶⁰ Mediators, according to this principle, have to be “honest with both parties and disclose whatever information is necessary to prevent deliberate fraud, manipulation, and trickery. This aspect of the human dignity value of informed consent operates throughout the mediation process.”²⁶¹

256 J M Nolan-Haley, ‘Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision-Making’ (1999)

74 The Notre Dame Law Review 775 <<https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3W83-1BP0-00CT-S01T-00000-00&context=1519360>> accessed 12 Oct 2019, 776.

257 See:

<https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf> accessed 12 Oct 2019.

258 Haley (n 256) 787.

259 *ibid* 778.

260 *ibid* 792.

261 *ibid*.

One more central gain that informed consent can achieve is securing compliance with the outcome of the mediation process, as it “enlists a sense of personal obligation and honor in support of compliance, and consensual processes are more open than command to the establishment of reciprocal obligations and of detailed plans for carrying out the terms of an agreement.”²⁶² Such compliance shall emerge from the feeling that informed consent creates, that the agreed upon mediated solution was just, and was made by the parties themselves.²⁶³ However, in spite of all the gains this principle can achieve, there is a debate regarding the scope of the application of the principle.

The debate about the scope of the informed consent principle is highlighted by some scholars²⁶⁴ who believe that it should be clarified that informed consent has two forms; the “participation” consent, and the “outcome” consent. By participation consent, they mean a party’s conscious knowledgeable acceptance to take part in the mediation process, and by outcome consent, they refer to “the degree to which a party understands the agreement reached during the mediation process.”²⁶⁵ Both parts construct what can be called a “meaningful self-determination”.²⁶⁶

The debate here is about the extent of the mediator’s duty towards protecting informed consent and whether it should be limited to participation consent, or be widened to include the outcome consent. Some scholars believe that “the law should impose a duty on mediators of informed participation consent, but not informed outcome consent.”²⁶⁷ The rationale behind this is fear of creating a conflict with the mediator’s obligation of neutrality, and that it could “undermine the quality of the mediation process to such an extent that the process could no longer be aptly labeled

262 C A McEwen and R J Maiman, ‘Mediation in Small Claims Court: Achieving Compliance through Consent’ (1984) 18 Law & Society Review 11 <<https://doi.org/10.2307/3053479>> accessed 12 Oct 2019, 47.

263 *ibid* 47.

264 M T Colatrella, ‘Informed Consent in Mediation: Promoting Pro Se Parties’ Informed Settlement Choice While Honoring the Mediator’s Ethical Duties’ (2013) 15 Cardozo Journal of Conflict Resolution 705 <<https://ssrn.com/abstract=2423026>> accessed 12 Oct 2019, 707.

265 *ibid*.

266 L P Love and J W Cooley, ‘The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary’ (2005) 21 Ohio State Journal on Dispute Resolution 45 <<http://dx.doi.org/10.2139/ssrn.940453>> accessed 12 Oct 2019, 71.

267 Colatrella (n 264) 707.

“mediation.””²⁶⁸ However, other scholars²⁶⁹ argue that the full application of informed consent is necessary as parties, especially if they’re unrepresented, need to fully understand that any agreement reached by mediation might result directly in a waiver of their legal rights, because the concept of informed consent needs to be fully guaranteed in order to protect “the psychological and legal interests associated with the values of autonomy, human dignity, and efficiency.”²⁷⁰

However, we are not concerned in this thesis with exploring the legal aspects of informed consent, with all their complications regarding “litigisation” of mediation, by converting it into another arena for traditional litigation,²⁷¹ and moving to the arena of arbitration practice, which clashes with parties’ self-determination as a core mediation value.²⁷² What we are concerned with here is expanding the scope of informed consent duty, to aid in handling more significant obstacles that might hinder reaching a mutual agreement, such as parties need to vent emotions and arguments, and handle hidden psychological motives which might have more influence on the process than pure legal discussions.²⁷³

With this understanding, mediators shall be expected to help parties “avoid common decision-making traps like selective perception and advocacy bias.”²⁷⁴ By achieving this, mediation can assure the vesting of a “maximal control and choice with the disputant—not with the mediator, the state, or another third party.”²⁷⁵ However, in real life mediation practice, the ways in which mediators implement this core value are many and various. This wide variety of mediation practices comes mainly from diversity in “mediation styles”, which we will discuss later in this chapter, and from the variety of scholars, regulators, and practitioners’ perceptions of the preferred mediator role/job, which we shall explore thoroughly in Chapter Six of this thesis.

268 *ibid.*

269 Haely (n 256) 788.

270 *ibid* 788.

271 W D Brazil, ‘Continuing the Conversation about the Current Status and the Future of ADR: A View from the Courts’ (2000) 2000 *Journal of Dispute Resolution* 11 <<https://scholarship.law.missouri.edu/jdr/vol2000/iss1/6>> accessed 30 Oct 2019, 29.

272 J M Nolan-Haley, ‘Mediation: The “New Arbitration”’ (2010) 17 *Harvard Negotiation Law Review* 61, <<https://journals.law.harvard.edu/hnlr/wp-content/uploads/sites/91/2012/09/61-96.pdf>> accessed 30 Oct 2019, 61.

273 Colatrella (n 264) 768.

274 *ibid* 773.

275 Waldman (n 228) 3.

2.6.1.2 Good faith and parties' self-determination

The scope of parties' self-determination as a core mediation value extends to guarantee the parties' right to choose to opt out and feel free to "leave the process at any point, with or without settlement, and without coercion."²⁷⁶ This provision gains great significance in the case of mandatory mediation, especially in court-connected mediation practice, where parties might be obliged to use mediation first if they wish to litigate.²⁷⁷ However, such obligations might incite these parties, who might not be happy with such compulsory referral, to decide to come to the table with an intention to avoid any genuine participation in the process, or any sincere cooperation with the mediator, which can often result in them ending the process without settlement, or even without any real communication. Such intentions are labelled "Bad Faith" and in order to avoid the harmful consequences of such behaviour, mediation scholarship and practice are increasingly resorting to the concept of a "Good Faith" requirement.²⁷⁸

Black's Law Dictionary provides a general definition of 'good faith' as a "state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage."²⁷⁹ However, in a mediation context, it might be useful to use a more specific definition, that includes a clear list of the necessary elements required to fulfil the good faith requirement. Kimberlee Kovach suggested this list, which includes: arriving at the mediation session well prepared; considering the other parties' interests;

276 T Hedeem, 'Coercion and Self-Determination in Court-Connected Mediation: All Mediations are Voluntary, but Some are more Voluntary than Others' (2005) 26 *The Justice System Journal* 273 <<http://www.jstor.org/stable/27977255>, at 273> accessed 30 Oct 2019, 273.

277 See P Brooker, 'Mediating in Good Faith in the English and Welsh Jurisdiction: Lessons from Other Common Law Countries' (2014) 43 *Common Law World Review* 120 <<https://doi.org/10.1350/clwr.2014.43.2.0268>> accessed 30 Oct 2019, S Vettori, 'Mandatory Mediation: An Obstacle to Access to Justice?' (2015) 15 *African Human Rights Law Journal* 355 <<https://doi.org/10.17159/1996-2096/2015/v15n2a6>> accessed 30 Oct 2019, and C H Van Rhee, 'Mandatory Mediation Before Litigation in Civil and Commercial Matters: A European Perspective' (2021) 4 *Access to Justice in Eastern Europe* 7 <<https://doi.org/10.33327/AJEE-18-4.4-a000082>> accessed 30 Oct 2019.

278 Kovach K, 'Good Faith in Mediation Requested, Recommended, or Required a New Ethic' (1997) 38 *South Texas Law Review* 575, C L Zumi and H C La Rue, 'Prohibiting Good Faith Reports under the Uniform Mediation Act: Keeping the Adjudication Camel out of the Mediation Tent' (2003) 1 *Journal of Dispute Resolution* 67 <https://repository.uclawsf.edu/faculty_scholarship/281/> accessed 30 Oct 2019, H Costigan-Cowles, 'Negotiations for the Home: Balanced Approach to Good Faith in Foreclosure Mediation' (2013) 4 *University of Illinois Law Review* 1571 <<https://illinoislawreview.org/print/volume-2013-issue-4>> accessed 30 Oct 2019, and T Sourdin, 'Good Faith, Bad Faith? Making an Effort in Dispute Resolution' (2012) 2 *Victoria University Law and Justice Journal* 19 <<https://doi.org/10.15209/vulj.v2i1.10>> accessed 30 Oct 2019.

279 BLACK'S LAW DICTIONARY 762 (9th ed. 2009).

having all necessary decision makers present, in person, at the mediation session; engaging openly in the conversations; not responding to direct questions with lies; showing a willingness to listen and understand the interests and position of the other party', and "making no affirmative misrepresentations or misleading statements to the other parties or the mediator during the mediation."²⁸⁰ This final element has a special significance in our thesis, as it places a burden on the negotiating parties to "act reasonably and genuinely in the mediation,"²⁸¹ and it acts as a rationaliser for the seemingly absolute privilege of parties' self-determination, as we shall explore more thoroughly later in this thesis.

However, the concept of good faith in mediation has been criticized profoundly on several grounds. These criticisms gain increasing significance in case of mandatory mediation as in voluntary mediation parties are supposed to fulfil the good faith requirement without worrying about their free will and self-determination which is not exactly the case with mandatory mediation. The first argument against good faith is the definitional argument which claims that the good faith criterion relies on subjective assessment and suffers lack of clear agreed upon guidelines.²⁸² This subjectivity and uncertainty "would increase the harm that such a requirement could do to the mediation process itself. A vague or expansive "good faith" requirement could distort both the role of the neutral and the way the parties participate in the mediation."²⁸³

Such criticisms can be mitigated by adopting an objective list, for instance, the above-mentioned Kovach list, in order to add some objectivity to the concept. Moreover, if mediators offered "a good deal of education for the parties,"²⁸⁴ and gave them "a clear roadmap of how to behave in that mediation,"²⁸⁵ the anticipated harms of imposing these measures in mediation as education is a "key to good faith conduct in mediation."²⁸⁶ When this education uses predetermined objective criteria for a good

280 Kovach (278) 623.

281 Queensland Uniform Civil Procedure Rules 1999, R 325.

282 J Lande, 'Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs' (2002) 50 *UCLA Law Review* 69, 75.

283 Brazil (271) 32.

284 U Boettger, 'Efficiency Versus Party Empowerment-Against a Good-Faith Requirement in Mandatory Mediation' (2004)

23 *The Review of Litigation* 1, 5

285 *ibid* 46.

286 Kovach (278) 619.

faith requirement, the duty of fulfilling it plays as a rationaliser for the privilege of parties' self-determination, instead of being an obstacle that might distort the process and the role of the mediator, as we shall observe in more detail in the final chapter of this thesis.

2.6.2 Procedural fairness

*A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.*²⁸⁷

Parties need to feel that the outcome they could reach is fair, and that this must “manifestly and undoubtedly be seen to be done”. How can mediators, regulators, and service providers manifest this in a way that makes it undoubtedly visible? The answer lies mainly in assuring parties that confidentiality and impartiality are completely maintained, as “long experience has taught mediation professionals that procedures such as preserving confidentiality and avoiding significant professional or personal relationships with clients facilitate settlements that are fairer and more satisfying to the disputants.”²⁸⁸

Moreover, an aspect which is no less important than confidentiality and impartiality is showing respect to disputing parties during the mediation process. This is essential in guaranteeing that justice is “seen to be done”, as parties has the right to expect from mediation to provide them with the full opportunity to *exercise voice*, to make them believe that their voice has been *clearly heard*, and to treat them in a *dignified manner*.²⁸⁹

Procedural fairness then is an umbrella body for three sub-values; confidentiality, impartiality, and respect.

²⁸⁷ R v Sussex Justices, ex parte McCarthy ([1924] 1 KB 256, [1923] All ER Rep 233)

²⁸⁸ Waldman (228) 4.

²⁸⁹ N A Welsh, ‘Do you Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation’ (2017) 70 SMU Law Review 721 <<https://scholar.smu.edu/smulr/vol70/iss3/7>> accessed 10 Nov 2019, 721.

2.6.2.1 Confidentiality

*As a matter of moral propriety, mediators cannot credibly present themselves as faithful and impartial information brokers unless they honor the private nature of the facts and feelings entrusted to them.*²⁹⁰

Confidentiality is one of the most vital requirements for mediation success.²⁹¹ Most mediators mention in their introductory statements that mediation will be a safe space for the party, and “they urge parties to unburden themselves without fear that their secrets will be betrayed. “Trust us,” mediators tell their clients, for this is a private place where confidences are kept and respected.”²⁹² This safe zone is significant, as mediation as a dispute resolution gains its claimed effectiveness in dispute resolution from the manner in which parties disclose information about their position, interests to the mediator and their counterparts, which “they would otherwise withhold in a public hearing.”²⁹³ This safe disclosure, that takes place under the shield of confidentiality, shall lead to revealing potential solutions that parties might not have realised without the safe disclosure.²⁹⁴ A prime and central component of the confidential nature of mediation “arises from the fact that, in contrast to litigation, the mediation procedure is structured in all legal systems as a private procedure.”²⁹⁵ This fact makes the responsibility to respect confidence “mediation’s most compelling and straightforward ethical imperative,”²⁹⁶ but why does it have that significance? And why must mediators make it a prime responsibility?

First, it can “strengthen the level of trust that mediators can establish with disputants (and between the disputants themselves).”²⁹⁷ **Second**, it supports impartiality, as being “confident that the mediator will not take sides regardless of what happens, parties feel

290 Waldman (n 228) 227.

291 Hopt and Steffek (n 176) 49.

292 Waldman (n 228) 227.

293 Hopt and Steffek (n 176) 49-50.

294 *ibid* 50.

295 *ibid* 49-51.

296 Waldman (n 228) 227.

297 *ibid* 229.

free to confess the less appealing aspects of their situation.”²⁹⁸ **Third**, it protects the integrity and trustfulness of the mediation process as a whole, because if mediators “promise to protect party privacy, and parties rely on those promises. If promises are broken, parties would be justified in wondering what other aspect of the process is a forgery. If a mediator vows to keep confidences and then offers up a party’s secrets, perhaps the vows to remain impartial and promote party autonomy are shibboleths as well.”²⁹⁹ In other words, “without confidentiality protection in mediation, lawyers and clients might be reluctant to disclose certain information potentially useful for settlement discussions, worried that it could be used against them in later proceedings. This could inhibit their negotiation conduct.”³⁰⁰

However, if confidentiality is used as a shield, who or what is protected by this shield? Nadja Alexander answers this question under the title “Three types of confidentiality”, where she mentioned:

- Insider/outsider confidentiality;
- Insider/insider confidentiality; and
- Insider/court confidentiality.³⁰¹

2.6.2.1.1 The scope of confidentiality

The three types mentioned above cover the wide range of situations that might occur in mediation, as follows.

- **Insider/outsider confidentiality:** This type means that “those parties involved in a mediation (insiders) cannot make prohibited disclosures to people outside the mediation (outsiders).”³⁰² This obligation can be extended to include all participants in mediation, such as mediators, parties, experts, advisers, witnesses, interpreters, and all relevant support staff. It prohibits them from disclosing any information they might be exposed to at the mediation to non-participants, or “outsiders”.

²⁹⁸ *ibid* 230.

²⁹⁹ *ibid*.

³⁰⁰ Alexander (n 245) 58.

³⁰¹ *ibid* 382.

³⁰² *ibid*.

- **Insider/insider confidentiality:** This type regulates the exchange of information within private mediation sessions (caucuses) between the mediator and a party. Applying this type shall take one of two approaches.³⁰³

A- **The open communication approach:** in this approach, all information disclosed to mediators in caucuses will not be treated as confidential, unless this has been specifically requested by the party who disclosed the information.

B- **The in-confidence approach:** here all information disclosed privately in caucuses will be treated as confidential, unless otherwise indicated by the relevant party.

- **Insider/court confidentiality:** This type “involves the rights and obligations associated with protecting these mediation communications from being legally discovered or admitted in evidence in court and arbitral proceedings. It is categorized as a specific form of insider/outsider confidentiality, where the court is the ‘outsider’, although technically this area is not about confidentiality but rather about admissibility of evidence. Specifically, it is about the admissibility of mediation communications in evidence in court or tribunal proceedings.”³⁰⁴ This type of confidentiality leads us to be able to discuss privilege without prejudice.

2.6.2.1.2 Confidentiality vs “without prejudice”

*The success of mediation as a process is substantially founded on the principle that what takes place at the mediation is and remains unacceptable to the courts in subsequent litigation if the mediation does not result in settlement. Putting it another way, mediations do not generate admissible evidence.*³⁰⁵

303 Alexander (n 245) 384.

304 ibid 385.

305 Mackie (n 30) 114.

Without prejudice, simply, is “a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish.”³⁰⁶ This is the main concept of the “without prejudice” rule, which has been developed as a mixture of agreed-upon public policy and an expressed or implied agreement made by parties themselves.³⁰⁷ The scope of this rule includes “all genuine negotiations, whether oral or written, undertaken in an attempt to settle a dispute are protected from subsequent disclosure in proceedings, whether or not the label ‘without prejudice’ has been applied to them,”³⁰⁸ but the “without prejudice” protection doesn’t include the mediation agreement itself.³⁰⁹ Meanwhile, confidentiality covers:

- Information created or shared in a joint mediation session, such as the mediator’s notes and documents, and visual material prepared for the purposes of mediation;
- Information provided to the mediator in a private session, or in a phone call or email with one of the parties;
- Observations on the behaviour and conduct of participants in mediation;
- The reasons for failure to reach agreement at mediation.³¹⁰

Now, what are the practical differences between confidentiality as explained above, and without prejudice rule? Confidentiality clauses can be much safer than “without prejudice” privilege, which has limited coverage compared to confidentiality protection. This difference is not only limited to the scope of the given coverage for the various components of ongoing disputes, as the difference extends to the pre-dispute discussions. While “without prejudice” may not always have a role in pre-dispute discussions or discussions, confidentiality “protects these mediated sessions, even where there is no juridical dispute at all, such as in grievance procedures, where parties want or agree to keep discussions from the internal company decision-maker.”³¹¹

306 *Rush and Tompkins v. Greater London Council* [1989] A.C. 1280, 1299

307 Mackie (n 30) 114.

308 *ibid* 115.

309 For examples from courts, see: *Brown v. Rice*, [2007] EWHC 625.

310 Alexander (n 245) 380.

311 Mackie (n 30) 121.

Confidentiality, then, is safer, less controversial, and mitigates practical difficulties. However, does this protection have no exceptions? Is it indefinite and absolute? Or are there some limitations and restraints?

2.6.2.1.3 General exceptions on confidentiality

It is theoretically possible that information may emerge during a private meeting in a mediation which indicates imminent danger to the health, lives or property of third parties.³¹²

What should happen in such instances? Should they keep their duty to not disclose what they have heard in spite of this expected risk? In these situations, mediators become obliged, under a moral and legal duty, superior to their professional duty of respecting confidentiality. Here they have to guarantee that appropriate agencies are fully informed about these threatening circumstances. Such a challenge is “one of the most difficult ethical situations for a mediator to face, and fortunately likely to be a very rare occurrence.”³¹³ Mediation regulations, and mediators’ codes of conduct, usually address these concerns.³¹⁴

The instances that might lead to removing the duty of confidentiality and relieving mediators from their general obligation to keep confidential what they have been told include situations where:

- *The mediator is required under the general law to make disclosure;*
- *The mediator reasonably considers that there is a serious impending risk of significant harm to the life or safety of any person if the information relating to that risk is not disclosed;*
- *The mediator reasonably considers that there is a serious impending risk of being made personally subject to criminal proceedings unless the information sought is disclosed.³¹⁵*

³¹² *ibid* 285.

³¹³ Mackie (n 30) 285.

³¹⁴ See: Hopt and Steffek (n 176) 52 where they explored various exceptions to mediators’ confidentiality obligations in European and North American countries, including: Netherlands, Bulgaria, England, Ireland, Canada, and USA.

³¹⁵ Mackie (n 30) 128.

Apart from these occasions, if the mediator has breached her confidentiality provision, this will be clearly considered as a breach of contract by her, and she will possibly be considered to be negligent.³¹⁶ Deviating from the confidentiality obligation is a great risk that threatens procedural fairness in mediation, even if no harm or damage has occurred to any party or third person, as justice “should manifestly and undoubtedly be seen to be done.” This risk shall become more apparent while discussing one more element of procedural fairness; impartiality.

2.6.2.2 Impartiality

*Disputants must be able to trust that mediators approach their cases with no preconceived idea of how the settlement negotiations should go. They must be confident that the mediator isn't rooting for one side or hopeful that a particular outcome will prevail. Not only must mediators actually conduct their mediations with no bias in favor of (or against) one set of disputants, the mediation setting must appear clear of any taint of bias.*³¹⁷

Mediator impartiality and neutrality are two ways to describe the norm that all mediators have to avoid in favouring one party over another. Some scholars believe that there is a distinction between them.³¹⁸ However, most scholars use them interchangeably to discuss the concept that mediators have to be free from unwanted bias. This critical aspect of the mediation process is practically always integrated in most mediators' known codes of ethics.³¹⁹

³¹⁶ *ibid* 124.

³¹⁷ Waldman (n 228) 277.

³¹⁸ L Cooks and C Hale, 'The Construction of Ethics in Mediation' (1994) 12 *Mediation Quarterly* 55

<<https://doi.org/10.1002/crq.3900120106>> accessed 10 Nov 2019, where they say in 63: “The concept of impartiality appears to have garnered the greatest level of agreement and support... The concept of neutrality is more problematic.” Mayer also believes that impartiality and neutrality are different terms, he suggests that Impartiality is “exhibiting no bias toward one of the parties or the concerns he or she is expressing” and neutrality is “having no relationship with one of the parties or stake in the outcome”, See: Mayer (n 11) 200.

³¹⁹ Kovach (n 174) 311.

According to this ethical obligation “mediators must avoid playing favorites or even mediating in a context in which the temptation to play favorites appears strong.”³²⁰ One of the essential applications of this obligation is avoiding conflicts of interest, which has been designed to evade, not only improper alliances between the involved mediator and the parties, but also any appearance of unseemly alliances. These alliances can take various forms, as they could be related to preexisting financial, personal, or professional relationships with one or more of the parties, or with others who are close to these parties. For instance, if one of the parties were a mediator’s former client, a business associate or tennis partner, the mediator might need to think carefully about whether their bonds with that party shall preclude her from being able to mediate the case. These business and personal relationships “may compromise a mediator’s ability to mediate impartially.”³²¹ Such relationships might cause a perception problem, as they might make it appear as if this mediator may favour the parties she previously knows, even if there are no tangible signs which show such favouritism.³²² This perception problem explains perfectly the golden rule we keep quoting; “justice should not only be done, but should manifestly and undoubtedly be seen to be done.”³²³

One more situation in which a mediator’s impartiality might be challenged is when questioning her influence or impact on the final mediation outcome, as in some occasions “mediators may believe (accurately or not) that a proposed resolution is unfair to one of the disputants. Any response a mediator chooses in such a circumstance presents direct challenges to neutrality.”³²⁴ There are two schools of thought here; one suggests that the mediator is responsible for the mediation outcome, so she shall participate in shaping the final resolution to keep the balance, achieve justice³²⁵, and guarantee a sustainable settlement that addresses all parties’ needs. The other school of thought suggests that “it is not the mediator’s job to make a conclusion about the outcome.”³²⁶ This second viewpoint pays great attention to parties’

320 Waldman (n 228) 277.

321 *ibid* 277-278.

322 *ibid* 278.

323 *R v Sussex Justices, ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233).

324 Kovach (174) 311.

325 Achieving justice in mediation settlements will be discussed later in this chapter.

326 Kovach (n174) 311.

autonomy as a core value that shall not be influenced by the mediator's own beliefs. These two schools of thought will be thoroughly explored later in this chapter.

A final common context where a mediator's impartiality might be profoundly challenged is when one disputant is significantly more powerful than the other, which might push the less powerful party to make decisions that may not represent her free will. This challenge of power imbalance in mediation needs further, more focused discussion, as we shall see below.³²⁷

2.6.2.2.1 Impartiality and power imbalance

*Power is the currency of conflict. Whether its exercise is intentional or not, when people are engaged in conflict, their power is in play. The choice in conflict is not whether to use power but how to use it.*³²⁸

As in traditional litigation procedures, the ideal situation where both parties are equal in their knowledge of law, resources, influence, or the quality of their legal representation situation does not usually exist.³²⁹ That presence of power is not limited to the context of conflicts, but is rather the central notion in social relations “in the same sense in which energy is the fundamental concept in physics.”³³⁰ The concept of power in mediation “represents the ability to shape both mediation process and outcome.”³³¹ The party who has more power is more likely to apply control during the mediation session and gain their preferred outcomes. In contrast, the disputant who has less power might find herself struggling to keep away from unwanted results.

Power in mediation can stem from numerous sources:³³² knowledge and accurate data about the dispute and its context, resources including money and access to contacts

327 This theme shall be discussed again thoroughly later in Chapters Six and Seven, as a challenge to mediator roles.

328 Mayer (n 11) 50.

329 I Roper, ‘Mediation: Good Faith, Bad Faith’ (2015) 40 Alternative Law Journal 50 <<https://doi-org.proxy.lib.strath.ac.uk/10.1177/1037969X1504000112>> accessed 10 Nov 2019, 50.

330 B Russell, *Power: A New Social Analysis* (Norton 1938) 4.

331 Waldman (n 228) 94.

332 *ibid* 94-95, but these resources will be discussed again in Chapter Six while discussing the main challenges to the existing mediators' roles.

and expertise, a position strongly supported by existing legislation or precedents, and personal traits including insight, eloquence, **logic**³³³, empathy, determination and analytical prowess. In real life, “rarely do disputants enter mediation with exactly equal amounts of power. Some asymmetry is to be expected, and one cannot (and should not) decline every case where one party seems to hold a few extra cards.”³³⁴

We should distinguish between three grades of power imbalance here:³³⁵

- 1- Slight acceptable/normal imbalance that often comes accompanied by most conflicts/disputes, and this one is natural, normal, and expected. There is no real threat to fairness in mediation or to the mediator’s ethical integrity, and the mediator should proceed with no fear, and with no action needed to restore the balance.
- 2- Extreme power imbalance, where one party is significantly stronger than the other, to the extent that an unjust outcome is a strong possibility and the weaker party’s free will is seemingly sacrificed. Here the mediator might realise the she would be better declining than proceeding, inform the party that mediation is not the suitable place for them, and they might try another resolution.
- 3- Where imbalance is not too extreme, but serious to the extent that the mediator needs to intervene and take a move to protect the weaker party from reaching a settlement she does not really want. However, this intervention will always be challenged by the mediator’s impartiality as a core value.

In contexts such as the last situation above, where there is a serious power imbalance, no simple solution can be easily followed, “if the mediator attempts to correct an imbalance, the mediator may be perceived as an advocate for the weaker or less able party, compromising neutrality. Yet if the mediator does nothing, the weaker party may not have the genuine ability to participate effectively, raising ethical concerns as well.”³³⁶ However, this dilemma shall be discussed thoroughly later in this thesis, in

333 There is a thorough analysis of the meaning, potentials, and role of logic in both mediation and day to day life in Chapter Four.

334 Waldman (n 228) 87-88.

335 *ibid* 88.

336 Kovach (n 174) 311.

Chapter Five, while discussing the harms which fallacies can do to parties in mediation.

2.6.2.3 Respect

*[R]esearch reveals that disputants are more likely to feel that they have been treated fairly in a dispute resolution process if they are given an opportunity to tell their story and feel listened to by a neutral and respectful third party. If disputants are treated with respect and dignity, they are likely to believe that the outcome reached in such a process is fair, even if actual terms of the agreement go against them.*³³⁷

Apart from confidentiality and neutrality, some scholars³³⁸ believe that for procedural justice to be fulfilled, the third party has to guarantee three linked elements. First, disputants have to perceive that they had the full opportunity to participate in the process and have their “voice” represented by presenting their views, indicating their concerns, explaining their perspectives, and showing their evidence. Second, disputants need to perceive that the mediator has heard, understood, and considered these released perspectives, concerns, views, and evidence. Finally, disputants must have the perception that the mediator “treated them in a dignified, respectful manner and that the procedure itself was dignified.”³³⁹

The opportunity to participate and speak or have their voice heard is “not always pretty or easy to hear. Voice can be angry, aggressive, and cause discomfort, both for the person expressing it and the person listening to such expression. Such voice, with a strong emotional content, is often called “venting” in mediation.”³⁴⁰ In spite of this difficulty, it’s essential to respect parties’ right to talk and vent, as “mediators who

337 Waldman (n 228) 5.

338 See: Waldman, *ibid* 5 and N A Welsh, ‘Making Deals in Court-Connected Mediation: What’s Justice Got to Do with it?’ (2001) 79 Washington University Law Quarterly 787 <<https://scholarship.law.tamu.edu/facscholar/945>> accessed 10 Nov 2019, 744.

339 Welsh (n 338) 820

340 Welsh (n 289) 744.

seek to place restrictions on venting ultimately could chill the expression of righteous anger and fear by those feeling the effects of inequality, bias, and prejudice.”³⁴¹ This opportunity to participate will be achieved whether disputants have spoken amongst themselves or through their lawyers, as parties usually believe that they have been allowed to enjoy the necessary opportunity to have their voices heard in mediation sessions, if their representatives speak freely on their behalf.³⁴² However, parties’ perceptions of this right becomes stronger and more evident if they get the chance to “tell their stories”³⁴³ directly.

The right to “voice”, and opportunity of “venting” will not be fulfilled without the second element, the disputants’ perception that they have been heard and their views, concerns, and evidence have been acknowledged. This feeling of being heard is a result of the mediator’s careful and purposeful practice of active listening, well-articulated questions, and precise paraphrasing.³⁴⁴

Finally, the treatment itself comes as a main umbrella that encompasses the three elements altogether. Hearing parties carefully, and allowing them the opportunity to “voice” means respect. Ignoring their desire to talk and “vent”, or not letting them feel that they have been heard and their views and concerns have been acknowledged indicates, simply, disrespect. This treatment can be observed in the way which the mediator calls parties by their names, offers them seats, punctuality, hospitality, and a warm reception.

To conclude, it is essential to emphasise that taking care of interpersonal behaviour before and throughout mediation sessions is highlighted as a distinct component of procedural fairness, independent of the process of decision-making. Above all, “people value being treated with dignity and having their rights acknowledged.”³⁴⁵

341 *ibid* 745, and see: T Grillo, ‘The Mediation Alternative: Process Dangers for Women’ (1991) 100 *The Yale Law Journal* 1545 <<https://doi.org/10.2307/796781>> accessed 10 Nov 2019.

342 *ibid* 743.

343 *ibid*.

344 Pyncheon and Kravak, (n 63), L Boulle and M Nesic, *Mediator Skills and Techniques: Triangle of Influence* (Bloomsbury Professional 2010), and Mackie (n 30).

345 T R Tyler and M Tonry, ‘Procedural Justice, Legitimacy, and the Effective Rule of Law’ (2003) 30 *Crime and Justice* 283 <<https://doi.org/10.1086/652233>> accessed 10 Nov 2019, 298-299.

2.6.3 Substantive fairness

*Although most mediators are uncomfortable with the role of justice arbiter, they seek to facilitate a good-enough outcome—one that promotes party autonomy while satisfying minimal notions of fairness and equity.*³⁴⁶

While most practitioners agree on the inevitability of fairness as a general concept in mediation, there is a substantial debate regarding whether mediators ought to be responsible for assuring the fairness of the mediation process outcomes.³⁴⁷ This debate has caused a significant addition to the political criticism of mediation.

The concept of justice in many cultures is “represented by a blind folded goddess holding a sword that symbolizes the state authority in one hand and, balancing a scale that symbolizes justice in the other.”³⁴⁸ Justice in this way is understood as rule determined, impartial, consistent and fully in the hands of the state representative. This way of perceiving justice cannot be applicable to the context of mediation, where the ultimate authority for decision-making process lies with the negotiating parties themselves.³⁴⁹ Because the decision-making process in the judiciary is in the hands of the judge, the meaning and the role of substantive justice is understood, as the third party here is a formally trained judge, and her main goal to achieve justice. However, in the mediation process, for the parties, who are not necessarily experts on law³⁵⁰, one of their main goals is to address their needs that have been threatened by the dispute.

Another reason for this debate about the role of justice in mediation is that “because mediation is held in private, its procedures informal and flexible, and the safeguards of due process do not apply, it is recognized that there is always the danger that more powerful interests could prevail over the weaker.”³⁵¹ This reflects the concern we have discussed above regarding the power imbalance which challenges the mediator’s

³⁴⁶ Waldman (n 228) 6.

³⁴⁷ Haley (n 256) 778.

³⁴⁸ M Roberts, *Developing the Craft of Mediation: Reflections on Theory and Practice* (Jessica Kingsley 2007) 166, 167.

³⁴⁹ *ibid.*

³⁵⁰ We shall touch upon the mediation accreditation requirements in the last chapter of this thesis.

³⁵¹ *ibid* 167.

impartiality. However, the question here for the mediator is not about how to help the weaker party without jeopardising impartiality, but rather, the question becomes: Is it my job to help the weaker party to reach a fair settlement? The question here concerns whether the mediator has to, or is even allowed to intervene or not, before discussing the safe interventionary approach without risking impartiality. Is achieving justice a significant matter in the context of mediation, to the extent of making the mediator responsible for it?

We believe that the answer should be yes. Fairness is as a matter of ultimate significance in mediation. Parties need to feel that the outcome they have reached is fair “or as fair as is practicable in the circumstances.”³⁵² It’s natural to expect and require justice and fairness from mediation as an alternative dispute resolution, as long as the two other main resolutions, judiciary and arbitration, consider justice to be a central notion. However, because mediation is a unique resolution with a distinct nature, the meaning of justice in the context of mediation might require a different application. Two conflicting notions then: first, mediation is a form of dispute resolution that should achieve justice similar to that provided by the judiciary; second, mediation is a flexible, party made process, and the meaning of justice pursued here shall be different. Each notion has its followers.

The first notion’s supporters “feel that legal rules have a role to play in mediation, functioning as placeholders for larger notions of equity and fair play,”³⁵³ but the others believe that “formal law and justice diverge sharply”³⁵⁴ and regard “the law less as a reflection of our collective social conscience and more as a rigid set of rules that may do more harm than good.”³⁵⁵ We tend to agree with the second group who suggest that justice and formal law do not necessarily overlap. We do agree that “legal rules may have little compelling moral force and should play a minor role in private negotiation.”³⁵⁶ In any case, justice is a major player in the mediation arena, bearing

352 *ibid* 166-167.

353 Waldman (n 228) 6.

354 *ibid*.

355 *ibid*.

356 *ibid*.

in mind that it might here adopt different rules and features to cope with the distinct nature of mediation.

Because the mediator is the conductor of the mediation process, many regulatory codes place a burden on her to observe, to some extent, if the essential concept of justice is harmed, then she might have to withdraw. For instance, in the Alabama Code of Ethics for Mediators, “a mediator may withdraw if the disputants’ agreement seems to rest on fraud, duress, overreaching, the absence of bargaining ability³⁵⁷, or unconscionability.”³⁵⁸ Arkansas and Florida codes of ethics for mediators have quite similar rules regarding the mediator’s duty in the case of detecting any of these examples.³⁵⁹

We conclude then that justice is a matter of importance in mediation, and the mediator has to take care of this, but how she shall do this? We will answer this in Chapter Six, where we shall examine this assumption more comprehensively, with special attention paid to those situations where the concept of fairness is harmed by ignoring rationality and logical thinking.

2.7 Mediation styles: Revisiting mediation grids

*Mediation can be practiced in several ways, using different processes. What they all have in common is that they have a number of stages, and that the mediator is impartial and does not make a judgment.*³⁶⁰

In both academic research and real life, authors and ordinary people tend to “compartmentalize and give labels.”³⁶¹ Mediation is no exception, as labels and

357 Mentioning the differences on parties’ “bargaining ability” here and its influence on the expected mediation role was one of the incentives for scoping this thesis this way. However, we shall revisit this on coming chapters.

358 Alabama. Code of Ethics for Mediators, Standard 3(b) (2010), Adopted by Order of the Supreme Court of Alabama, December 14, 1995 and effective on March 1, 1996, including amendments received through June 1, 1997, and May 1, 2015.

359 Waldman (n 228) 118, and see: Florida Rules for Certified and Court-Appointed Mediators (Effective August 2021), Rule 10.420(b), and finally see Rule 187.00.01-001 - Requirement for the Conduct of Mediations and Mediators- Rules of conduct to which mediators on the Arkansas Alternative Dispute Resolution Commission's Roster of Mediators must adhere (Standard B, 2004).

360 Liebmann (n 33) 14.

361 Stitt (n 183) 5.

classifications are very common in mediation scholarship. However, “it doesn’t really matter what label is placed on the mediation; what matters is that the mediator selected has the skill to maximize the disputants’ opportunity to negotiate a resolution to their dispute. What also matters is that the disputants (or their lawyers) ask questions to find out the mediator’s style before the mediator is selected so that there are no surprises at the mediation.”³⁶² Labeling is not a major issue, as mediation in effect has accommodated the fact that there is no specific best practice with which to perform mediation, a fact which has been established in empirical studies.³⁶³ This diversity of models and styles is one of the main advantages of mediation, as it increases flexibility, broadens its creativity, handles cultural sensitivity, and opens up consumer choices.³⁶⁴

One of the main reasons behind disagreement within the mediation community about both styles and models is practitioners’ concerns about the degree of the mediator’s positivity in the mediation process, or “how active or passive the mediator should be during meetings with disputants.”³⁶⁵ We classify mediation according to this criterion into interventionist mediation and guardian mediation. One more consideration that might help in labelling and classifying mediation styles is the mediation goal: is it to simply end the dispute, or to provide remedy to the parties? In this category there are two styles; terminal mediation and healing mediation. The final criterion upon which we might classify mediation styles is aspects of the dispute. According to this consideration, mediation can be either limited, or integral. The three given criteria then are; mediator positivity, mediation goals, and disputes’ aspects.

2.7.1. Mediator positivity classification: Interventionist and guardian Styles

In 1996, Len Riskin developed a typology of mediation approaches that captured the mediation field’s collective

³⁶² *ibid.*

³⁶³ Roberts (n 131), and to review a wider range of styles that reflects this fact, see Nadja Alexander in her “mediation metamodel” where she presented a full systematic framework that targets understanding the reality of mediation as it being practiced within various contexts: N Alexander, ‘The Mediation Metamodel: Understanding Practice’ (2008) 26 *Conflict Resolution Quarterly* 97.

³⁶⁴ *ibid.*

³⁶⁵ Dana (n 5) 110 where the author presents Self-Mediation or Do-it-yourself Mediation as another style of mediation that does not involve a third party/mediator so it is out of our scope, as our thesis is mainly about the mediator’s role in mediation.

*imagination and has gained increased traction ever since.*³⁶⁶

This very famous typology³⁶⁷ has been revisited twice, once, seven years later, by the author himself, where he reworked his 1996 grid.³⁶⁸ Then, in 2005, he added a new revision,³⁶⁹ so that we have a grid, a new old grid, and a new new grid. However, these revisions and improvements did not change the fact that the old grid still has great “widespread popularity and presence in training curricula, credentialing measures, and informal mediator chatter.”³⁷⁰ Building on this, we intend here to reflect on and discuss the 1996 grid, and its two famous terms; evaluative and facilitative mediation.

It has been consistently clear that there is a well-established distinction between what Riskin called “facilitative mediation”, in which the mediator only facilitates the negotiating parties’ own endeavours to reach a settlement, and what he called “evaluative mediation”, where the mediator also assists the negotiating parties by offering a third-party opinion on the merits of the dispute or of specific matters between the negotiating parties.³⁷¹

The evaluative style adopts a directive behaviour, which might take different forms from adopting an assertive posture, offering a reality test, and suggesting ideas about available options. The evaluative/directive style “was associated with the readiness to assert a greater strength of [*intervention*] where necessary.”³⁷² Evaluative mediators feel free to present their views regarding settlement routes, and regarding the legal merit of the position of each party. Because this type of mediator offers their own evaluations, they represent their own practical expertise regarding applicable law and industry practice as a substantial component of their skill. However, this theme is not

366 Waldman (n 228) 19.

367 See: L L Riskin, ‘Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed’ (1996) 1 Harvard Negotiation Law Review, 7.

368 L L Riskin, ‘Retiring and Replacing the Grid of Mediator Orientations’ (2003) 21 Alternatives to the High Cost of Litigation, 69 <<https://doi.org/10.1002/alt.3810210402>> accessed 15 Nov 2019, and see: L L Riskin, ‘Decision making in Mediation: The New Old Grid and the New New Grid System’ (2003) 79 The Notre Dame Law Review, 1.

369 L L Riskin, Retiring and Replacing the Grid, *ibid* 69.

370 Waldman (n 228) 19.

371 Mackie (n 30) 11-12.

372 Roberts (n 348) 145.

limited to the evaluative style, it is evident in other practices including wise council mediation and expert advisory mediation where mediators heavily direct parties.³⁷³ Furthermore, evaluative mediators do believe that parties' self-determination (disputant autonomy) acts as a core mediation value which can be better achieved where parties are fully informed regarding the worst and best alternatives to the settlement. They regard providing information about likely litigation outcomes as "increasing, not diminishing, disputant autonomy."³⁷⁴ Yet, it is important while discussing this directive approach to differentiate between two distinct contexts of these interventions; problem/ substantive interventions and process interventions/facilitation. Problem interventions might encompass offering legal advice, technical information, or "evaluating and even suggesting options for agreement within the mediation, and proposing terms of agreement between the parties".³⁷⁵ On the other hand, process intervention includes various aspects of the structure and dynamics of the mediation session from seating arrangements to reframing party statements and from setting the agenda to directing the way communication is channelled among negotiating parties and the mediator.³⁷⁶

On the other hand, the facilitative style, which has been described variously as *laid back* and *elicitive*, adopts an unobtrusive posture that takes "different forms of mediator behavior as well – an 'abstinence'; quiet and considered demeanour; and a calmness of manner."³⁷⁷ In this style, mediators believe in parties' capability to solve their own disputes. Consequently, the mediators' main focus is on developing parties' capacities through professional questioning and listening skills. Facilitative mediators participate by "helping parties better explore their underlying interests, develop proposals, and evaluate those proposals. They ask questions designed to help the parties probe in greater depth the likely consequences of settling or not settling. They encourage parties to assess the strengths and weaknesses of their various legal positions."³⁷⁸ However, they do not evaluate the accuracy or viability of any

373 Alexander (n 363) 16.

374 Waldman (n 228) 21.

375 Alexander (n 363) 7

376 *ibid*, where Alexander differentiated clearly between two aspects of process intervention; mediation structure and mediation dynamics. However, we believe that some of the given examples are interchangeable, for instance seating arrangements and order of speaking can be under both categories while Alexander allocated the first one to the structure intervention and the order of speaking to the dynamics.

377 Roberts (n 348) 145.

378 Waldman (n 228) 19.

disputant's evidence or position, nor do they suggest any assessment or valuation of any opinion, offer, or argument given by the parties. Indeed, they do not offer any prediction regarding the possibilities about what might happen if the dispute is settled or not settled, but rather believe that offering any of these valuations or predictions shall "impair mediator impartiality and stifle party autonomy. If a party appears to be sticking stubbornly to an unrealistic position, a facilitative mediator may ask questions in an effort to create movement. But she would stop short of giving her own view of the merits or offering an opinion of what a reasonable settlement option would be."³⁷⁹ The facilitative mediator is "like a symphony conductor: she brings the instruments together and works to help them play in harmony, but she does not add a bass or soprano voice herself. She is the maestro of process, but endeavors to have little influence on the actual melody that emerges."³⁸⁰

Differences between these two main styles are clearer now. While they both seek to solve the problems in assisting negotiation between parties, they perceive mediation values and the mediator's role differently, as explained above. These differences do not contradict the fact that "some mediators adopted both styles and other possible styles, sometimes in the same session."³⁸¹ Adopting any of these two styles is up to the mediator's qualifications, orientation, and personality; the dispute's nature and complexity; and the parties' preferences and relations. However, we propose here two styles which we have developed from Riskin's 1996 dichotomy. He was concerned in his classification about the mediator's activities as it tries to measure the techniques and strategies mediators employ while attempting to deal with the merits of the dispute. We suggest instead another criterion for classifying mediation styles, not precisely according to activities, but rather more concerned with the degree of the mediator's positivity towards the discussion that takes place in mediation. In our dichotomy, the interventionist style shall substitute for the evaluative style, and the guardian style shall replace the facilitative style. The differences, though, are subtle.

³⁷⁹ *ibid* 20.

³⁸⁰ *ibid*.

³⁸¹ Roberts (n 348) 145.

The foremost difference between the interventionist and evaluative styles is that the latter's fundamental role is to "evaluate matters that are important to the mediation",³⁸² and its main perception of the negotiating parties is that they need the mediator to "provide some guidance as to appropriate ground for settlement"³⁸³, whereas the interventionist style does not confine itself to this rule, but rather surpasses this mission, to convince and persuade the involved party to adopt the mediator's evaluation, and to make her decision in the shadow of this evaluation. Moreover, while evaluative mediators might not see negotiating parties as fully able to understand their, and their counterparts', positions, interventionist do not share the same view; they rather believe that even parties might be able to understand the full situation, they may still need a specialised intervention regarding managing the exchange of this understanding because conflicts might increase the possibility of misrepresentation and misapprehension of this understanding as we shall see on Chapter Three of this thesis. In contrast, the principal distinction between the guardian and facilitative styles is that the latter's central role is to facilitate the ongoing parties' negotiation process, its conception of the negotiating parties being that they are "intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers,"³⁸⁴ whereas the guardian style suggests that even although parties may be intelligent and mature enough to manage their differences, they do need protection without control, and safeguarding without dominance.

The persuasion attribute that distinguishes the interventionist and guardian styles has evolved from the proposed understanding of the meaning of negotiation. If negotiation is a persuasion game, as we suggested in Chapter One, then mediation, which is an assisted negotiation process, shall be managing and encompassing this persuasion process. In the interventionist style, as a positive approach, persuasion becomes a job for the mediator herself, to not only evaluate *matters that are important to the mediation*, but rather to take a step forward and convince the party with her evaluation by *mentoring* her, using persuasion tools, on why she should accept and follow the

382 *ibid.*

383 *ibid* 24.

384 *ibid* 24.

mediator's evaluation. However, this persuasion endeavour shall not mean to create a confronting situation between the mediator and the targeted party. It is rather a reasoned offering not an argumentation process as mediators shall, by all possible means, avoid challenging their parties and exposing them to this provoking condition. On the other side, the guardian style is a more passive approach that does not require the mediator to persuade the party of her viewpoint. Rather, it assumes that the mediator shall keep an eye on the persuasion/negotiation phase that occurs in mediation and *monitor* the game, in order to guard the parties from misapprehension, misreading and misleading moves that might harm the process.

2.7.2. Mediation goal classification: Healing and terminal styles

Not all models view mediation as a tool for problem solving. Some adopt a broader vision, viewing mediation as a way to help people gain a deeper understanding of themselves and those they interact with. These models stress the potential of mediation to enhance relationships and encourage personal growth.³⁸⁵

One of the benefits that mediation can bring is repairing, saving, or even bolstering the parties' relationship.³⁸⁶ Rebuilding parties' ties that have been harmed by their disputes can be a noble goal for mediators to achieve. However, this is not always the case. Having this goal as a priority, or a lesser goal, or indeed not having it at all on the list, is dependent on the mediator's adopted viewpoint regarding the main goal of the mediation process; is it just a dispute resolution that aims mainly, or even only, at terminating the conflict, or is it, or should it be, more provident, prudent, and far-seeing?

³⁸⁵ Waldman (n 228) 22.

³⁸⁶ See 2.3 section above in this chapter "Mediation Significance: Why Mediation?".

The *Healing* style is a therapy -oriented³⁸⁷ style, and *Terminal* is a settlement -oriented one³⁸⁸. Both of them occupy two far ends of our suggested dichotomy, as a reflection and restructuring of Susan Silbey and Sally Merry's "therapeutic and bargaining" styles³⁸⁹. This later classification relied on many characteristics that distinguish the two given types, by giving a thorough description of each style that allows a clear vision of it.³⁹⁰

The therapeutic style perceives the role of the mediator as being to help parties communicate and identify areas of agreement. Its main statement about litigation as a mediation alternative is that it is inappropriate because it "worsens relationships."³⁹¹ In the therapeutic mediation process, parties have fewer private sessions and more direct communications between themselves where they tend to be seated facing each other.³⁹² The assumed cause of conflict here is misunderstanding and failures in communication, and the main incentive for parties to settle is their shared desire for reconciliation and maintenance of a good relationship.³⁹³

On the other hand, the bargaining style perceives the role of the mediator as being to reach a settlement. Bargaining style mediators' main statements about alternatives to mediation are that the legal system is costly, slow, and difficult to access, as they spend more time in private sessions, get seated facing parties, and facilitate less direct communication between disputants. During the negotiation phase, the focus is mainly on demands that are subject to trading, and the mediators tend to eliminate non-specific and more emotional demands.³⁹⁴

Now, we shall explain how these two styles shall be developed and restructured. We conceive the main theme of the bargaining style as "ending" the dispute, "closing" the deal, and terminating the case. The prime focus of this style is the dispute as an

387 See: S Silbey and S Merry, 'Mediator Settlement Strategies' (1986) 8 Law and Policy 19–25.

388 See: K Kressel and others, 'The Settlement-Oriented vs the Problem-Solving Style in Custody Mediation' (1994) 50 Journal of Social Issues 67–84 <<https://doi.org/10.1111/j.1540-4560.1994.tb02398.x>> accessed 20 Nov 2019.

389 Silbey and Merry (n 220).

390 *ibid*.

391 *ibid* 21.

392 *ibid*.

393 *ibid* 22.

394 *ibid* 21-22.

independent given fact. The metaphor that can simplify the mediator's role here is regarding her as a surgeon eliminating a tumour. Putting an end to the living dispute is at the core of this approach, regardless of parties' future relations or their feelings toward each other. Therefore, labelling it as a "bargaining" style seems quite broad, as bargaining is the core of any discussion that might take place at many mediation sessions, even if it was "therapeutic" or "inter-relational" oriented. Bargaining is a fact of life and a quotidian human activity, and labelling a mediation style with it can be misleading.

On the other hand, the main feature of the "therapeutic" approach is rebuilding the harmed parties' relationship to achieve a sustainable conciliation. The suggested healing style has a more parties-made therapeutic nature. Healing as a medical term, by its dictionary definition,³⁹⁵ refers to the fact of becoming well again, as a result of either self-development, or as a result of help offered by someone else. Therapy, with its narrower vision, focuses on the intervention given by the therapist, as it is usually referred to as "a treatment that helps someone feel better"³⁹⁶ without reference to their self-recovery,³⁹⁷ and the role of the parties themselves on knowing their problem, its cause, and the best cure for it. This self-healing, even with the help of the mediator's "recovery with agency",³⁹⁸ is the main theme of the two best known existing styles that can be encompassed by our suggested umbrella healing style; the transformative mediation style, and the narrative mediation style.

In their book *The Promise of Mediation*,³⁹⁹ Robert A. Baruch Bush and Joseph P. Folger introduced the concept of transformative mediation. In this style, the transformative mediation school "views mediation's main task to be relational change and personal growth rather than dispute settlement."⁴⁰⁰ Mediation, according to this school, offers parties "the possibility of better understanding themselves and their

395 See Cambridge Dictionary <<https://dictionary.cambridge.org/dictionary/english/heal>> accessed 21 Nov 2019.

396 See Cambridge Dictionary <<https://dictionary.cambridge.org/dictionary/english/therapy>> accessed 20 Nov 2019.

397 For more about the self-recovery concept, see: T Newby, 'What Is Self-Recovery? – The Challenge for Humanitarian Agencies' (CARE Insights, 20 November 2019) <<https://insights.careinternational.org.uk/development-blog/what-is-self-recovery-the-challenge-for-humanitarian-agencies>> accessed 20 November 2019.

398 Or as stated in defining self-recovery "Self-recovery is recovery with agency", see *ibid*.

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

400 Waldman (n 228) 22.

underlying goals, as well as the perspectives and goals of their adversaries.”⁴⁰¹ Mediators here are totally oriented toward “promoting parties’ recognition of their own needs and capacities and encouraging their ability to empathize with each other.”⁴⁰² The main job of the mediator here is to “help the parties better understand where *they* want to go with their dispute. Under no circumstances should the mediator intervene in ways that effect a shift in the substantive direction of the discussion.”⁴⁰³

Narrative mediation is another style that can join the healing style category. In this narrative approach “even if no agreement emerges, the process is successful if participants walk away with a new story about their interaction with one another.”⁴⁰⁴ This style was introduced to the mediation world by Gerald Monk and John Winslade in their book *Narrative Mediation: A New Approach to Conflict Resolution*.⁴⁰⁵ The mediator here “helps parties look more closely at unexamined feelings of entitlement as well as scripts handed to them by virtue of their membership in family, religious communities, or society at large”⁴⁰⁶.

According to this style, parties come to the mediation table with their own stories, and the mediator’s main job is to deconstruct this story and “help the parties work toward a more positive discourse. According to this view, shifting to an alternate narrative will effect shifts in the parties’ relationship and situation.”⁴⁰⁷ The change in parties’ own narrations about their relationship that has been affected by the dispute is a core target in this style. This approach, as a healing style, focuses on the future of the parties’ relationship and their perceptions about each other in order to create a better relation, which makes it another version of the inter-relational/healing style - the transformative style.

401 *ibid.*

402 *ibid.*

403 *ibid* 23.

404 *ibid.*

405 See: J Winslade and G Monk, *Narrative mediation: A New Approach to Conflict Resolution* (Jossey-Bass 2000). The authors, on “Chapter One: Narrative Mediation: What Is It?” quoted Hippocrates where he says in Precepts: “Healing is a matter of time, but it is sometimes also a matter of opportunity.” This was an inspiration to come up with the “healing” style term versus the therapeutic style introduced by Susan Silbey and Sally Merry. The Healing term is also inspired by Lois Gold, see: L Gold, ‘Influencing Unconscious Influences: The Healing Dimension of Mediation’ (1993) 11 *Mediation Quarterly*, 55 <<https://doi.org/10.1002/crq.3900110107>> accessed 20 Nov 2019.

406 Waldman (n 228) 24.

407 *ibid* 23.

2.7.3. Disputes' aspects classification: Limited and integral styles

Another typology can be added to the spectrum here relying on the dispute's aspects. If the Interventionist vs Guardian classification was a reflection on one continuum of Riskin's 1996 grid, which concerns the mediator's activities in "the Evaluative vs Facilitative styles", the Limited vs Integral typology is a restructure of the other continuum, which concerns the scope of the problem that mediation seeks via "the Narrow vs Broad styles."⁴⁰⁸ This restructuring is complemented by Jay Folberg and Dwight Golann work "the triangle of dispute and resolution",⁴⁰⁹ and with an inspiration by Lagos Egri from his leading work *The Art of Dramatic Writing*.⁴¹⁰

Riskin's 1996 continuum is concerned with the scope of the problem, and has two ends, the narrow approach, and the broad one. This continuum takes a horizontal cone shape, in which the "narrow" end represents the extreme *narrow* style where the mediation is focused only on litigation issues. Then the cone gets wider, and the scope gets broader, where mediation discusses business issues, before it moves forward to a broader level in order to cover personal/professional/relational interests. Finally, the continuum cone reaches its widest end, where the broad style is ready to explore community interests. The cone describes how the scope gets broader, step by step, as a process of gradual expansion.

Folberg's and Golann's triangle for conflict and negotiation allows a brighter image of "the scope of the problem" than the one given by Riskin. They suggested that "there are three sets of factors, or interests, at work in most conflicts. These interests can be thought of as three "Es": economic, emotional, and extrinsic. They form the three sides of the negotiation triangle, which represent the three sets of interests that must be addressed to reach a satisfactory settlement of a dispute."⁴¹¹

Building on this, the scope of the problem shall be seen from this three factors triangle. The full image, which is the ideal treatment "to reach a satisfactory settlement of a

⁴⁰⁸ Riskin (n 367) 17.

⁴⁰⁹ Folberg and Golann (n 103).

⁴¹⁰ L Egri, *The Art of Dramatic Writing: Its Basis in the Creative Interpretation of Human Motives* (Simon & Schuster 1946) 33-37.

⁴¹¹ Folberg and Golann (n 103) 5.

dispute” is an application of the “Limited vs Integral Styles” that we suggest as another way of classifying mediation, according to the scope of the problem, rather than the “narrow vs broad” approach suggested in Riskin’s 1996 grid. The latter sees ‘narrow’ and ‘broad’ as “levels of mediation.”⁴¹² The mediator in this classification, according to Riskin, who takes care of relational issues is adopting a broad approach/style, as Riskin presumes that when a mediator discusses these relational issues, she has already discussed the previous levels of the continuum, namely the legal merits and business matters. In our suggested “limited vs integral” approach, the mediator can discuss relational issues and still apply a limited style, as she can discuss this aspect without presuming that she has discussed legal or business matters, as Riskin’s style presumes.

This limited style of mediation discusses one or two only from the given three Es. When the mediator discusses the economic/legal side only, then she adopts the limited style, but if she does not limit herself to the legal side only, and goes beyond to explore the emotional/psychological status of the parties and to consider the social context of the dispute which concerns the image of the disputants in the society, “*the extrinsic side*”, then she can be classified as an integral mediation practitioner. Riskin’s broad style goes deeper and digs to reach the maximum depth, but the integral approach regards it from all angles at once. The broad approach is deep and sophisticated, but the integral approach, above all, is thorough and comprehensive. An example that might simplify the limited vs integral classification is the *Blind Men and the Elephant*⁴¹³ story, where six blind men came across different parts of an elephant’s body, and each blind man “creates his own version of reality from that limited experience and perspective.”⁴¹⁴ This limited mediation approach looks like “seeing” the dispute from one angle/part only, while the integral approach makes you a sighted person who can see/perceive the whole/integral dispute/elephant. Comparatively, narrow vs broad styles can be seen from Maslow’s hierarchy of needs, where he ranked five human needs, in hierarchical levels within a pyramid, starting from survival needs on the base of the pyramid, and elevated to self-actualisation on the top. Once one

412 Riskin (n 367) 18.

413 See: ‘Story: Blind Men and the Elephant’ Peace Corps <<https://www.peacecorps.gov/educators/resources/story-blind-men-and-elephant/>> accessed 20 November 2019.

414 See: ‘Blind Men and the Elephant’ All About Philosophy <<https://www.allaboutphilosophy.org/blind-men-and-the-elephant.htm>> accessed 20 November 2019.

level is satisfied, the next level up shall follow, and so on.⁴¹⁵ The four problem-definition continuum levels in Riskin's 1996 model and its elevation in his illustrative cone⁴¹⁶ looks somewhat similar to Maslow's 1954 pyramid, as the two shapes reflect the gradual elevation that takes a more developed and advanced level at every step. The mediator's move from a limited to an integral approach is a horizontal round move around the dispute triangle/the elephant, while the mediator's move from a narrow to a broad approach is a vertical straight move from the base of the pyramid/the cone, to the top.

One more addition is helpful in order to complete the full illustrated image of our suggested typology. The credit for this addition is given to Lagos Egri, who suggested that "every object has three dimensions: depth, height, width. Human beings have an additional three dimensions: physiology, sociology, psychology. Without a knowledge of these three dimensions, we cannot appraise a human being."⁴¹⁷ He believes that "It is not enough, in your study of a man, to know if: he is rude, polite, religious, atheistic, moral, degenerate. You must know why. We want to know why man is as he is, why his character is constantly changing, and why it must change whether he wishes it or no."⁴¹⁸ He thinks that the psychological attitude is "the product of the other two. Their combined influence gives life to ambition, frustration, temperament, attitudes, complexes."⁴¹⁹ This interaction between the three dimensions is what we need to utilise here in shedding more light on the limited vs integral styles.

Folberg and Golann's three Es are interrelated and interact as much as Egri's three dimensions of human beings. The way you feel (emotional) about the dispute is affected by the social context (extrinsic) of it, and both influence the way you understand the legal (economic) aspect of it, and of course, the economic dimension of a dispute will similarly act on the psychological and social worlds of the disputants. That's why the integral approach shall be significant in addressing the "three sets of interests that must be addressed to reach a satisfactory settlement of a dispute."⁴²⁰ Such

415 Maslow (n 87).

416 Riskin (n 367) 22.

417 Egri (n 410) 33.

418 *ibid.*

419 *ibid* 34.

420 Folberg and Golann (n 103) 5.

a settlement shall be satisfactory, sustainable, and enforceable by its nature because it shall satisfy all parties' interests and address all their needs.⁴²¹ However, the three Es triangle and the human being's three dimensions will be explored thoroughly in the next chapter.

However, these classifications are not rigid political borders, as most mediators practice a mixture of them⁴²² which brings benefits to mediation practice. The facilitative mediator resorts sometimes to evaluative mediation and terminal mediation practitioners. Developing the craft of mediation cannot ignore parties' relationships all the time, and even limited style mediators do touch upon the various angles of the dispute from time to time. However, our understanding of mediation as a rationalised negotiation shall, as we shall see in the last two chapters of this thesis, represent a model in its own right; yet, this suggested model can work with a variety of other mediation models. We don't see the rigid boundaries between the mediation models as strict borders. Many of them have common tools that can make them coexist. The rationaliser mediator can be facilitative or evaluative, limited or integral; it is mainly about adding more logic to the discussion and assuring less misunderstanding or misrepresentation as we shall see thoroughly throughout this thesis.

Notwithstanding all the classifications by which criteria scholars categorise mediation, the *objective of mediation* typology remains the most critical, as other classifications shall, to some extent, derive from this one. Determining that a mediator's objective is mainly aimed towards ending the dispute will take them directly to terminal approaches, and this might push them to use a narrow approach that discusses litigation issues only, or, similarly, motivate them to be inclined toward the economic/legal side of the dispute, as other levels (and sides) are more connected to healing/therapeutic approaches, which deal more with the human aspects and parties' relationships. In the same line, if their goal is mainly to settle the dispute, they could tend to be

421 This, again, can be evidenced by reading Egri's elaboration of his human being's three dimensions: "Analyze any work of art which has withstood the ravages of time, and you will find that it has lived, and will live, because it possesses the three dimensions. Leave out one of the three, and although your plot may be exciting and you may make a fortune, your play will still not be a literary success." See: Egri (n 410) 34. On this quotation, the word "settlement" can fit very well as a replacement for "work".

422 Roberts (n 348) 145.

interventionist/evaluative, as such intervention/evaluation shall ease their mission into reaching a settlement, while aiming to maintain parties' relationships will push them toward more guardian/facilitative approaches. Determining the mediation goal and picking the one that suits them from the list is a critical action then, but where is this list? The next section considers mediation's objectives.

2.8 Mediation objectives

Hopt and Steffek have noticed that “the basic aims of the regulations and the reasons for implementing mediation are largely the same in the Member States of the European Union as in the wider world. These reasons are: Broader and better access to justice, more sustainable conflict resolution and a wider acceptance of the results, dispute resolution for the benefit of all parties, more just solutions from both an individual and collective perspective, strengthening of the parties through an integrative and constructive method of dispute resolution, a low entry threshold, relief of the judiciary's workload and cost-savings for the parties and the government.”⁴²³ These goals are the main motivations behind adopting mediation, and they are the main motivations behind adopting specific mediation approaches.

Nadja Alexander listed the following precise list of five objectives of mediation practice as the most prominent themes that represent the worldwide diversity of contemporary mediation practices:⁴²⁴

- Service–delivery;
- Access to justice;
- Interpersonal relations transformation;
- Social transformation;
- Client satisfaction.

Together, these objectives affect the mediator's role⁴²⁵ and mediation regulation.⁴²⁶ Accordingly, it is important to have a closer look at them.

⁴²³ Hopt and Steffek (n 176) 9.

⁴²⁴ Alexander (n 245) 42.

⁴²⁵ Will explore that later in Chapter Six.

⁴²⁶ Will touch upon this in Chapter Seven.

1- Service-delivery

The service-delivery goal comprises several sub-objectives including “reducing court waiting lists, judicial workloads, costs to disputants, costs to the state-sponsored judicial system and the time involved by all relevant parties in resolving a single dispute.”⁴²⁷ Furthermore, it includes “achieving settlement within a relatively short time frame.”⁴²⁸ This list of service-delivery sub-objectives is a priority for most known governmental court-connected mediation programs.⁴²⁹

2- Access to justice⁴³⁰

This objective overlaps with the previous one, as “better service-delivery of dispute resolution outside the courts arguably increases access to the courts for disputes, which do not get to mediation.”⁴³¹ However, the concept of “access to justice” refers, not only to access to the courts, but also access to informal justice, which allows “resolving disputes without the formalistic and adversarial rules associated with litigation.”⁴³² This “informal justice” concept encompasses “participatory justice”, which involves encouraging parties’ participation in dispute resolution.⁴³³

3- Interpersonal relations transformation

The main aim here is empowering parties, in order to transform their relation by encouraging “mutual acknowledgment and responsiveness to the other disputants and their constituencies.”⁴³⁴ By being party-oriented and emotion-focused, mediators who prioritise this objective ⁴³⁵perceive their core job as being to transform parties from feeling self-absorbed and vulnerable, because of their conflict, to feeling confidence, by offering “the possibility of better understanding themselves and their underlying goals, as well as the perspectives and goals of their adversaries.”⁴³⁶

4- Social transformation

⁴²⁷ *ibid.*

⁴²⁸ *ibid* 43.

⁴²⁹ *ibid.*

⁴³⁰ For more see: D L Rhode, *Access to Justice* (Oxford University Press 2004).

⁴³¹ Alexander (n 245) 43, and Genn, H, *Judging Civil Justice* (Cambridge University Press 2010) 78.

⁴³² Alexander, *ibid* 43.

⁴³³ *ibid.*

⁴³⁴ *ibid* 45.

⁴³⁵ Waldman (n 228) 22.

⁴³⁶ *ibid.*

Mediations that prioritise this objective seek to explore “social change by identifying not only the individual, but also the social context within which the conflict occurs and causes the conflict.”⁴³⁷ Those mediations consider a wide “array of interests, including those of communities or entities that are not parties to the immediate dispute.”⁴³⁸ Accordingly, they “can provide a forum for social change by developing and implementing core values for specific communities such as businesses, schools, universities, government departments, neighbourhoods, churches, sporting associations and other communities.”⁴³⁹

5- Client satisfaction

“Three sets of factors are primarily responsible for facilitating satisfaction with mediation: party expectations, process factors and outcome factors.”⁴⁴⁰ Firstly, parties’ prior expectations shall shape the grade of their satisfaction. Accordingly, if there is “[a] party expecting mediation to save time and money, for example, [she] will probably be satisfied with a mediation that results in a prompt and cost-effective settlement. By contrast, a party is likely to report relative dissatisfaction with mediation if it violates or otherwise falls short of her prior expectations.”⁴⁴¹ Secondly, process factors include having a “noncoercive, unbiased, comprehensible, informative, attentive to party interests and private”⁴⁴² mediation process. Finally, outcome factors encompass two elements: achieving settlement and saving costs.⁴⁴³

Linking these objectives to the given styles above can be useful in understanding them better. Interventionist/evaluative, terminal, and limited/narrow mediations apparently suit service delivery and access to justice goals. Guardian/facilitative and healing/therapeutic mediations fit well with Interpersonal Relations Transformation. Integral/broad styles involve social transformation objectives. Finally, in spite of the initial impression that client satisfaction is a personal/emotional objective that is usually aimed at by healing/therapeutic, integral/broad, and guardian/facilitative

437 Alexander (n 245) 45.

438 Riskin (n 367) 21-22.

439 Alexander (n 245) 46.

440 Guthrie and Levin (n 205) 888.

441 *ibid* 889.

442 *ibid* 893-894.

443 *ibid* 895.

mediations, this objective could be seen as common to all mediation styles, as achieving it will encourage the parties to keep using mediation as their preferred resolution, which is the common aim for most mediation scholars and practitioners.

Conclusion

On this chapter we tried to explore mediation scholarship in a detailed and thorough approach. This chapter has built on the previous one that presented negotiation as a “persuasion game”. However, defining mediation was more sophisticated, despite the fact that negotiation is still the corner stone of this definition. Mediation definition, we believe, encompasses five essential elements: the process “the facilitated negotiation”, the trigger “the dispute/conflict”, the participants “parties/disputants”, the conductor “the mediator”, and the product “the mediation outcome”.

The process has been thoroughly explored by visiting mediation phases and with revisiting mediation styles and suggesting a classification that shall help understanding its mechanism and its objectives in accordance with given styles. The conductor “the mediator”, has been discussed briefly as this thesis shall investigate her role later in final chapters. And finally, because exploring mediation scholarship can’t be completed without discussing the context in which mediation takes place, we mentioned above the elements of mediation definition that include trigger and participants as main elements. However, we believe that understanding mediation scholarship thoroughly requires deeper investigation of these two elements as they have strong connection with the other mediation elements and understanding them shall make the whole image more comprehensible. Therefore, Chapter Three will try to examine them more closely.

The main new concept this chapter presented is redefining mediation as a rationalised negotiation game by envisaging mediator’s main role through rationalisation lenses. The rationalised mediation is an independent model, and its distinction comes from the focus of the mediator and the promise mediation offers. The Rationaliser mediator is highly focused on parties’ arguments, their structure, relevance, and sufficiency. This focus distinguishes this style from other styles where mediators are more concerned about other themes, such as self-image or the relationship with the other

party. However, this does not mean excluding these other styles. Focusing on the arguments of the parties, shall not contradict being facilitative or evaluative as this model offers three grades of interventions that allow wide range of moves that can be taken by the mediator which can work with a variety of mediation models as we shall see in the final chapters of this thesis.

Yet, the image will still be incomplete and unable to support the main premises this thesis is trying to examine. We referred above⁴⁴⁴ to the importance avoiding any “affirmative misrepresentations or misleading statements to the other parties or the mediator during the mediation.”⁴⁴⁵ This avoidance shall require a deeper investigation of the main reasons that might cause these misrepresentations or misleading conversations. Furthermore, we highlighted the significance of helping the negotiating parties to “act reasonably and genuinely in the mediation.”⁴⁴⁶ However, this reasonableness shall equally require a deeper investigation of the scholarship of logic, reasoning, and argumentation. Thus, we shall explore logic in Chapter Four and discuss logical deviations on Chapter Four and Chapter Five in order to examine the possible ways of achieving rationality and reasonableness in mediation.

⁴⁴⁴ See 2.6.1.2 on this chapter.

⁴⁴⁵ Kovach (n 278) 623.

⁴⁴⁶ Queensland Uniform Civil Procedure Rules 1999, R 325.

Chapter Three

Dispute and Disputant:

The Two Triangles

In Chapter One we reviewed negotiation scholarship, and ended with proposing that negotiation's main theme is persuasion, which can be perceived as a "persuasion game". Then, we explored in Chapter Two the scholarship of mediation, and suggested a new definition for mediation as a "minded negotiation" or "minded persuasion game", as it offers a clear articulation that stresses the central role of reason and logic in the persuasion/negotiation game that occurs on the occasion of having a dispute.

We intend in this chapter to explore the definition, nature, and dimensions of disputes, as these disputes are the arena of any mediation process. Discussing the different given frameworks that attempt to analyse disputes and discover different aspects of them will pave the way to suggest our approach to conceiving the dimensions of the dispute, or what we call the "Dispute's Triangle", as we believe that having a clear and simple framework in understanding disputes is a core element in assisting mediators in their job as negotiation "minders."

However, proposing a workable framework for understanding disputes only permits us to figure one side of the coin, the dispute itself, without helping us understanding how "disputants" regard these disputes, how they handle them, and how they make decisions towards resolving them. This shall be as important as understanding disputes.

In this chapter we explore different given frameworks that have attempted to analyse people's decision-making processes and understand the components that shape people's behaviours, especially during conflicts, in both prescriptive and descriptive approaches. Next, we will attempt to build our own framework benefiting from, engaging with, and reflecting on explored approaches from Aristotle to Shapiro. We shall label this proposed framework the "Disputant Triangle." Therefore, we now have two new triangles; the dispute, and disputant triangles.

The dialogue between these two triangles can give us more insights about the types of aid that negotiating parties might need from a mediator. We shall call this dialogue

“The Containment Game.” The chances of reaching a resolution of a dispute may depend on the course and results of this game, and the negotiating parties’ awareness of its occurrence. Moreover, and more importantly for our thesis, the success of the mediator in helping negotiating parties reach a mutually accepted resolution of their conflict, can highly benefit from noticing, understanding, and directing the course of this containment game towards the direction that gives a higher likelihood of achieving the needed objective of the mediation session.

3.1. Dispute or conflict?

*The social sciences now include a field called “conflict resolution,” whereas modern legal studies more often describe the field as “dispute resolution.” The different terms signal an important distinction between the two approaches.*⁴⁴⁷

Carrie Menkel-Meadow

While dispute resolution professionals, including lawyers, mainly focus on the concrete nature of actual disputes and specific techniques for settling these disputes, social scientists who work in the conflict resolution field mainly focus on the embeddedness of those disputes in greater fields or forms of social relations.⁴⁴⁸ However, in order to better examine whether the distinction between these two fields shall have an impact on our thesis, we need to first explore the two terms ‘conflict’ and ‘dispute’.

Conflict can be defined as “a situation in which each party aspires to an outcome that the other (is) apparently unwilling to provide,”⁴⁴⁹ a “perceived divergence of interest, or a belief that the parties’ current aspirations cannot be achieved simultaneously.”⁴⁵⁰ In other words, conflict is “a belief that if one party gets what it wants, the other (or

447 C J Menkel-Meadow, ‘Roots and Inspirations: A Brief History of the Foundations of Dispute Resolution’ in M L Moffitt, R C Bordone and Program on Negotiation at Harvard Law School (eds), *The Handbook of Dispute Resolution* (1st edn, Jossey-Bass 2005) 14.

448 *ibid* 15, and Moffitt and Bordone introduction of the book, at 2.

449 Pruitt and Kim (n 179) 5.

450 *ibid* 7.

others) will not be able to do so.”⁴⁵¹ According to this understanding, conflict is “found in almost every realm of human interaction,”⁴⁵² as we are exposed every day to social situations in which “a minimum of two actors (parties) strive to acquire at the same moment in time an available set of scarce resources.”⁴⁵³ Conflict, then, is “a social system of actors with incompatibility between their goal-states.”⁴⁵⁴ While this interpretation of conflict regards conflict as a “contradiction”, this contradiction takes place “where the acceptability region is located inside the incompatibility region.”⁴⁵⁵

On the other hand, “disputes are generally less intense over time and have a greater degree of negotiability, whereas conflicts are more intense over time and have a lesser degree of negotiability. Unsatisfied needs are found in conflicts, whereas disputes do not possess the same level of satisfaction.”⁴⁵⁶ In other words “conflict enjoys a broader and deeper meaning than the term dispute and can connect us with deep-seated and unresolved stories in our lives.”⁴⁵⁷ This lesser room for negotiability in conflicts is a result of the nature of relations during the conflict, as it can be noticed that “in conflicts, the relations often turn sour and dialogue ends,”⁴⁵⁸ while in disputes, dialogue can be continued.

These suggested differences between the two terms conform with the disciplinary differences that made social scientists more likely to discuss “conflicts,” while lawyers may tend to focus on “disputes.”⁴⁵⁹ However, “neither discipline has settled on a single definition of either term,”⁴⁶⁰ which urges us to wonder if the terms ‘disputes’ and ‘conflicts’ refer to the same thing, especially considering that some scholars already use these two terms interchangeably.⁴⁶¹

451 *ibid* 8.

452 *ibid* 9.

453 Wallensteen (n 25) 27.

454 J Galtung, *Theories of Conflict* (Online edn 2009)

<www.transcend.org/files/Galtung_Book_Theories_Of_Conflict_single.pdf> accessed 3 Jan 2020.

455 *ibid* 24.

456 A Tidwell, *Conflict Resolved? A Critical Assessment of Conflict Resolution* (Continuum 2003) 9.

457 Alexander (n 245) 9, and compare Moffitt and Bordone when they state that “Conflicts are often seen as broader (involving more people), deeper (extending beyond surface issues into questions of value, identity, fear, or need), and more systematic (reaching beyond a single interaction or claim).” See: M L Moffitt, R C Bordone, and Program on Negotiation at Harvard Law School, *The Handbook of Dispute Resolution* (1st ed, Jossey-Bass 2005) 2-3.

458 Vestergaard, Helvard and Sorensen (n 181) 4.

459 Meadow (n 447) 15, and Moffitt Bordone and Program on Negotiation at Harvard Law School (n 457) 2-3.

460 Moffitt, Bordone, and Program on Negotiation at Harvard Law School (n 457) *ibid*.

461 See for example: Noone (n 173) 3.

In support of the idea of the interchangeable nature of the two terms, Moffitt and Bordone have highlighted⁴⁶² that the *Dictionary of Conflict Resolution*⁴⁶³, while explaining the given definition of the term conflict, covered “more than twenty paragraphs, even without considering its many compound usages.”⁴⁶⁴ We agree that if there is any suggested difference between the common uses of the terms conflict and dispute, they shall be notably thin, insignificant, and rarely obvious. Accordingly, we shall ignore these slight theoretical differences and echo Moffitt and Bordone’s assertion that “we are not convinced that the work of precisely differentiating between disputes and conflicts merits the effort. No body of knowledge or advice should hinge on whether the condition being described falls into the category of dispute or conflict. We do not concern ourselves with questions over which labels observers put on the dynamics they study, but instead focus on the insights observers have to offer about people experiencing the problem, their views of the problem, and the processes by which they are seeking to resolve their differences.”⁴⁶⁵ Therefore, we will keep using the two terms interchangeably from now on.

3.2. Dimensions of disputes/conflicts

*Understanding conflict is basic to its resolution. If we seek to end a conflict, we must start by understanding its nature. What makes a successful peacemaker or conflict resolver is not a set of processes, methodologies, or tactics; it is a way of thinking, a set of values, an array of analytical and interpersonal skills, and a clear focus.*⁴⁶⁶

The way in which we perceive conflict profoundly shapes our approach and attitude to dealing with it. Each conflict can be viewed as a disagreement, an incompatibility of interests, a feeling, or a contradiction between two, or more, sets of behaviours. Building on this insight, it is not a wise move to start handling any conflict before

462 Moffitt, Bordone, and Program on Negotiation at Harvard Law School (n 457) 2-3.

463 Yarn D H and William & Flora Hewlett Foundation, *Consortium on Negotiation Conflict Resolution* (Credo Reference from Dictionary of Conflict Resolution, 1st ed, Jossey-Bass 2012).

464 Moffitt, Bordone, and Program on Negotiation at Harvard Law School (n 457) 3.

465 *ibid* 2-3.

466 Mayer (n 11) ix.

grasping an accurate understanding of its nature, its roots, the complex interactions that make it up, and “the forces that motivate the behavior of all participants, including ourselves.”⁴⁶⁷ This understanding of the nature of the conflict shall help the intervenors “either to identify the cause or to rationalize causation and move forward.”⁴⁶⁸

However, because we all differ in our ways of understanding and conceiving social phenomena that surround us, “there are many different lenses we can use to look at conflict, and each of us will find some more amenable to our own way of thinking than others.”⁴⁶⁹ Yet, one of the most common ways in understanding, conceiving, and analysing a conflict/dispute is to explore its dimensions. Nevertheless, there are a wide range of studies that have suggested various sets of dimensions of conflict.

It is necessary before we start exploring these approaches to make a distinction between **dimensions** of conflict and **typologies** of conflict, as “a typology classifies conflicts into types. A dimension is a variable that applies to all conflicts, regardless of type. Moreover, they can be conceived of dynamically: a conflict can move along these dimensions; that is what makes them different from a taxonomic, static scheme.”⁴⁷⁰

Dimensions, then, are aspects/angles of the given approach which suggests that each dispute includes aspects of others within them, whereas typologies are classifications according to which one dispute can be allocated to one category and a different dispute can be allocated to another. Conflict typologies can, for example, be:⁴⁷¹ interpersonal, intrapersonal, inter-group, structural, relational, task, relation, or value conflicts etc. Conflict dimensions, by contrast, can be represented by one of the ‘triangles’ shown below.

467 *ibid* 1.

468 Tidwell (n 456) 4-5.

469 Mayer (n 11) 4.

470 Galtung (n 454) 43-44.

471 See S E Abdullahi, ‘A Typology of Conflicts and Conflict Resolution in the Muslim World’ (2006) 38 *Peace Research* 9 <<http://www.jstor.org/stable/23608102>> accessed 3 Jan 2020, M A Straus and E M Douglas, ‘A Short Form of the Revised Conflict Tactics Scales, and Typologies for Severity and Mutuality’ (2004) 19(5) *Violence and Victims* 507–20 <https://doi.org/10.1891/vivi.19.5.507.63686> accessed 3 Jan 2020, and K Shonk, ‘3 Types of Conflict and How to Address Them’ (Program on Negotiation, Harvard Law School, Daily Blog, 3 June 2025) <https://www.pon.harvard.edu/daily/conflict-resolution/types-conflict/> accessed 3 Jan 2020.

3.3. Triangle(s) of dispute

*When it comes to dimensions each author in the field will have his own bundle to present.*⁴⁷²

Johan Galtung

There is a wide range of approaches in perceiving disputes and analysing their underlying structures in order to find a satisfying framework in dealing with them. Studying many of these different approaches shows that the “three sides structure” is noticeably common.

Below, we intend to explore a number of these approaches and explore the components of each “bundle”. Then, we shall introduce our proposed framework that is learned from, engaged with, and reflected in most of these explored approaches.

3.3.1 Mayer’s triangle

*Conflict may be viewed as occurring along cognitive (perception), emotional (feeling), and behavioral (action) dimensions. This three-dimensional perspective can help us understand the complexities of conflict and why a conflict sometimes seems to proceed in contradictory directions.*⁴⁷³

Bernard Mayer

By “perception”, Mayer means understanding or belief, so that the conflict, from this cognitive dimension, exists when one party’s beliefs that her interests, needs, or wants are incompatible with the other party’s interests, needs, or beliefs.

⁴⁷² *ibid* 43-44.

⁴⁷³ Mayer (n 11) 4.

By “feeling”, he means one’s emotional reaction to an interaction or a situation that involves someone else, even if the other person doesn’t know anything about this feeling, as, according to Mayer, “in conflicts, it does not take two to tango. Often a conflict exists because one person feels in conflict with another, even though those feelings are not reciprocated by or even known to the other person.”⁴⁷⁴

Finally, by “action” he means the way of expressing our beliefs - “perceptions” - and emotions- “feeling”. Action, then, is the behaviour that one party adopts to express her feelings and beliefs by, for example, signing petitions, submitting a case, committing violence etc.

These three dimensions are dynamic and have a mutual effect on each other, as someone’s beliefs affect and are affected by her emotions towards a situation or an interaction, and both beliefs and emotions affect and are affected by the external behaviour this person is adopting.

Such a dynamic relationship between these three dimensions creates an image of a triangle where each side of this geometrical figure shapes a part of the image and affects, and is affected by, its length, thickness, and movement.

3.3.2 HNP triangle

*Surprisingly, despite what appear to be infinite variations, all difficult conversations share a common structure. When you are caught up in the details and anxiety of a particular difficult conversation, this structure is hard to see. But understanding that structure is essential to improving how you handle your most challenging conversations.*⁴⁷⁵

⁴⁷⁴ ibid 5.

⁴⁷⁵ Stone, Patton, and Heen (n 115) 4.

Douglas Stone, Bruce Patton, and Sheila Heen of the Harvard Negotiation Program (HNP), developed a framework for understanding any given hard conversations, or conflicts. They studied hundreds of conversations of various kinds and discovered that “there is an underlying structure to what’s going on, and understanding this structure, in itself, is a powerful first step in improving how we deal with these conversations. It turns out that no matter what the subject, our thoughts and feelings fall into the same three categories, or “conversations”. And in each of these conversations we make predictable errors that distort our thoughts and feelings, and get us into trouble.”⁴⁷⁶

They suggested that every difficult conversation has three sides; questions, conversations, or dimensions.

The first aspect of conversation involves disagreement over the question of “what happened”. This dimension of every situation is concerned about the perception of actual facts; “Who said what and who did what? Who’s right, who meant what, and who’s to blame?”⁴⁷⁷

The second aspect involves the feelings involved in conversations or the emotional aspect. This shall include questions like “Are my feelings valid? Appropriate? Should I acknowledge or deny them, put them on the table or check them at the door? What do I do about the other person’s feelings? What if they are angry or hurt?”⁴⁷⁸

Finally, there is the third dimension, which involves the question of identity. This side is concerned about the value of debate regarding self-image and self-esteem. It is concerned with whether others regard us as good people or bad? Competent or incompetent? Worthy of love or unloveable?⁴⁷⁹

3.3.3 Folberg and Golann triangle (the triangle of conflict and negotiation)

Logic is not the singular path to negotiating settlement of a conflict. There is increasing

⁴⁷⁶ ibid 7.

⁴⁷⁷ ibid.

⁴⁷⁸ ibid.

⁴⁷⁹ ibid 8.

*recognition that to negotiate a satisfactory resolution of a conflict there must be an understanding of and attention to the emotional and the relationship components, which may be the underlying bases of the conflict.*⁴⁸⁰

Folberg and Golann

Folberg and Golann highlighted that, although the essential focus of lawyers during negotiation is on the trade-offs of legal claims that can be measured by money, not paying enough attention to the non-monetary elements shall result in an impasse.

Building on this premise, they developed a simple, yet accurate, formula for perceiving conflicts. They named it “The Three Es Triangle”⁴⁸¹. This suggested triangle includes economic, emotional, and extrinsic dimensions.

By the economic side, they mean that all legal claims that can be weighted by economic considerations and translated into financial figures. By the emotional side, they refer to the feelings that each party has towards the conflict and the other party. Finally, the extrinsic side⁴⁸² refers to the social aspect of the dispute, which encompasses the image, impression, and reputation each party leaves or wishes to leave amid the conflict.

3.3.4 Our proposed dispute triangle

Our proposed triangle is a mixture of the above three triangles, although it shares close similarities with the last one, less similarity with the HNP bundle, and has significant differences from Mayer’s approach.

⁴⁸⁰ Folberg and Golann (n 103) 5, and see the previous chapter.

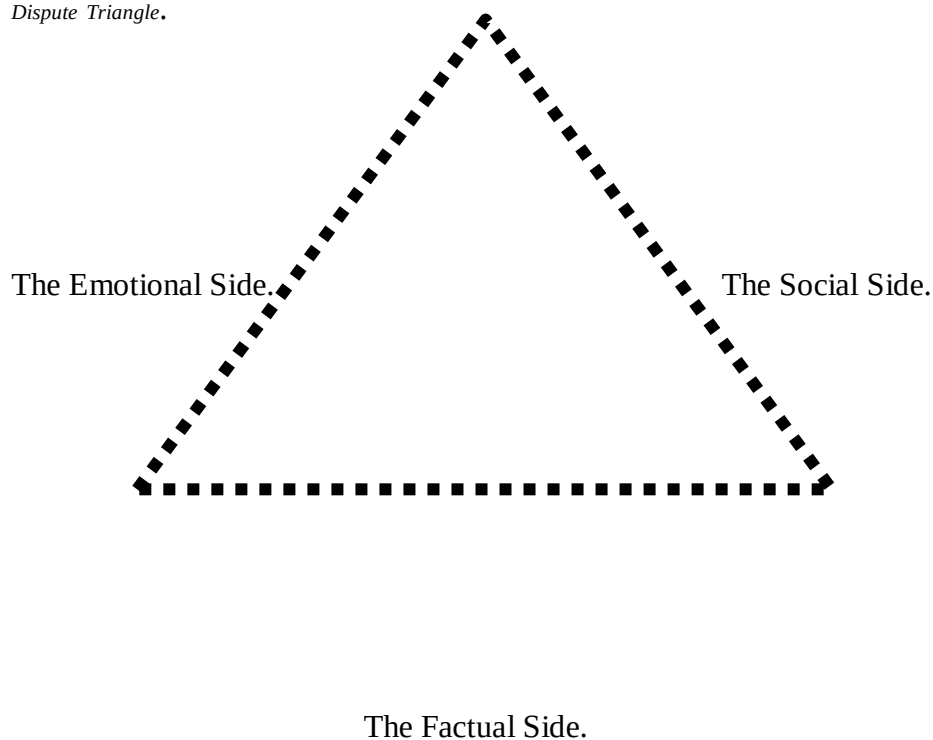
⁴⁸¹ *ibid.*

⁴⁸² On their previous edition, Folberg and Golann named it “Environmental Side”. By ‘environment’, they meant the same concept; the social context, self-image, and the relational aspect, see J Folberg and D Golann, *Lawyer Negotiation: Theory, Practice, and Law* (2nd edn, Wolters Kluwer 2010) 7.

We suggest a frame of three integrative sides that includes a factual (objective) side, a social (outer) aspect, and an emotional (inner) dimension. These three sides interact and practice mutual influence on each other.

Figure 1:

Dispute Triangle.



3.3.4.1 The factual (objective) aspect

This side is exactly the “What Happened?” conversation/question/dimension on the HNP triangle, and is concerned with objective elements that have already taken place in the situation that created the conflict. The factual side is not far too from the “Behavioral Dimension” proposed by Mayer, as any “action” taken by any party is a factual element which has an objective nature. The way we deal with this aspect is highly affected by our education, knowledge, experience, our powers of observation, logical skills, and analytical abilities. It involves every action that can be perceived by the senses and can be handled by the mind. However, this aspect is independent from our approaches in dealing with it. What happened has happened, and our way of handling it is a different subject, as we shall observe later in this chapter while discussing our proposed “Disputant Triangle”.

This factual side is the aspect that lawyers take care of, as it usually can be discussed using legal norms and can “often” be interpreted by financial figures, which explains why Folberg and Golann termed it “Economic”. However, we disagree with them, as not every dispute/conflict has an economic nature/side/aspect. Disputes over children’s custody, international disputes over borders, and conflicts between religious groups can be very good examples of conflicts that have no obvious financial aspects to be presented on the table. However, all of them have a “legal” nature and all of them contain “factual” components that possess an objective status.

3.3.4.2 The social (outer) aspect

This side has very few differences from the “Extrinsic” dimension on the Folberg and Golann triangle, and it widely differs from the “Identity” conversation in the HNP triangle, and from the “Cognitive” dimension in Mayer’s approach. Yet, this outer side encompasses the “setting and social considerations, including how others will view what is going on, and how the resolution will appear to third parties,”⁴⁸³ so is more concerned with self-image and face saving, as it involves the more superficial aspects of our existence. However, it is not simply limited to the image that others picture of us, as Folberg and Golann explain. Our proposed social side encompasses the relational elements that connect parties to each other, the history of their relationship, the precarious ties that brought them together, and all other connectors created by any given unifying common social grounds, including kinship, neighbourship, and colleagueship.

Social considerations are widely affected by factual components, as the facts of the dispute (what happened, who did it, when and how) shape the perceived image that each party wishes to have in her society. These social considerations differ from the “Identity” and “Cognitive” aspects suggested by HNP and Mayer. The identity and cognitive components involve the beliefs, value measures, and personal sets of principles each party holds all the time - and not exclusively - during the conflict. Components such as identity, cognition, and beliefs are personal, and attached to the

⁴⁸³ Folberg and Golann (n 103) 6.

disputant, not the dispute. However, we shall explore that factor in depth while presenting our suggested “Disputant Triangle” below, later in this chapter.

3.3.4.3 The emotional (inner) side

This side is very typical of aspects which the three triangles above suggested and explained, being connected to all feelings and emotions which parties might bear toward the situation or toward each other, or, using again Folberg and Golann’s words, “the internal pushes and pulls on parties created by the conflict that effect how they feel about themselves”.⁴⁸⁴

However, to be more accurate and precise, and to distinguish this angle from other emotional/feelings sides introduced by previous triangles, we mean here by referring to this emotional aspect the feelings that concurrently surround the conflict, and that either arise as a reaction to it, or as a catalyst that caused the conflict or escalated it. Therefore, we don’t mean, by referring to this side, any traits, characteristics, prejudices, or personal attitudes. For example, if one of the disputants has default negative feelings about immigrants, LGBTQ people or the poor, the other party belonged to one of these groups, and this was thought to be one of the dispute’s triggers, we still don’t discuss these constant feelings, prejudices, and biases. In spite of the fact that these features might affect the way each party feels about the dispute, herself, and the other party, we are only concerned here about those feelings themselves, not the traits or personal characteristics that might have pushed them to rise, escalate, or de-escalate. The difference between the feelings that compose this “Inner/Emotional” side and the personal traits resembles the difference between the “Outer/Social” side and the Identity/Beliefs/Embedded Biases concept⁴⁸⁵.

⁴⁸⁴ *ibid* 6.

⁴⁸⁵ See above 3.3.4.2.

While all these differences will be discussed below in this chapter while explaining the “Disputant Triangle”, before moving to this, we shall explore the role of emotions in disputes, as this should better present the disputant triangle.

3.4 The role of emotions

*Emotions are an essential, irreplaceable ingredient in any negotiation. Getting rid of emotions is not possible and not desirable.*⁴⁸⁶

Daniel Shapiro

As mentioned in Chapter One, we all negotiate every day of our social life, whether about where to go on our next holiday, when to get hired on a new job, or how much to pay for a new house. And all negotiators experience emotions all the time. These feelings may be negative ones such as sadness, guilt, or anger, or might be positive emotions like happiness, joy or triumph.⁴⁸⁷ However, the role of all these emotions, whether positive or negative, is crucial in conflicts, as, while they may fuel conflicts, they can also be a key to deescalating them, as many emotions can moderate, control, or even prevent conflicts⁴⁸⁸ Indeed, this is not limited to simple individual discussions or conflicts, as emotions intervene at all levels. Accordingly, “whether in negotiation of large-scale political issues or of everyday conflicts between colleagues or spouses, emotions have the potential to impede or facilitate a wise agreement.”⁴⁸⁹

However, what makes emotional forces have this unique role is the fact that they are undetectable to the ordinary eye, yet the impact they have is profoundly felt, as they can easily tear apart a longstanding friendship, destroy a successful business, and break up a happy marriage.⁴⁹⁰ Furthermore, emotions are very personal and individual, as

486 D Shapiro, ‘Enemies, Allies, and Emotions: The Power of Positive Emotions in Negotiation’ in M L Moffitt, R C Bordone and Program on Negotiation at Harvard Law School (eds), *The Handbook of Dispute Resolution* (1st edn, Jossey-Bass 2005) 79.

487 Fisher and Shapiro (n 10) XI.

488 Mayer (n 11) 11.

489 Shapiro (n 486) 67.

490 D Shapiro, *Negotiating the Nonnegotiable: How to Resolve Your Most Emotionally Charged Conflicts* (Penguin Books 2017) xiii.

there is no known mathematical equation that can tell with sufficient certainty how and when the counterpart shall react. Apologising to the partner may escalate the dispute today, but might work successfully tomorrow.⁴⁹¹

Moreover, negotiators follow emotions, even on the occasions where this might seem unjustifiable, according to any rational financial analysis. It is normal to witness an individual party who might “intelligently decide to throw away an appealing settlement offer in favour of his personal emotional fulfilment of seeing the defendant’s directors and lawyers being cross examined in the court, or even for exposing their so-called corporate immorality.”⁴⁹² As stated above, negotiating parties can neither avoid their emotions nor should they try, because emotions are unavoidable. This happens, simply, because we are human beings, and are unable to - indeed cannot - remove emotions from our natural interactions.⁴⁹³ However, this shall have a great impact on cognition, reason, and rational thinking, as we will explore next.

3.4.1 Emotions and reason

*Conflict is not resolved by reason alone.*⁴⁹⁴

Daniel Dana

We have to admit that “if people could always stay perfectly rational and focused on how to best meet their needs and accommodate those of others, and if they could calmly work to establish effective communications, then many conflicts would either never arise or would quickly deescalate. But of course, that is not human nature, even if many of us occasionally pretend that it is.”⁴⁹⁵ This prevailing fact imposes its reality; reasonableness has very little to do with disputes, “notwithstanding cherished beliefs about human rationality. Intellectual elitists may sneer at the proposition that our beliefs and attitudes are not entirely the result of “logical analysis of the facts.””⁴⁹⁶

491 *ibid* xvi.

492 M C Aaron, ‘Finding Settlement with Numbers, Maps, and Trees’ in: M L Moffitt, R C Bordone, and Program on Negotiation at Harvard Law School (eds), *The Handbook of Dispute Resolution* (1st ed, Jossey-Bass 2005) 202.

493 Shapiro (n 486) 67-68.

494 Dana (n 5) 86.

495 Mayer (n 11) 10.

496 Dana (n 5) 86.

The reason behind the profound effect of emotions in our thinking is that when persons “feel overtaken by negative thoughts, [they may] temporarily be unable to think clearly, or not even hear what others are saying. Thinking and interpretation are based on our appraisal of what is happening.”⁴⁹⁷ Therefore, our cognition itself is highly affected by emotions. Using Shapiro’s words, “When we are frustrated, we tend to think negative thoughts. When we are happy, we are more likely to think positive thoughts. Strong emotions also tend to narrow the scope of our thinking. When we are angry at someone, it is hard to think about anything or anyone other than that person. We experience tunnel vision.”⁴⁹⁸ The way in which we perceive conflict, think about it, and take decisions towards its resolution are strongly influenced by our feelings toward the disputed matter and the other party. This might explain why “agents such as lawyers are likely to have greater emotional distance from the subject matter of a negotiation. This distance should help them to make more rational recommendations or decisions than would disputants themselves.”⁴⁹⁹

These prevailing effects of emotions are not limited to the early stages of our thinking, which include narrowed cognition and vision, but rather exceed that, to “impose their own demands into these busy brain processes.”⁵⁰⁰ Therefore, while the mind is trying to analyse the situation that created the dispute, it also recalls our experiences, beliefs and values, and tries to produce rational decisions, while emotions interfere to impose their own demands.

On the other hand, according to Damasio, emotions can point us in the appropriate direction, and take us to the proper place where we may be able to successfully put the tools of logic to good use.⁵⁰¹ Emotions here can serve as internal friendly guides, and they can also help negotiators communicate with their counterparts, and read their signals that might also guide them. Emotions here can “assist us with the daunting task

497 J L Hocker and W W Wilmot, *Interpersonal Conflict* (10th ed, McGraw-Hill Education 2017) 297.

498 Shapiro (486) 69-70.

499 C Guthrie, ‘Option Generation: Be Careful what you Ask for’ in: M L Moffitt, R C Bordone, and Program on Negotiation at Harvard Law School (eds), *The Handbook of Dispute Resolution* (1st ed, Jossey-Bass 2005) 229.

500 D Stone and Sh Heen, ‘Bone Chips to Dinosaurs: Perceptions, Stories, and Conflict’ in: M L Moffitt, R C Bordone, and Program on Negotiation at Harvard Law School (eds), *The Handbook of Dispute Resolution* (1st ed, Jossey-Bass 2005) 154.

501 A Damasio, *Descartes’ Error: Emotion, Reason, and The Human Brain* (Putnam 1994) xiii.

of predicting an uncertain future and planning our actions accordingly.”⁵⁰² However, knowing about the significant role of emotions in guiding reason does not, by any means suggest that reason shall be considered less important than emotions, or relegate logic to a backseat to emotions. On the contrary, understanding this pervasive role of emotions shall give us a great opportunity of enhancing emotions’ positive effects and minimizing the harms they might do to “the process of planning and deciding.”⁵⁰³

However, this might raise a question about the mechanism of our decision-making process, especially during conflicts. This mechanism shall show us the factors, elements, and forces according to which we act, behave, react, and take decisions towards our disputes, which necessitates deeper exploration of this process.

3.5 Disputant decision-making “The Disputant Triangle”

While many approaches that have tried to better understand conflicts agree on the fact that exploring disputes in all their dimensions shall aid in this understanding, many approaches to describing human decision-making process have tried to reveal the components, factors, and principal players in this process. However, most of these approaches do not focus their scope on the occasion of having a dispute, but rather, attempt to explore the structure of human behaviour on a generic basis. However, this generalised analysis of human behaviour can be supported by other studies that have analysed this behaviour on the occasion of having a conflict, such as those conducted by Morton Deutsch or Leigh Thompson. We have already discussed their contribution in Chapter One of this thesis⁵⁰⁴; however, we shall revisit them in further chapters.

Here we shall explore three frameworks that attempt to explain the components that form, or shall form, shape, and produce human actions. The first triangle was introduced by Aristotle as perspective one in order to help orators to persuade their audience; the second is descriptive, and suggested by Freud, to analyse the mechanism of the human mind. Finally, the third one, proposed by Shapiro, was a descriptive approach to analyse the various dimensions of human behaviour during conflicts.

502 *ibid* xiii.

503 *ibid* 246.

504 See above on this thesis: Chapter One, 1.6 Negotiation motives and 1.7 Negotiation limitations.

3.5.1 Aristotle triangle

*Now the proofs furnished by the speech are of three kinds. The first depends upon the moral character of the speaker, the second upon putting the hearer into a certain frame of mind, the third upon the speech itself, in so far as it proves or seems to prove.*⁵⁰⁵

Aristotle

In his work *Rhetoric*, Aristotle was concerned about the elements every speaker needs to master in order to persuade the audience. His main interest in this text is to arm orators with tools and skills that shall make their speeches persuasive. However, while he was trying to do so, he did, intentionally or unintentionally, point out that every person, in order to persuade others during a talk, speech, conversation, discussion, or negotiation, needs to have credibility (*ethos*) as a clear method of proof and direct way of persuasion. *Ethos*, which is an artistic proof that shall be established end embedded within the discourse itself, provides the targeted audience with genuine insight into the speaker's/persuader's integrity, character, and goodwill. The second necessary form of proof is the emotional appeal (*pathos*) and the third is the speech itself, its arguments and reasoning (*logos*).⁵⁰⁶

Accordingly, a person on the occasion of having a conversation, shall be equipped with these three elements; her credibility as a person who has morals, ethics, beliefs, and an identity that is worthy of trust and respect (*ethos*), her ability to understand, respond, expect, accommodate, and handle others emotions and feelings (*pathos*), and, finally, her logical reasoning ability and mind argumentation skills.⁵⁰⁷

505 Aristotle, *The Art of Rhetoric*, English translation and introduction by John Henry Freese, (William Heinemann 1939) 17.

506 Perloff (n 50) 28.

507 Jowett and O'Donnell (n 51) 41.

This triangle, described by Aristotle, is a prescriptive structure, as he “requires” these three elements from every party who wishes to commence a persuasive dialogue. Yet, while his recipe was tailored for the elite in Athens, who were willing to be orators and master rhetoric as a career, we can learn many lessons from his approach, as we shall see later in this chapter.

3.5.2 Freud’s triangle

*If the differentiation we have made of the mind into an id, an ego, and a super-ego represents any advance in our knowledge, it ought to enable us to understand more thoroughly the dynamic relations within the mind and to describe them more clearly.*⁵⁰⁸

Sigmund Freud

In his psychoanalytic theory⁵⁰⁹, Sigmund Freud proposed that our mind, personality, and behaviour perform according to the results of the dynamic interaction between three components known as the id, the ego, and the superego. These three components work together to produce the complex human behaviour we witness every day.

The id is the source of psychic energy. It is present from birth, unconscious, and it includes primitive and instinctive behaviors. According to Freud, the id is totally driven by the pleasure principle, which endeavours to provide an instant gratification of all needs, desires, and wants; for instance, an increase in thirst or hunger shall produce an immediate movement to drink or eat. However, trying to fulfil our desires immediately is not always legal, realistic, rational, or acceptable. This is where the ego is necessary.

⁵⁰⁸ S Freud, *The Standard Edition of the Complete Psychological Works of Sigmund Freud* (Hogarth Press 1962).

⁵⁰⁹ For more about Freud’s ideas and theories, see: E Erwin, *The Freud Encyclopaedia: Theory, Therapy, and Culture*. (Routledge 2002).

The ego's main role is to ensure that all the id's desires, needs, and wants are expressed in a manner that can be acceptable in the real world, as its main responsibility is dealing with reality using logic and rationality. The ego's tool in achieving this is the "reality principle", by which the ego weighs the benefits and costs of every desire declared by the id, and decides accordingly to abandon those desires or to act upon them in a realistic and socially acceptable way.

Finally, the superego comes to hold the ideals and moral standards that we learn from our family, school, and wider society to build our own ethical sense of right and wrong. The superego supports us with moral guidelines for making ethical judgments. Thus, while the ego tries to make our decisions realistic rational and legal, the superego attempts to make them ethical and idealistic. However, maintaining the balance between these three components is essential and, according to Freud, the ego is responsible for keeping this balance, as all rational, logical, and realistic assessment processes lie on the ego task list.

Accordingly, when Freud's theory comes to an application in the arena of conflict and the disputants' behaviour while handling these conflicts, the three proposed elements shall suggest different reactions to the conflict. For instance, if one person's car is crashed into by another, her id shall urge her to satisfy her feeling of anger and desire of revenge by hitting, swearing, or smashing the culprit's car. At the same time, the superego might push her to forgive, tolerate, and accept, while the ego's responsibility is to weigh the losses and find the best rational way to get them fixed. Here is raised the critical role of the ego in avoiding being extremely judgemental and realistic if she solely followed the superego, or being uncontrollable, impulsive, or even criminal, if she entirely followed her id. Despite the various criticisms this theory has received since its early publication, especially regarding its methodology, applications and lack of sufficient empirical research⁵¹⁰, it can still enlighten our research in the area of analysing disputants' behaviour and negotiators' decision-making process, or, as

510 *ibid* xiii.

Samuels has precisely stated, “we can take his ideas and apply them to how we understand our selves and the world around us in the twenty-first century. Not only can we live more rational and satisfying lives, but we can also overcome many of our political and social problems if we understand how reason, emotions, desires, and the unconscious work.”⁵¹¹

3.5.3 Shapiro triangle

*Key dimensions of conflict resolution:
rationality, emotions, and identity.*⁵¹²

Daniel Shapiro

While Aristotle’s triangle was prescriptive and tailored to help professional orators, Shapiro’s triangle, similar to Freud’s model, is designed in a descriptive way to analyse the three dimensions of human behaviour. However, Shapiro designed his framework in order to understand human behaviour during conflict, whereas Freud’s structure was not limited to dispute occasions. The three sides of Shapiro’s triangle are: *Homo economicus*, *Homo emoticus*, and *Homo identicus*.⁵¹³ *Homo economicus* is the first dimension of his triangle, and conceives of people as rational creatures. This rationality aspect will motivate people during disputes, and in everyday life situations, to obtain their desires, needs, and wants “as efficiently as possible.”⁵¹⁴ The second dimension of Shapiro’s model is *Homo emoticus*. Here, rationality is sidelined in favour of emotions, which animate disputants’ thoughts and actions. While these emotions might facilitate resolution of the conflict, it must be noted that “emotions can also hinder conflict resolution.”⁵¹⁵ Finally, there is the realm of identity which Shapiro labels as *Homo identicus*. Here the disputant looks beyond emotions and reason, to consider the fundamental aspects of identity, which include “who you are, what you

⁵¹¹ R Samuels, *Freud for the Twenty-First Century* (1st ed, Springer 2019) 1.

⁵¹² Shapiro (n 490) 9.

⁵¹³ *ibid.*

⁵¹⁴ *ibid.*

⁵¹⁵ *ibid* 10.

hold as important, and how you conceive of meaning in your life.”⁵¹⁶ This side encompasses disputants’ beliefs, values, and loyalties.

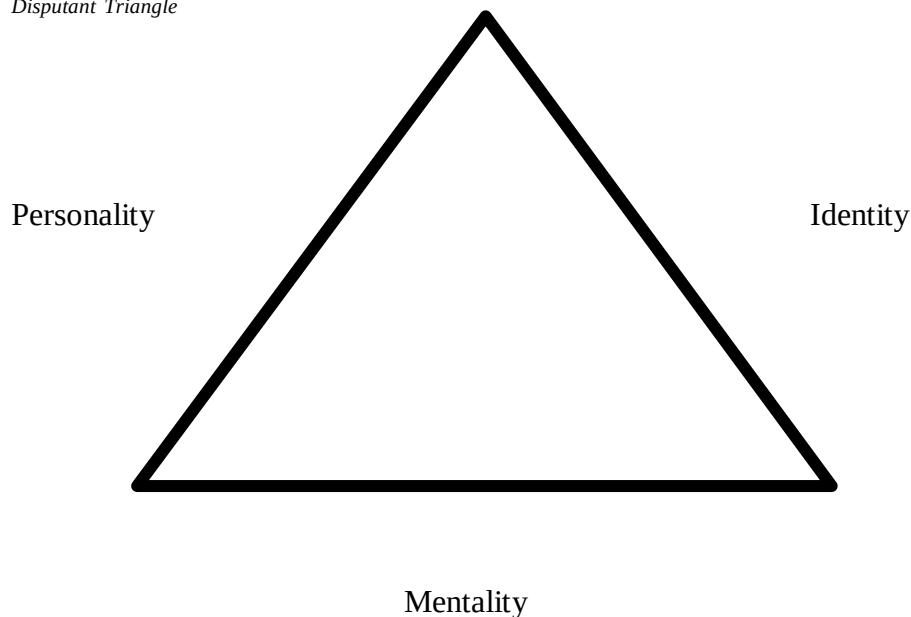
These three aspects interrelate and work together to shape our behaviours and decisions, and resolving conflicts, as Shapiro asserts, can be achieved “only by addressing all three.”⁵¹⁷

3.5.4 Our proposed triangle

Understanding, analysing, and reflecting on the three triangles pushed us towards suggesting a better-structured approach to help us understand disputants’ behaviours and decisions-making processes in a clearer, more simple and beneficial way.

Our proposed triangle consists of three sides: Personality, Identity, and Mentality. Below, we shall explore each side, then we shall try to find the relationship between this triangle and our proposed dispute triangle in order to perceive how disputants handle, or should handle, disputes.

Figure 2:
Disputant Triangle



⁵¹⁶ ibid 11, however, Shapiro’s framework to analyze identity will be explored later on this chapter.
⁵¹⁷ ibid 9.

3.5.4.1. Personality side

*Anyone who has negotiated with people who are stubborn, short-tempered, shy, Machiavellian, or risk-averse will attest to how important negotiators' personalities can be in determining how negotiations unfold.*⁵¹⁸

Personality, as we use it in our approach, is different from *pathos* side in Aristotle's triangle, and closer to the *id* component of Freud's framework. Nevertheless, it engages with emotions and feelings as Aristotle's concept of *pathos* does, and seems rather primitive and instinctive, as does Freud's conception of the *id*.

In dictionaries, personality is defined as “the type of person you are, shown by the way you behave, feel, and think,”⁵¹⁹ or “the special combination of qualities in a person that makes that person different from others, as shown by the way the person behaves, feels, and thinks.”⁵²⁰ In more detailed and specified sources it is defined as “a characteristic way of thinking, feeling, and behaving. Personality embraces moods, attitudes, and opinions and is most clearly expressed in interactions with other people.”⁵²¹ It includes all behavioural characteristics, both acquired and inherent, that enable distinguishing every person from others and that can be witnessed in individual's relations to their environment, families, and all other social groups.⁵²² Thus, personality is a combination of characteristic patterns of feelings, thoughts, and behaviours that compose a “type” and make a person “unique”.

These characteristic patterns, or “traits”, can be decisive in determining whether the negotiation will be productive or not, as these traits are “stable and enduring characteristics of individuals that predispose negotiators to react situations in

518 R W Gilkey and L Greenhalgh, ‘The Role of Personality in Successful Negotiating’ (1986) 2 *Negotiation Journal*, 245 <<https://doi.org/10.1007/BF00999110>> accessed 27 Feb 2020, 245.

519 See Cambridge Dictionary, personality: <https://dictionary.cambridge.org/dictionary/english/personality>

520 Gilkey and Greenhalgh (n 518) 279.

521 P S Holzman, ‘Personality’ *Encyclopædia Britannica* (24 February 2020) <https://www.britannica.com/topic/personality> accessed 27 Feb 2020.

522 *ibid*.

particular ways.”⁵²³ Indeed, because personality is stable and highly influential in shaping a person’s behaviours, it occupies the first side of our triangle. This side is concerned with the patterns of parties’ behaviours that reappear on various occasions. These patterns are labeled as traits; for example ““conservatism” is an example of a trait that reappears in such diverse areas as political views, style of dress, child-rearing practices, and negotiated business decisions. Similarly, an “aggressive” person is likely to be aggressive on dates, behind the wheel of a car, in business meetings, and in sports activities, as well as in conflict situations. Such patterns exist because traits are predispositions to respond in characteristic ways to situations which simply trigger what “comes naturally” to each individual.”⁵²⁴ Therefore, personality precedes disputants’ beliefs, views, and values which form their *identity*. Furthermore, these personality traits influence disputants’ reasoning abilities and logical powers, or their *minds*. This explains why “throughout literary history, many novelists and playwrights have defined personality as “destiny,” poignantly illustrating the “inevitability” of their protagonist’s fate as a consequence of character traits that relentlessly determine his or her choices in life.”⁵²⁵

In order to illustrate the fundamental role of personality in shaping disputants’ attitude towards each other as well as towards the dispute, Gilkey and Greenhalgh used an example of a negotiation between two different personalities, regarding a divorce settlement: “If the husband tends to be highly competitive, he is likely to define the situation as one in which he must win as much as possible in the settlement. If the wife tends to be highly accommodating, she might submit to his exploitive demands and not strive to preserve her own interests. She might even let his lawyer handle the whole thing.”⁵²⁶ However, these traits are not mysteries, and neither should they be. The main task facing us regarding this feature is to “observe and document any reliable association between specific character traits and the likelihood of varying life choices, patterns of behavior, and consequences of the behavior for oneself and others.”⁵²⁷ However, this does not and should not mean that the influence of personality traits on

523 *ibid.*

524 *ibid.*

525 S V Sandy, S K Boardman, and M Deutsch, ‘Personality and Conflict’ in P T Coleman, M Deutsch, and E C Marcus (eds), *The Handbook of Conflict Resolution: Theory and Practice* (3rd ed, Jossey-Bass 2014) 400.

526 Gilkey and Greenhalgh (n 518) 280.

527 Sandy, Boardman, and Deutsch (n 525) 400.

negotiators behaviors can't be challenged. Indeed, this pessimistic view shall hinder future development on this field. There is substantial evidence presented by fairly recent research which indicates that negotiation performance can be open to personal modification,⁵²⁸ for instance, when parties feel comfort with the context and setting of the negotiation and when they are surrounded by positive expectations, we shall “predict better performance”⁵²⁹. Accordingly, we believe that disputants, with proper help from neutral parties, shall “strive to understand each other despite any difference in ethnic and gender identities, family and life experiences, and cultural perspectives.”⁵³⁰ Here the role of the mediator can be critical in helping parties to take note of these differences, understand them, and react upon this understanding. However, we shall explore the role of mediators in helping negotiating parties later on this thesis.

3.5.4.2. Identity side

*In times of conflict, with ourselves or with others, many people have come to ask, “What would Jesus do?” (or “What would Buddha do?”). This may provide a refreshing counterweight to the sometimes a moral practice of negotiation, and it may at other times exaggerate conflict: “I must do this because this is who I am; if I act differently, I am not merely losing a negotiation, I am betraying myself.” And when the identity is linked to a group, then one is betraying one’s family, one’s nation, one’s religion, and so on.*⁵³¹

Clark Freshman

528 H A Elfenbein, ‘Individual Differences in Negotiation: A Nearly Abandoned Pursuit Revived’ (2015) 24 Current Directions in Psychological Science 131 <<https://doi.org/10.1177/0963721414558114>> accessed 27 Feb 2020, 131.

529 *ibid.*

530 Sandy, Boardman, and Deutsch (n 525) 400.

531 C Freshman, ‘Identity, Beliefs, Emotion, and Negotiation Success’ in: M L Moffitt, R C Bordone, and Program on Negotiation at Harvard Law School (eds), *The Handbook of Dispute Resolution* (1st ed, Jossey-Bass 2005) 99-100.

This side is another aspect of the *ethos* side in Aristotle's approach and the *superego* in Freud's framework, as introduced above. Identity is usually referred to as reputation,⁵³² or beliefs and characteristics that make people different from others.⁵³³ However, these dictionary definitions seem to be both insufficient and misleading, as they mix identity with personality and refer to them as synonyms.

In his book *Negotiating the Nonnegotiable* Shapiro tried to develop a framework to clarify the fundamental components defining everyone's core identity. He named his framework "the BRAVE Framework". This acronym bears the first letters of the five pillars he wanted to draw attention to, in order to facilitate the mission of understanding a person's identity:

1. *Beliefs: refer to specific ideas as you hold as true.*
2. *Rituals: are personally meaningful customs and ceremonial acts, such as holidays, rites of passage, regular prayer, or evening dinner with the family.*
3. *Allegiances: are felt loyalties to an individual or group, such as a family member, friend, authority figure, nation, or ancestor.*
4. *Values: are guiding principles and overarching ideals, often conveyed through a single word such as justice, compassion, or freedom.*
5. *Emotionally meaningful experiences: are intense events, positive or negative, that define a part of you. They comprise everything from the day you got married to the hour your first child was born, the moment your parent slapped you to the memory of mass violence conducted against your group.*⁵³⁴

We agree with him that these five pillars determine and shape the *image* that reflects how we see ourselves and how others see, or we wish them to see, us. Both sides of the identity coin influences our attitude towards conflict as it is usually easier to proceed in a dispute if one can perceive oneself as being virtuous and honourable, and

532 See Cambridge Dictionary as it defines identity as "the reputation, characteristics, etc. of a person or organization that makes the public think about them in a particular way," see: <<https://dictionary.cambridge.org/dictionary/english/identity>> accessed 3 Mar 2020

533 See Oxford dictionary at: <<https://www.oxfordlearnersdictionaries.com/definition/english/identity>> accessed, 3 Mar 2020.

534 Shapiro (n 490) 17.

our counterpart as evil, or even dangerous.⁵³⁵ Accordingly, this image affects negotiation as “sometimes we see ourselves as people who must bargain, sometimes we see ourselves as people who cannot bargain—or ought not.”⁵³⁶ This can explain why, while it is a fact that people negotiate and bargain all over the world, we increasingly do so “with people whose values and behaviors are unfamiliar to us.”⁵³⁷ This unfamiliarity increases the chances of violating each negotiator’s identity, which may result in experiencing escalating emotions, such as anger.⁵³⁸

As stated above⁵³⁹, identity is highly affected by personality. These effects are profound to the extent that there are several studies which suggest that the main known personality types “can account for a broad range of political behavior and attitude.”⁵⁴⁰ This assumption has been explored by more advanced research that considered even the genetic factors involved, and concluded that there is a correlation between a person’s personality motivations and her tendency to adopt certain political ideologies.⁵⁴¹ However, this assumed relationship between personality and ideologies as a main component of a person’s identity still needs more empirical studies to examine its accuracy and applicability.⁵⁴² Nevertheless, the point we wish to pay attention to in this thesis is that both personality and identity have great impact on the third proposed side, mentality. Actually, a person’s characteristics and values practice enormous influence in her logical abilities and reasoning skill, as we shall explore now.

3.5.4.3 Mentality

Intellectual elitists may sneer at the proposition that our beliefs and attitudes are

535 Mayer (n 11) 6.

536 Freshman (n 531) 105.

537 A Wanis-St John, ‘Cultural Pathways in Negotiation and Conflict Management’ in: M L Moffitt, R C Bordone, and Program on Negotiation at Harvard Law School (eds), *The Handbook of Dispute Resolution* (1st ed, Jossey-Bass 2005) 120-121.

538 Freshman (n 531) 107.

539 See above on this chapter: 3.5.4.1.

540 M Fatke, ‘Personality Traits and Political Ideology: A First Global Assessment’ (2017) (2017) 38 *Political Psychology* 881 <<https://doi.org/10.1111/pops.12347>> accessed 20 Mar 2020.

541 B Verhulst, L J Eaves, and P K Hatemi, ‘Correlation not Causation: The Relationship Between Personality Traits and Political Ideologies’ (2012) 56 *American Journal of Political Science* 34 <<https://doi.org/10.1111/j.1540-5907.2011.00568.x>> accessed 20 Mar 2020.

542 A Gerber and others, ‘The Big Five Personality Traits in the Political Arena’ (2011). (2011) 14 *Annual Review of Political Science* 265 <<https://ssrn.com/abstract=1839115>> accessed 20 Mar 2020.

*not entirely the result of logical analysis of the facts.*⁵⁴³

By mentality we mean brainpower, intellectual ability, and rationality, which encompasses a person's logical analysis ability, mental capacity, and argumentation skills. This side can be called mentality⁵⁴⁴, reason⁵⁴⁵, or just "mind", and we shall continue using these three terms interchangeably in the future. We have touched upon this "mind" side previously in Chapter One while discussing the central persuasion route.⁵⁴⁶ The role of this side is to embrace all pure mental activities that our brains perform while organising data, analysing it, and producing decisions. If this side were to be linked to one of the sides of the disputant's triangles, from Aristotle and Freud respectively, it would most closely resemble *logos* in Aristotle's approach, and *ego* in Freud's framework, as both of them involve logic and rationality as a main component, in a similar fashion to our *mentality* side. The reasoning activities comprised in this side are thoroughly encompassed by logic as a discipline, as we shall explore in the next chapter. In spite of the indispensable role of reason in our decision-making processes, we agree with Daniel Dana on the fact that conflict cannot be settled by reason alone; reasonableness has limited power in handling disputes.⁵⁴⁷ This fact confronts, not only intellectual elitists, but also the layperson, who will often be surprised by "the extent to which we are ruled by needs and strivings that defy commonsense logic."⁵⁴⁸ However, both professional researchers and laypersons might need to be better employed trying to mitigate these effects, which is one of the main objectives of this thesis.

543 Dana (n 5) 86.

544 We adopt here the Merriam-Webster dictionary definition of mentality as "mental power or capacity" see: https://www.merriam-webster.com/dictionary/mentality?fbclid=IwAR0Xcuua-an77fSLkjO-J7XfvDLmRTMC0Cyf2YTISzyw804BFG4_Q3TNINQ, this is different from the other common definition of mentality as "a person's particular way of thinking about things" according to Cambridge as this definition makes the barriers between mentality and personality blurring and vague, see: <https://dictionary.cambridge.org/dictionary/english/mentality> accessed 20 Mar 2020.

545 Reason gives quite the same meaning we intend to label on the side of the triangle, as it is defined by dictionaries as "the ability of a healthy mind to think and make judgments, especially based on practical facts," or "the power of comprehending, inferring, or thinking especially in orderly rational ways," see: <https://dictionary.cambridge.org/dictionary/english/reason> accessed 20 Mar 2020, and <https://www.merriam-webster.com/dictionary/reason> accessed 20 Mar 2020.

546 See above in this thesis: Chapter One, 1.2.2 Can persuasion be a synonym of negotiation?

547 Dana (n 5) 86.

548 Sandy, Boardman, and Deutsch (n 525) 400.

As we have explored in Chapter One of this thesis, what makes situations deteriorate is that this marginalisation of the supposedly vital role of reason in the decision-making process escalates during times of conflict.⁵⁴⁹ Competitive behavior, which arises during conflicts, encourages defense motives and can discourage accuracy. This attitude empowers heuristics and the peripheral persuasion route at the expense of the mind/reason central route; however, we are attempting throughout our thesis to mitigate the effects of this fact, by examining the mediator's role toward this problematic finding.

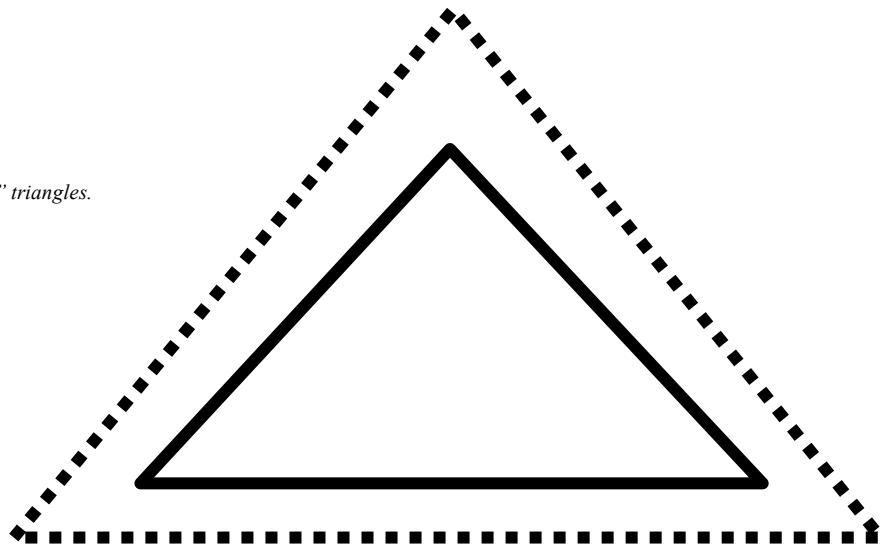
However, before we progress to explore new approaches to mitigate the harmful impacts of the fact of the *limited role of logic/reason in conflicts*, we need to know more about why this happens. Why does reasonableness have little to do with conflicts? This shall be explored by introducing what we call “the containment game.”

3.6 The containment game

*The core question is: ‘Do I have a conflict?’ -
Or ‘Does the conflict have me?’⁵⁵⁰*

Freidrich Glasl

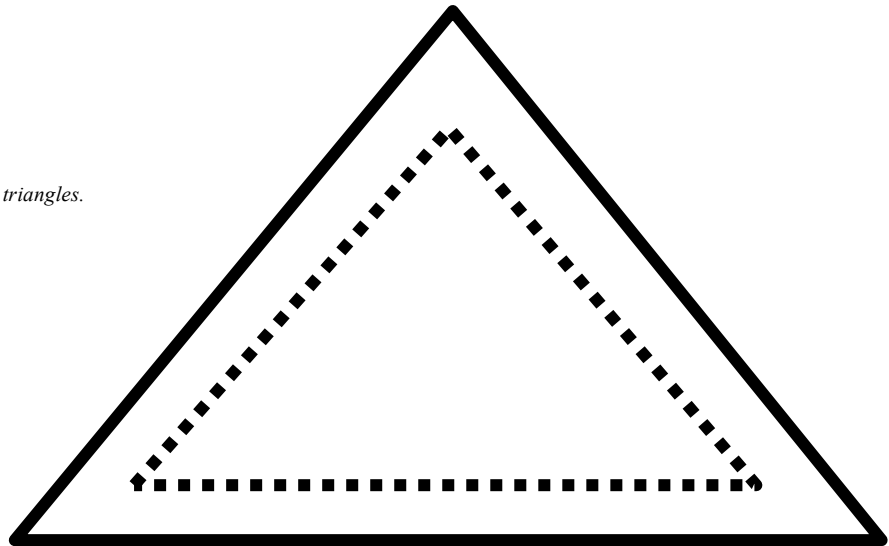
Figure 3
“A conflict has me” triangles.



⁵⁴⁹ See above in this thesis: Chapter One, 1.6 Negotiation motives and 1.7 Negotiation limitations.

⁵⁵⁰ Glasl (n 4) 22.

Figure 4
“I have a conflict” triangles.



If reasonableness has little to do with conflicts, as Dana stated above, this is because disputants let conflicts “have them”. This is not a play on words by Glasl, but rather a simple differentiation between two modes that a disputant can be in:

‘The conflict has me’ means that I have lost self-control and self-direction. I can consciously enter a disagreement, but at a certain level I am no longer able to keep an overview of the situation and to influence it in such a way that, and by large, only the things I intend actually occur. And if the conflict has me I am no longer able to step out of the situation and switch off; I am ‘other directed’, i.e. controlled from the outside.⁵⁵¹

If the conflict “has” a disputant, then her perception becomes noticeably distorted. She will be plagued by thoughts and ideas that she can’t shake off. In such a situation, emotions can emerge and obsess her completely. Consequently, her behaviour is likely to become inflexible and stereotyped, and her will shall be narrowed to a limited number of goals.⁵⁵²

⁵⁵¹ *ibid.*

⁵⁵² *ibid.*

All these results shall lead to conflict escalation and can make reaching resolutions a very difficult process. Indeed, this is not limited to individual disputants, but happens even to companies and nations who behave during conflicts in the same way that individuals do, as “we watch nations engage in politically and economically disastrous decisions as the result of national anger or pride. Unwise escalation and competitive drive lead companies to bid too high in corporate takeover battles. Sports stars reject enormous salary offers out of pride, ego, greed, and sometimes as a result of a distasteful or demeaning negotiation process.”⁵⁵³

Glasl’s distinction between “Do I have a conflict?” or ‘Does the conflict have me?’ stimulates further questions about the relationship between the dispute and the disputant; the nature of this relationship, the steps needed to make it a healthier one, and the role mediators shall play in helping to achieve these steps.

In order to picture the relationship between the dispute and the disputant, in the shadow of Glasl’s quote, we might need to recall our two proposed dispute and disputant triangles here, and attempt to explore the possible moves required to lessen the chances of facing the situation where the conflicts “have” us.

When a person is engaged in a dispute, she shall deal with the three sides of this dispute - the factual, the emotional, and the social, and shall engage with these three dispute dimensions through her triangle; her personality, her identity, and her mind/rationality.

The disputant’s *personality* is expected to direct the dispute’s emotional side, as an aggressive person’s emotional reaction towards a dispute shall be different from a tolerant person’s emotional response. The feeling that the dispute leaves on them might not be the same.⁵⁵⁴ Each person’s special combination of qualities and unique way of feeling and behaving shall dictate a specific emotional response towards the dispute.

⁵⁵³ S R Peppet, ‘Six Principles for Using Negotiating Agents to Maximum Advantage’ in: M L Moffitt, R C Bordone, and Program on Negotiation at Harvard Law School (eds), *The Handbook of Dispute Resolution* (1st ed, Jossey-Bass 2005) 207.

⁵⁵⁴ See above on this chapter: 3.5.4.1. Personality Side.

Therefore, we can assume that the personality side in our proposed disputant triangle has a noticeable effect on the emotional side of our proposed dispute triangle.

A disputant's *identity* is expected to influence the social side of the dispute she is involved in. One's beliefs, values, rituals, loyalties, and emotionally meaningful experiences shall shape the self-image she wants to leave during the dispute.⁵⁵⁵ This image encompasses the "setting and social considerations, including how others will view what is going on and how the resolution will appear to third parties."⁵⁵⁶ A conservative disputant's preferred self-image is expected to be different to a liberal disputant's preferred self-image. In a family dispute, for instance, a feminist might be motivated to handle the social side of this dispute in a way that complies with her values and beliefs.

It is important to notice that these two disputant triangle sides - personality and identity - interact and practice mutual influence. On one hand, personality, by dictating a specific emotional response, might "introduce or exaggerate the role of identity."⁵⁵⁷ For instance, an arrogant person shall overestimate her own beliefs and allegiances, while a humble party might be less eager to impose her personal values. On the other hand, rigid beliefs and dogmatic loyalties can make the emotional response to others' actions that defy these beliefs and loyalties significantly profound and intense.⁵⁵⁸

Finally, a disputant's mind and rationality are expected to handle the factual side of the dispute. Car damage, rent delay, or slander are specific facts that shape the factual side of the dispute, which can stimulate discussions about possible legal liability, and expected financial burdens. These legal and financial discussions are expected to be dealt with by disputants' analytical skills, logical abilities, and rational systemised thinking. However, this is not always the case unfortunately.

555 See above on this chapter: 3.3.4.2 The Social (Outer) Aspect.

556 Folberg and Golann (n 103) 6.

557 Freshman (n 531) 107.

558 *ibid.*

During disputes, as many studies have shown⁵⁵⁹, a competitive attitude can become in charge. This competitive mode stimulates defence motives,⁵⁶⁰ allows the peripheral route of persuasion to displace the central one,⁵⁶¹ and opens the gates for heuristics, biases, and fallacies to replace logical reasoning. In such a context, logic becomes forgotten or lost, and the disputant finds herself in a situation where the conflict does “have” her, because she will be “no longer able to step out of the situation and switch off.”⁵⁶² She will be directed, controlled from outside her rationality, as her emotions and allegiances come and obsess her completely.

When this surrounding happens, the mediator’s mission as a *persuasion game minder/rationaliser* becomes harder to achieve. When parties deviate from the central route of persuasion to the peripheral one, it is expected that the mediator might need to interfere to bring them back. When parties forget about rationality and logic, it’s expected that the mediator may need to remind them. However, recalling logic, watching it applied, and reminding parties of its importance requires, first, a minimum knowledge about logic itself, as both a form of scholarship, and as a practice. This aspect we shall explore in the next chapter; however before moving to the next chapter, we shall have a closer look at role of mediators in the containment game.

3.6.1 The operational meaning of the containment game in practice

In the containment game, mediators, as rationalisers, are expected to take actions during the process to help parties avoid getting trapped within the dispute. These actions shall include adding more time, wise conduct of separate sessions, reframing parties’ statements in a way that reduces the charged nature of their language, adjust seating arrangements to mitigate confronting attitudes... etc. These interventions are expected from mediators in most mediation styles; however, the rationaliser mediator shall be able to recognise the reality of the situation in closer and clearer lenses.

Mediators here shall be able to see how the emotional side of the conflict is hindering any positive communication and they can see how the social side, the image of the

559 Deutsch (n 34), Neale and Bazerman (n 159), and Patton (n 26).

560 See Chapter One of this thesis: 1.6 Negotiation motives.

561 See Chapter One of this thesis: 1.2.2 Can persuasion be a synonym of negotiation?

562 Glasl (n 4) 22.

parties as successful professionals for instance, is obstructing all pathways to settlement. The lenses this containment game offers to mediators allow them noticing the interaction between the two triangles. When the mediator is able to see these dynamics thoroughly, she will be better prepared to deploy a suitable move to help parties step out of the situation and escape from the narrow vision that makes them ignore alternative viewpoints, surrounding factors, and long-term consequences.

However, the operational meaning of this game depends on the grade of intervention the rationaliser mediator is willing to adopt. Rationaliser mediators, as we shall see in the final two chapters of this thesis, can apply various minor roles which reflect the wide range of tasks/jobs mediators are expected to do in order to rationalise the mediation process. These include addressing parties' concerns, handling their emotions, mitigating their biases, and dealing with logical fallacies that might take place and lead to worsening the discussion progress. In the final chapters we shall see how all these moves/roles can be applied in mediation contexts with several examples that shall show how mediators can help parties in this containment game along with the persuasion game presented in Chapter One, and displacement game that we shall explore in the next chapter.

Chapter Four

Logic and Substitute

Logic: The Two

Reasoning Pathways

*Almost all authors agree on a distinction between processes that are unconscious, rapid, automatic and high capacity, and those that are conscious, slow and deliberative.*⁵⁶³

In Chapter One “Negotiation, The Persuasion Game”, we explored the two persuasion routes⁵⁶⁴: the central route that follows logic and reason, and the peripheral route that follows heuristics and biases. This distinction between the two routes has a fairly similar application to Daniel Kahneman’s famous concept⁵⁶⁵ of “System 1 and System 2”, where our brain moves between System 1 which is fast, intuitive, and emotional, and System 2, where reasoning, self-awareness, and logical deliberate thinking are in charge.⁵⁶⁶ Therefore, exploring these two systems/routes is essential in understanding the mental models which negotiating parties use - or should use - in mediation, in order to reach a better mutually accepted mediation outcome that honestly translates parties’ free will, and sincerely reflects their informed consent.

In the first part of this chapter, we shall begin by exploring System 2 or the Central Route’s main discipline, logic. This entails exploring its meaning, history, significance, and its relationship to other disciplines, in order to explore in the following chapters how it can promote mediation, and boost its quality and efficiency. In the process, we shall explore the existing definitions of logic as a subject, in order to better understand exactly what it entails. The definition’s exploration will lead us to examine the nature of logic and its classification, whether as a science or an art, in

563 J St B T Evans, ‘Dual-Processing Accounts of Reasoning, Judgment, and Social Cognition’ (2008) 59 Annual Review of Psychology 255 <<https://doi.org/10.1146/annurev.psych.59.103006.093629>> accessed 15 Nov 2020, 256.

564 We shall revisit these two routes in Chapter Six of this thesis, while discussing the mediator’s role in helping parties moving between the two routes smoothly, by turning them into active participants in the negotiation/persuasion process; see: Petty and Cacioppo (n 1a), Petty and Cacioppo (n 1b), and compare: Chaiken (n 1).

565 See: Kahneman (n 2).

566 This might be far from Edward De Bono discussion about the two forms of logic: The Rock Logic and The Water Logic where he means by the first the rigid solid thinking and mental activity while the later refers to the flexible, adjustable, and accommodative way of thinking; see: E De Bono, *I Am Right, You Are Wrong* (Penguin 2016).

order to determine the way we should use it in our study. Next, we shall have briefly examine its history, and how it developed over the centuries, and how many schools emerged from it to shape new disciplines. The history of logic might urge us to explore the significance of this scholarship and its role in our lives. Then, we shall review the scope of logic, in order to show the subjects that logic scholars care about and how this, too, developed from the era of Greek philosophers, when it possessed limited accessibility as an elite subject, to its current status as a practical subject, and source of pragmatic scholarship. In contemporary studies of logic, it is widely recognised that logic has influenced many other disciplines and life aspects. Politics, media, marketing, and many other subjects have engaged with logic and perceived it as very useful scholarship that should not be treated as a dry academic subject anymore, but rather one that people should engage with daily life issues. Finally, we will explore the relationship between logic and law. the changes that have occurred in this relationship, and its influence in logic teaching in law schools. Such teaching shall build a bridge between logic and mediation, as mediation should be one of the major subjects that uses logic as a vital feeder and valuable resource. Such an initiative shall put new tools in mediators' hands and help them develop their practice, as it offers them new roles and allows for a better understanding of any given dispute, as we will see in coming chapters.

Next, we shall explore substitution in logic by exploring System 1, or the Peripheral Route, through demonstrating the three main mental deviations that replace traditional logic, as mentioned above. These three deviations are, namely, heuristics, biases, and fallacies. Heuristics are the main umbrella that touch upon and correspond with the other two mental processes. We will explore the various given definitions of heuristics, the manner in which they work, a number of examples of heuristics, their potentially harmful influences on peoples' decisions, and, finally, their positive side, which makes them essential in our lives. Secondly, we shall discuss biases: their meaning, typology, their influences on the mediation process, and the expected roles of mediators towards helping negotiating parties by mitigating their harmful effects. Finally, we will set out a brief introduction to fallacies, as the third main type of mental errors negotiating parties might be expected to experience. This introduction to fallacies is a link between

this chapter and the next one (Chapter Five) which is devoted to discussing fallacies, their meaning, typology, and their expected effects on mediation values. Accordingly, we shall (in Chapter Six) explore the known mediators' roles and jobs in order to see how this shall help in dealing with fallacies during mediation. Finally, in Chapter Seven, we shall conclude by discussing our proposed role as mediator, and examining its suitability for handling fallacies and supporting parties' logical reasoning in mediation.

However, before we visit and investigate the two-thinking systems theory, we might need to shed some light first on the critiques this theory faced and examine their validity and possible influence in the usability of the theory in our thesis.

The theoretical foundations of the theories that presented dual-process models/types in decision-making and human reasoning have faced serious scrutiny which “challenged the validity and relevance of evidence in support of it.”⁵⁶⁷ One of the famous critiques of this theory is its lack of ability to “enhance our understanding of how the mind works”.⁵⁶⁸ Furthermore, while these criticisms admit the theory's seductiveness and simplicity, they argue that these advantages do not compensate their lack of evident predictive power.⁵⁶⁹ Moreover, some scholars believe that the dual-process theories are unrealistic as they “seem to assume that each of us is half-angelic.”⁵⁷⁰ Thus, they believe that dual process -as an idea- has no sufficient theoretical framework, and assume that this duality is not tenable.⁵⁷¹

However, we agree with viewpoints that perceive the debate between the supporters of the dual-process models and their opponents as an unresolvable debate because it is hard to claim that there are sufficient theoretical or empirical arguments to favour one of these standpoints over the other, to the extent that the choice between adopting the

⁵⁶⁷ M Osman, “An Evaluation of Dual-Process Theories of Reasoning,” *Psychonomic Bulletin & Review* 11, no. 6 (2004): 1005–1006, <<https://doi.org/10.3758/BF03196730>> accessed 30 May 2026.

⁵⁶⁸ G Gigerenzer, “Personal Reflections on Theory and Psychology,” *Theory & Psychology* 20, no. 6 (2010): 739, <<https://doi.org/10.1177/0959354310378184>> accessed 30 May 2026.

⁵⁶⁹ K Gideon Keren and Y Schul, “Two Is Not Always Better Than One: A Critical Evaluation of Two-System Theories,” *Perspectives on Psychological Science* 4, no. 6 (2009): 544, <<https://doi.org/10.1111/j.1745-6924.2009.01164.x>> accessed 30 May 2026.

⁵⁷⁰ N-E Sahlin, A Wallin and J Persson, ‘Decision Science: From Ramsey to Dual Process Theories’ (2010) 172 *Synthese* 142, <<https://doi.org/10.1007/s11229-009-9472-5>> accessed 30 May 2026.

⁵⁷¹ J D Grayot, ‘Dual Process Theories in Behavioral Economics and Neuroeconomics: a Critical Review’ (2020) 11 *Review of Philosophy and Psychology* 107, <<https://doi.org/10.1007/s13164-019-00446-9>> accessed 30 May 2026.

dual-process viewpoint or adopting the other team claim “boils—quite literally—down to a choice between two different religions.”⁵⁷² Yet, despite all of known recent criticism the dual processing theory faces, it remains popular and frequently used as it “promotes a good understanding of the reasoning literature.”⁵⁷³ Moreover, even with the views that attack the theory and accusing it of obscuring the “rich diversity of the human mind”,⁵⁷⁴ the theory, from the other viewpoint which we agree with, highlights the importance of motivation and cognitive capacity for decisions and judgments in the realm of persuasion and attitudes. Furthermore, the dual processing theories managed to offer a detailed explanation for various phenomena in the domains of human reasoning and decision making in a way that can “integrate a broad range of insights from social-cognition research.”⁵⁷⁵ Finally, it is easy to dismantle the main claim that opponents of dual-process theories use when they assume that system/type 1 is always invariably nonnormative and system/Type 2 is always invariably normative. In fact, this is a simplified twisted version of the theory in which all given features correlates to the two processing systems are assumed to be necessary features. However, none of all known dual processing theories claim this and it is clearly stated that system 1 can lead to right accurate answers and system 2 can lead to biased fallacious decisions.⁵⁷⁶

Thus, we can see that the critiques of the dual processing theory shall not minimize its significance and usability. These critiques can be valid too for the other theories that are adopted by the dual processing theories opponents. The field of human reasoning and decision-making faces a high grade of uncertainty as the empirical and theoretical research is an ongoing progress and keeps presenting evidence that favours one theory over another. However, we shall keep relying on dual system theory presented by

⁵⁷² W De Neys, ‘On Dual- and Single-Process Models of Thinking’ (2021) 16 *Perspectives on Psychological Science* 1423, <<https://doi.org/10.1177/1745691620964172>> accessed 4 June 2026.

⁵⁷³ S C Bellini-Leite, ‘Dual Process Theory: Systems, Types, Minds, Modes, Kinds or Metaphors? A Critical Review’ (2018) 9 *Review of Philosophy and Psychology* 213, <<https://doi.org/10.1007/s13164-017-0376-x>> accessed 4 June 2026.

⁵⁷⁴ D E Melnikoff and J A Bargh, ‘The Mythical Number Two’ (2018) 22 *Trends in Cognitive Sciences* 290, <<https://doi.org/10.1016/j.tics.2018.02.001>> accessed 4 June 2026.

⁵⁷⁵ R Deutsch and F Strack, ‘Duality Models in Social Psychology: From Dual Processes to Interacting Systems’ (2006) 17 *Psychological Inquiry* 171, <https://doi.org/10.1207/s15327965pli1703_2> accessed 4 June 2026.

⁵⁷⁶ J St B T Evans and K E Stanovich, ‘Dual-Process Theories of Higher Cognition: Advancing the Debate’ (2013) 8 *Perspectives on Psychological Science* 235, <<https://doi.org/10.1177/1745691612460685>> accessed 4 June 2026.

Kahneman and his colleagues as it still has the ability to promote a clear understanding of the way our minds work and the routes our persuasion follows.

4.1 System 2: Logic, the central route of persuasion

In this section we shall review the existing definitions of logic, its history, nature, scope, and finally its relationship to law, and the changes that have occurred in this relationship. By reviewing logic as a discipline, and as an original way of thinking, we shall be ready to progress to the second part of this chapter. which covers the illogical mental processes that form the peripheral route of persuasion, or what is termed System 2.

4.1.1 Logic definitions

*It is far from clear what is meant by logic or what should be meant by it.*⁵⁷⁷

There is immense diversity among scholars in the scope which they have implemented in defining logic, and in their discussions of the details of the subject.⁵⁷⁸ This diversity is great to extent that “almost every single writer having taken a different view.”⁵⁷⁹ For this reason some logicians believe that “it has become questionable whether there are any longer clear and appropriate definitions of the key terms 'reasoning' and 'argument' with which we can work.”⁵⁸⁰ Building on this, it becomes clear that most logicians are not agreed in their definitions of logic, but when laymen think of logic, the first meaning of logic that comes to their minds is seeing logic as “a process of reasoning by which, from certain general propositions which are assumed, we reach an irresistible conclusion.”⁵⁸¹ However, for logic scholars, agreeing on such a unified definition is not that simple.

⁵⁷⁷ J Hintikka and G Sandu, ‘What is Logic?’ in: D Jacquette (ed), *Philosophy of Logic -Handbook of the Philosophy of Science* (Elsevier Scientific Publications 2007) 13.

⁵⁷⁸ J S Mill, *A System of Logic, Ratiocinative and Inductive* (Benediction Classics 2011) 2.

⁵⁷⁹ *ibid.*

⁵⁸⁰ D N Walton, ‘What is Reasoning? What is an Argument?’ (1990) 87 *The Journal of Philosophy* 399 <<https://doi.org/10.2307/2026735>> accessed 22 Nov 2020, 399.

⁵⁸¹ J Fox, ‘Logic and Law’ (1900) 14(1) *Harvard Law Review* 39 <<https://doi.org/10.2307/1322630>> accessed 22 Nov 2020, 39.

One of the simplest definitions of logic is that which considers logic as “the analysis of argument or proof.”⁵⁸² In another definition, logic is the “science of reasoning”, and in order to expand on the premise, it has an appendix: “Reasoning is something which has various applications, and important among these traditionally is argumentation.”⁵⁸³ Meanwhile, other authors define logic in connection with critical thinking, as “Both logic and critical thinking centrally involve the analysis and assessment of arguments.”⁵⁸⁴ This connection suggests that the study of logic shall focus primarily on identifying and evaluating arguments.⁵⁸⁵

Among several given definitions of logic, we can accept the latter, and try to regard logic as the branch of knowledge that includes “the principles and conditions of correct thinking”,⁵⁸⁶ the main purpose of this set of principles being “[to] direct our mental operations in the discovery and proof of truth.”⁵⁸⁷ Therefore, logic can be considered as a form of “organized knowledge involving principles.”⁵⁸⁸ To be precise, we can agree that logic “is the theory of valid arguments, or the theory of deductive inference. A slightly broader sense includes the theory of definition.”⁵⁸⁹ The main subject of logic then is argument, which makes logic the study of argument⁵⁹⁰, in particular, “the study of criteria for distinguishing successful from unsuccessful arguments and the study of methods for applying those criteria.”⁵⁹¹

To elaborate, logic is the study of the analysis of arguments and the evaluation of the correctness or incorrectness of reasoning. Indeed, it is essentially the study of the principles and methods used to distinguish between correct and incorrect reasoning. By reasoning, we mean that mental activity that we call “inferring”. Performing inferences is to draw conclusions from premises, where the word ‘premises’ refers to

582 I Muller, ‘Greek Mathematics and Greek Logic’ in Corcoran, J. (ed.), *Ancient Logic and its Modern Interpretations* (Dordrecht 1974) 39.

583 L T F Gamut, *Logic, Language, and Meaning*, Vol 1, Introduction to Logic (The University of Chicago Press 1991) 1.

584 M Van Cleave, *Introduction to Logic and Critical Thinking* (Open Textbooks 2021) 8.

585 *ibid.*

586 N F Lucas, ‘Logic and Law’ (1919) 3 *Marquette Law Review* <<https://scholarship.law.marquette.edu/multir/vol3/iss4/8>> accessed 22 Nov 2020, 203.

587 *ibid.*

588 *ibid.*

589 P Suppes, *Introduction to Logic* (Van Nostrand Reinhold 1957) xviii.

590 M Pezzaniti, ‘*Informal logic and the Concept of 'Argument'*’ (PhD thesis, University of Windsor 2015). PQDT Open. <https://uwindsor.scholaris.ca/items/f189714f-3aa3-4d6d-895c-46597e32db2b> accessed 22 Nov 2020.

591 *ibid.*

‘data’, ‘information’, or ‘facts’, and by reasoning/inferring we produce an output “conclusion” from an input of “premises”. We use the term “Argument” to describe this set of statements which we put in order by “inferring”. Argument then is that compilation of statements, one of which is chosen as the premises, and the other as the conclusion. The job of the premises is to support and justify the conclusion, and the task of logic is to distinguish valid arguments where premises are sufficient to justify the conclusion, and invalid ones where premises fail to support the conclusion. Logic allows us to test this validity rigorously by stating, systematising, and investigating rules, laws, and principles that make this distinction methodical, reliable, and consistent.

4.1.2 Logic: Art or science?

*Men reasoned rightly before Aristotle ever formulated a canon of logic. It was, in fact, by an analysis of such reasoning that he discovered those canons; they could never have been discovered otherwise. Here as elsewhere the art came before the science; theory followed practice*⁵⁹².

It’s important to explore the nature and classification of logic before we attempt to use it in our study, as a discipline that can offer better understanding and application of the field of mediation. Indeed, before we classify logic under of these two main categories, art and science, we need to need to clarify what we really mean by these two terms. Science⁵⁹³ can be defined as a clear structure of systematised knowledge.

Accordingly, any body of knowledge that has been gathered and processed by a systematic methodology is called science. Physical sciences like Chemistry, Physics,

⁵⁹² Lucas (n 586) 204.

⁵⁹³ For more about the meaning of the two terms Art and Science in general see: Cambridge Dictionary <https://dictionary.cambridge.org/dictionary/english/>, and S Richmond, ‘The Interaction of Art and Science’ (1984) 17 Leonardo 81 <<https://doi.org/10.2307/1574993>> accessed 22 Nov 2020.

Biology, etc. respect this systematic methodology while studying any physical phenomena. Social sciences, including Economics, Sociology, and Political Science, also use this approach while studying given social phenomena. On the other hand, art generally means the practical application of knowledge to achieve a particular outcome. For example, while a scientist in chemistry has to possess a clear thorough knowledge of the chemical composition, characteristics, and nature of colours, the artist applies their knowledge of colours in painting using her imagination and human creative skills.⁵⁹⁴ Art gives the artist ample opportunity to express her moods, resulting in manifestations of creativity and individuality. The artist does not have to follow the strict limits of norms, rather, she is guided by her inspiration, while science is objective, strict. Scientific knowledge should always be consistent and reliable, as all researchers have to follow a clear methodology and critical analysis. Ultimately, science relies on reasoning, leaving behind emotions and feelings.⁵⁹⁵

4.1.2.1 Logic is a science

Logic can be clearly perceived as a science.⁵⁹⁶ This viewpoint relies on the fact that all sciences have diverse fields for investigation, but in the very end “all of them agree in their purpose, which is the establishment of satisfactory information, bound together and illuminated by laws”⁵⁹⁷. All sciences, from biology to botany and from history to psychology, seek to replace hazy, loose ideas and thoughts by systematic, exact, and reliable knowledge.

Logic, according to this viewpoint, has the same goal, but its arena is unique; as it cannot be considered one of the biological sciences, nor one of the physical sciences, which mainly depend on perception and measurement, nor be classified among the social sciences. In a nutshell, logic is the science that presupposes all these sciences, as “It is a science about the mental aspect of the sciences.”⁵⁹⁸

594 See Oxford Dictionary: <<https://en.oxforddictionaries.com/definition/art>> accessed 29 Nov 2020.

595 H M Boettinger, ‘Is Management Really an Art?’ (1975) 53 Harvard Business Review 54 <<https://hbr.org/1975/01/is-management-really-an-art>> accessed 29 Nov 2020.

596 Lucas (n 586) 203.

597 *ibid.*

598 *ibid.*

4.2.2 Logic is a science and art

*If there were but one rational being in the universe, that being might be a perfect logician; and the science and art of logic would be the same for that one person as for the whole human race.*⁵⁹⁹

There is an opinion, one explained thoroughly by John Stuart Mill⁶⁰⁰ and that we agree with, suggesting that logic can be perceived as an art, as well as a science, of reasoning. We regard it as the science of reasoning, as it manages the analysis of the mental process which takes place every time we reason, and also the art of reasoning, as it produces rules, grounded on this analysis, to conduct the process correctly.

Mill explains this peculiar nature of logic as follows: accurate understanding of the mental process itself, the steps of which it consists, and the conditions it depends on are the sole basis on which a system of rules, fitted for the direction of the process, can feasibly be founded. Art inevitably presupposes knowledge; precisely, it presupposes scientific knowledge, and if every art does not carry the name of the science on which it depends, it is only because numerous sciences are often needed to form the foundation of a single art. Such is the complexity of human affairs, on order just to enable one thing to be done. Logic, then, “comprises the science of reasoning, as well as an art, founded on that science.”⁶⁰¹

This discussion is important as long as we want to bring logic to the field of mediation. Once we have established that logic is a science, then it becomes acceptable to rely on the rules, principles, and conclusions applied in this science, as these rules and conclusions have been produced through a clear structure of systematised knowledge. On the contrary, if logic is an art, and only art, we should be very sceptical about any

⁵⁹⁹ Mill (n 578) 12.

⁶⁰⁰ *ibid* 3-4.

⁶⁰¹ *ibid*.

common rules applied by the logicians, as it will always depend on the imagination and human creative skills of the persons who apply it.

4.1.3 History of logic

*These are changing times for logic, as the subject is studied and taught in philosophy departments. In recent years there has been the advent of informal logic as a growing phenomenon in teaching logic, the demand for critical thinking in education, and increased questioning of the role and usefulness of formal logic. There has also been the remarkable growth of the newly found interdisciplinary field of argumentation.*⁶⁰²

Logic as a discipline was born more than two millennia ago, when Aristotle arranged and assembled a wide range of philosophical insights about reasoning, in order to organise his syllogistic⁶⁰³ logic.⁶⁰⁴ He was the first writer to formulate a logical system⁶⁰⁵, stating certain principles of reasoning and also creating two non-formal logical theories: strategies and techniques for devising arguments, and a clear theory of fallacies.⁶⁰⁶ Paying great attention to the application of syllogisms to metaphysics and mathematics, his thoughts on logic have been developed since, particularly by the scholastic thinkers and philosophers of the Middle Ages.⁶⁰⁷

602 Walton (n 580) 399.

Informal logic is that branch of logic that: examines the nature and function of arguments in natural language, stressing the craft rather than the formal theory of reasoning. It supplements the account of simple and compound statements offered by formal logic, and, reflecting the character of arguments in natural language, widens the scope to include inductive as well as deductive patterns of inference. See: Logic, informal. In T Honderich, *The Oxford Companion to Philosophy* (2nd ed, Oxford University Press 2005). Formal (or symbolic) logic: General term, not currently much used, for the study of formal logic. Generally, the study of logical form requires using particular schematic letters and variables ('symbols') to stand where terms of a particular category might occur in sentences. See: S Blackburn, 'Symbolic Logic' in *The Oxford Dictionary of Philosophy* (Oxford University Press 2016).

603 Syllogism: Originally defined by Aristotle as 'discourse in which, certain things being posited, something else necessarily follows', it came to have the narrower meaning typified by 'All men are mortal; Greeks are men; therefore, Greeks are mortal'. See Syllogism, at Honderich, *ibid*.

604 Gamut (n 583) 9.

605 Honderich (n 602) 3.

606 *ibid*.

607 Lucas (n 586) 205.

Aristotle might have been the philosopher who articulated the first principles of logic, but, as he said himself, he did not formulate the last word on logic, and the theories he proposed were not all faultless.⁶⁰⁸ The next major step in the history of logic was due to the Megarian – Stoic School, as they developed an alternative version of Aristotelian syllogism, and elaborated a full form of propositional logic⁶⁰⁹ that complements Aristotelian work. The leading thinker of this school was Chrysippus, who added over a hundred works in logic. There were fewer developments in logic in the following periods, the most influential logicians in these succeeding periods including Porphyry, Cicero, and Boethius in the Roman Empire; Philoponus in the Byzantine era; and Avicenna, alFarabi, and Averroës in the Islamic world⁶¹⁰. In this period, logic was a central discipline for each student who wished to go further than just studying Latin grammar.⁶¹¹

Since the beginning of the modern era, most contributions to logic have been made by mathematicians. During the twentieth century, we can distinguish three overlapping schools in the progress of logic. One of them, the ‘algebraic school,’ was dedicated to the relationship between operations like multiplication and addition, and regularities in valid reasoning.⁶¹² The work of the second tradition, the ‘logician school’, was to articulate the underlying logic of all scientific discourse into a unified single system. The major names in this school were Russell, and the most influential logician since Aristotle, Gottlob Frege⁶¹³. Frege made “brilliant use of his logical insights when developing his philosophical programmes concerning mathematics and language. He held that arithmetic and analysis are parts of logic”⁶¹⁴. The third school, the ‘mathematical school,’ has as its main aim the axiomatization of particular branches of mathematics, such as arithmetic, geometry, analysis, and set theory.⁶¹⁵ The intensive

608 J Corcoran, ‘Aristotle’s Logic at the University of Buffalo’s Department of Philosophy’ (2009) y (140) Bogota, Colombia 99.

609 Propositional logic in Oxford Dictionary of logic “Describes deductive systems whose variables range over propositions (or sentences) rather than individuals, properties, etc, i.e., logics over a propositional language. Typically, the primitive atomic formulae in propositional logics are sentence letters or parameters, e.g., p, q, r, etc. The expressivity of a propositional logic is limited, but may be enhanced by extending the basic logic with terms representing individuals and properties, quantifiers, and so forth.” See: T M Ferguson and G Priest, *A Dictionary of Logic* (Oxford University Press 2016).

610 Honderich (n 602) 3.

611 D M Gabbay, J Woods, and MyiLibrary, *Handbook of the History of Logic. Volume 1, Greek, Indian and Arabic logic* (Elsevier 2004)1, and Gamut (n 583) 11-12.

612 Honderich (n 602) 5.

613 *ibid.*

614 *ibid.*

615 *ibid.*

work on mathematical issues reached its apotheosis in the works of Kurt Godel, who has a significant reputation that ranks him with Aristotle and Frege.

Since the 1950s, more specialised topics have been thoroughly studied and added to the field of logic, including deontic logic⁶¹⁶, modal logic⁶¹⁷, relevance logic⁶¹⁸, and tense logic.⁶¹⁹ Logic still attracts more philosophers and mathematicians, and “there is no sign of abatement”.⁶²⁰

4.1.4 Significance: Why is logic important?

*The trouble is, however, that when — with others in coffeehouses, pubs, or university classrooms, or, alone, in moments of reflective solitude — we ponder such deep philosophical questions as those about existence, freedom, responsibility, etc., most of us do not know how to handle, in the requisite disciplined way, the logical concepts on which such questions turn. Learning a little logic can help us to get our thinking straight in philosophy as well as elsewhere*⁶²¹.

In modern times, logic has become a very broad and deep subject, as principles of logic have become universally applied in every known branch of systematic knowledge⁶²². If it is agreed⁶²³ that the most challenging test of any scientific theory is its accuracy and usefulness in predicting phenomena before these phenomena are observed, this

616 Deontic Logic: The study of principles of reasoning pertaining to obligation, permission, prohibition, moral commitment, and other normative matters. See: Deontic logic, in Honderich (n 602).

617 Modal logic: is a logic which deals with the modalities of necessity and possibility. Such a logic was first formulated in Aristotle's syllogism, and was investigated by medieval logicians. See: Ferguson and Priest, (n 609).

618 Relevance Logic: is a system of logic in which premises and conclusion are relevant to one another. See: Relevance logic, in Honderich, (n 602).

619 Tense Logic: is a logic that first explored by the Oxford philosopher Arthur Prior, obtained by adding two propositional operators 'P' (in the past...) and 'F' (in the future...) to classical propositional and first-order logic. See: Blackburn (n 602). Tense logic. In The Oxford Dictionary of Philosophy, 3rd Edition 2008, Oxford University Press.

620 Honderich (n 602) 8.

621 B Bradley and N Swartz, *Possible Worlds: An Introduction to Logic and its Philosophy* (Hackett Publishing Company 1979) xxi.

622 Suppes (n 589) xv.

623 *ibid.*

prediction has to involve the principles of logic.⁶²⁴ This importance exceeds the scientific field, and goes beyond it to become involved in daily life, to the extent that it has been eloquently stated that “most men will admit that they are not handsome. Many will concede they are not strong. But none will acknowledge that he is not logical. This is no peculiarity of our own age, for three centuries ago La Rochefoucauld remarked that men will often apologize for their memory, but never for their judgment⁶²⁵.”

A proper study of logic offers a facility in detecting any error in reasoning processes, and a consequent probability of avoiding these errors. Furthermore, such careful study demands that our thinking and reasoning about any difficult matter be supported with consistency and clearness. Logic, as a mental discipline, takes us through a mental training that gives us the habit and power of thinking clearly, which can, more than any other discipline, develop and strengthen our reasoning powers, not only the power of thinking systematically and consistently, but also the power of discovering and recognising the truth.⁶²⁶ Logic is our main facilitator in our operations of naming, defining, and classification.⁶²⁷ Indeed, it would not be inaccurate to say that logic is the “common judge and arbiter of all particular investigations. It does not undertake to find evidence, but to determine whether it has been found. Logic neither observes, nor invents, nor discovers; but judges...It does not teach that any particular fact proves any other, but points out to what conditions all facts must conform, in order that they may prove other facts.”⁶²⁸

In order to explain Mill’s well-known idea about perceiving logic as “the judge of all investigations”, we may use his brilliant example: “It is no part of business of logic to inform the surgeon what appearances are found to accompany a violent death. This he must learn from his own experience and observation, or from that of others, his predecessors in his peculiar pursuit. But logic sits in judgment on the sufficiency of that observation and experience to justify his rules, and on the sufficiency of his rules

624 *ibid.*

625 Loevinger (n 9) 471.

626 Lucas (n 586) 204.

627 Mill (n 578) 11.

628 *ibid* 9-10.

to justify his conduct. It does not give him proofs, but teaches him what makes them proofs, and how he is to judge of them.”⁶²⁹ Therefore, since logic states what exact relations should exist between any given data and whatever can be concluded from them, it clearly shows us the necessary link between proof and everything it can prove.⁶³⁰ Gaining proper skill in logical analysis lies at the heart of critical thinking. Therefore, increasing our logical abilities will lead to a corresponding increase in our overall critical skill; it is an indispensable tool for obtaining solid critical thinking ability.

This fundamental role of logic has made it an indispensable subject that all other sciences use, not only in judgements, as explained above, but also by inspiring researchers in different disciplines with tools, insights, and even theories, as we shall explore below in this chapter, before we proceed to focus on the role it can play in mediation, in the next chapter.

4.1.4.1 Logic applications in other disciplines

*Logic is, what Bacon so expressively called it, ars artium; the science of science itself.*⁶³¹

Logic relates to all subjects, as long as people reason, or suppose themselves to reason, about anything they can think about. Business, politics, the arts, literature, and everyday problems are all subjects open to logical reasoning. Every science must use logic to test, as stated above, whether certain conclusions do follow the given premises.⁶³² It’s not the simple relation that ties, to some extent, every single science to another, as some scholars have stated: “If logic is a science, it must stand in definite relations to other sciences”⁶³³. Logic is more essential and tangible than this, being at

629 *ibid.*

630 *ibid.*

631 Mill (n 578) 16.

632 M R Cohen, ‘The Place of Logic in the Law’ (1916) 29 Harvard Law Review 622 <<https://doi.org/10.2307/1326498>> accessed 15 Dec 2020, 630.

633 R W Schmidt, *The Domain of Logic According to Saint Thomas Aquinas* (Martinus Nijhoff 1966) 16.

the cross-roads of various academic disciplines⁶³⁴, from language to philosophy, and from psychology to computer science.

In philosophy⁶³⁵, thinkers have been interested in philosophical topics such as knowledge, the meaning and nature of assertions from the early days of philosophy, and logical principles widely applied in dealing with these topics. Furthermore, logic serves as an effective tool for analysing philosophical arguments, and in creating philosophical systems.

With linguistics,⁶³⁶ it can be easily stated that logic is the ‘universal language of thought’, but the ties, again, are deeper and more notable than just this. It has been claimed that “certain grammatical problems are closely related to logicians’ concepts and theories.”⁶³⁷ This comprises the works of scholars including George Lakoff and Jerrold J. Katz,⁶³⁸ who developed an “extensive and fruitful use of recursive function theory and related areas of logic in formal grammars and in the formal models of language users.”⁶³⁹

For some scholars,⁶⁴⁰ mathematics falls within the larger scope of logic, as all normal mathematical argumentation is carried out in logical terms and historically, most specific first examples of logical reasoning were taken directly from mathematics. Therefore, it can be said that “mathematics supplies logic with its techniques, but conversely, logic can also be used to analyse the foundations of mathematics.”⁶⁴¹

Even with computer science, around 1700, Leibniz⁶⁴² noticed that logical inference can be seen as a sort of computation, though not with ordinary but with binary numbers.

634 J J Hintikka, ‘Philosophy of Logic’ Encyclopædia Britannica (17 February 2017) <<https://www.britannica.com/topic/philosophy-of-logic/Logic-and-other-disciplines>> accessed 15 Dec 2020.

635 Bradley and Swartz (n 621) xxi.

636 G Preyer and G Peter (eds), *Logical Form and Language* (Oxford University Press 2015) 3-6.

637 Hintikka (n 634).

638 J J Katz and J A Fodor, ‘The Structure of a Semantic Theory’ (1963) 39 *Language* 170 <<https://doi.org/10.2307/411200>> accessed 15 Dec 2020.

639 Hintikka, (n 634).

640 See: I Chiswell and W Hodges, *Mathematical Logic* (Oxford University Press 2007)

641 *ibid* v.

642 Hintikka (n 634).

There is a straight line which runs from that perception to modern computer science, and the seminal work of Alan Turing⁶⁴³ and others.

For the methodology of the empirical sciences, general methodological problems, such as the nature of scientific explanations, have been discussed thoroughly among philosophers of science, and again, logic plays an important role as “many empirical sciences, especially the social sciences, use mathematical tools borrowed from probability theory and statistics, together with such outgrowths of these as decision theory, game theory, utility theory, and operations research. A modest but not uninteresting beginning in the study of their foundations has been made in modern inductive logic.”⁶⁴⁴

However, the most significant application of logic, for the purpose of this thesis, is the application of logic in legal studies and legal practices. Accordingly, we shall explore this aspect in a more thorough manner.

4.1.4.2 Logic and law

*All rules of law may be stated in the following hypothetical form: If certain facts are true, then a certain legal conclusion follows. For example, if a person purposefully and without justification or excuse causes the death of another, then the person is guilty of homicide.*⁶⁴⁵

This is not the final word on this topic; indeed, some scholars wouldn't agree with this quote, as they believe that law is both an art and a realistic practice that relies on experience and personal performance, one that therefore is not strictly limited to logic.

⁶⁴⁶ This trend became very common in the United States in the last century, for instance, “since Justice Holmes asserted that “[t]he life of the law has not been logic:

⁶⁴³ B J Copeland (ed), *Alan Turing's Automatic Computing Engine: The Master Codebreaker's Struggle to Build the Modern Computer* (Oxford University Press 2005).

⁶⁴⁴ Hintikka (n 634).

⁶⁴⁵ W Huhn, ‘The Use and Limits of Deductive Logic in Legal Reasoning’ (2002) 42 *Santa Clara Law Review* 813, 17.

⁶⁴⁶ *ibid.*

it has been experience,” lawyers and judges in the United States have minimised the importance of formal logic in understanding law and legal reasoning.”⁶⁴⁷ This viewpoint reflexes the debates between “Formalistic Jurisprudence”, the school that dominated legal thought in the 19th century on one hand, and the “Legal Realist Movement/ Free Law Movement”⁶⁴⁸ on the other. Nevertheless, this debate did not reach the point of denying the central role of logic in legal practice, or denying the fact that “evaluating and creating arguments lie at the heart of the crafts of lawyering and judging.”⁶⁴⁹

This debate can be articulated in other words, namely, should law and legal studies be considered primarily as being “scientific”, or whether it should be perceived as an art, or rather a realistic practice? This reminds us of our previous discussion about logic and its nature. The first grouping believes that “both law and science consist of sets of rules; both are concerned with predicting events; both legal reasoning and scientific reasoning use a framework of deductive logic to reason from general principles to particular results; and both legal principles and scientific principles evolve over time.”⁶⁵⁰ On the other hand, legal realists rejected the identification of law with science; they believe that law as a discipline, “differs from science in that science describes the physical world, while law reflects our values. Science is descriptive, while law is prescriptive. Scientific reasoning is intended to convey statements of fact, while legal reasoning seeks to persuade that one complex of values is more compelling than another.”⁶⁵¹ That’s why they profoundly rebelled and campaigned against the well-established formalism of the previous century, and asserted that the law should be analysed in light of its main purposes and targeted consequences, instead of just perceiving it “as an exercise in deductive logic.”⁶⁵² For them, the target of legal reasoning, as lawyers actually practice it, is not to demonstrate to the judge or their counterpart the truth or accuracy of a given fact, the aim is “to persuade others about

647 *ibid.*

648 For more about the Legal Realist Movement in the United States and the Free Law Movement in Europe, as a trend that adopted a realistic viewpoint and minimized the traditional role of logic in legal studies and legal applications, see *ibid.*, and: D Lind, *Logic and Legal Reasoning* (2nd ed, The National Judicial College Press 2007) 1.

649 *ibid.*

650 Huhn (n 645) 4-5.

651 *ibid.* 12.

652 *ibid.*

how the law ought to be interpreted and applied.”⁶⁵³ Therefore, they constructed a substitute means with which to interpret the law.

In spite of this polar debate, logic still, in both schools, has a vital role in law, and the close relationship between logic and law cannot be denied. The presence of logic, and the considering of reasoning and argumentation, usually takes place after many trials, as when “we often hear expressions such as this: "The lawyer for the defence gave a very logical argument to the jury.", or "The plaintiff's attorney introduced his evidence in a logical manner.””⁶⁵⁴ The reason behind this intimate relation between law and logic is the very unique nature of law, as laws and regulations are not self-applicable, rather, they need to be applied in the wider context of facts, and logical reasoning is the tool that connects laws and these contexts.⁶⁵⁵ Moreover, logic equips lawyers and judges with a precise approach and language that shall help them deliver the content of laws and legal norms in a manner that is more accessible and easier to comprehend than the natural language usually used by jurists and legislators. Thus, by turning a set of legal articles into a set of logical arguments, a lawyer can overcome the syntactic ambiguity of legislators’ natural language.⁶⁵⁶ Furthermore, logic can capture the content of an entire body of law through a simple set of logical axioms that can help lawyers in analysing the implications of that law for specific cases,⁶⁵⁷ and can provide a strong logical basis for defining many legal concepts, such as legal powers and legal rights.⁶⁵⁸ If it’s agreed, then, that logic is very important for lawyers, should law schools teach logic to law students?

4.1.4.3 Logic and law schools

Law schools no longer teach logic...this is tragic, given that the fundamental principles of

653 ibid 49.

654 Lucas (n 586) 203.

655 ibid 205.

656 H Prakken and G Sartor, ‘Law and Logic: A Review from an Argumentation Perspective’ (2015) 277 Artificial Intelligence <<https://doi.org/10.1016/j.artint.2015.06.005>> accessed 15 Dec 2020, 4.

657 ibid 5-6.

658 ibid 7.

*logic continue to undergird the law and guide the thinking of judges.*⁶⁵⁹

In every case, lawyers and judges use the principles of logic to structure their arguments. The American authors quoted above believe that logic is the “lifeblood” for American law. Accordingly, law professors “demand that students defend their comments with coherent, identifiable logic. By now we are all familiar with the great line spoken by Professor Kingsfield in *The Paper Chase*: ‘You come in here with a head full of mush and you leave thinking like a lawyer.’ What is thinking like a lawyer? It means employing logic to construct arguments.”⁶⁶⁰

According to these authors, whose position we agree with, the failure to provide law students with a proper education that both values and uses the principles of logic harms the core of the law. Leaving students to find and apply the principles of logic on their own “is like asking them to design a rocket without teaching them the rules of physics.”⁶⁶¹ When students master these logical rules and principles, they will be able to become better lawyers. Future lawyers should make themselves closely familiar with the basics of deductive reasoning, as “90 percent of legal issues can be resolved by deduction.”⁶⁶² Proper logical education can help lawyers and judges to “solve legal problems not controlled by precedent and help law students deflect the nasty hypotheticals that are the darlings of professors.”⁶⁶³ This is again a result of the close ties between logic and law, not to the extent of declaring that “law is applied logic”⁶⁶⁴, but to accommodate the nature of the practice of law, which is fundamentally argumentative. The practice of law deals with subjects in some controversy, and its main aim is the settlement of disputes - sometimes by persuasive approaches out of court through negotiation and mediation, and sometimes in legal battles in courts - in both situations, logical reasoning playing a central role.⁶⁶⁵ This can help explain why Aristotle identified the law with reason itself in his *Rhetoric to Alexander*: “Law,

659 R J Aldisert, S Clowney, and J D Peterson, ‘Logic for Law Students: How to Think Like a Lawyer’ (2007) 69 *University of Pittsburgh Law Review* 1 <<https://doi.org/10.5195/LAWREVIEW.2007.117>> accessed 15 Dec 2020, 100-101.

660 *ibid.*

661 *ibid* 101.

662 *ibid* 101-102.

663 *Ibid.*

664 Lucas (n 586) 206.

665 *ibid.*

simply described, is reason [lo- gos] defined according to the common agreement [homologia] of the city-state, regulating action of every kind”.⁶⁶⁶ Following Aristotle, philosophers from Thomas Aquinas and William Blackstone down to contemporary figures have essentially adopted this position, as they declare that “the law actually applied in society is - or ought to be - composed of rules, logically deduced from certain immutable ‘natural’ principles which are themselves discovered by man through the operations of reason.”⁶⁶⁷ However, other scholars, mainly legal positivists, would disagree with this position,⁶⁶⁸ as they assert that there is no necessary connection between law as it is and law as it should be.⁶⁶⁹ However, to us, the natural law position is more solid, and better suits the nature of law as a social tool and as professional practice that constantly resorts to logic, and uses, every day, reason and argumentation.

We believe that law schools should teach logic again in order to equip future lawyers with this essential instrument that helps them in their job. If these lawyers practice law in the courts, they will need logic to extract the principles from the precedents, then they will need it to determine the direction or path along which these principles are necessary to develop. Ultimately, this necessity becomes more obvious and tangible for legal practice in general, and mediation practice in particular, when we explore later in this thesis the harms that ignoring logical reasoning rules might cause, and the help that logic can offer in developing mediation styles and positively influencing mediators’ roles, responsibilities, and capacities.

4.2 System 1: Substitute thinking processes

How can one be rational in a world where vision is limited, time is pressing, and

⁶⁶⁶ F D Miller and C A Biondi, *A Treatise of Legal Philosophy and General Jurisprudence. Volume 6, A History of the Philosophy of Law from the Ancient Greeks to the Scholastics* (2nd ed, Springer 2015) 83.

⁶⁶⁷ *ibid.*

⁶⁶⁸ See: H L A Hart, *The Concept of Law* (3rd ed, Oxford University Press 2012).

⁶⁶⁹ See: H L A Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593 <<https://doi.org/10.2307/1338225>> accessed 5 Jan 2021, 601-602.

*decision-making experts are often unavailable?*⁶⁷⁰

Besides the rational central route of thinking, decision making, and persuasion through logic, humanity, either because of lack of resources or influence of emotions, has experienced another path of processing information and making choices. This substitute method is usually quicker and easier to use; however, it might come with a cost. Such a cost can simply be losing a better opportunity that could have been obtained if the central route was followed, or it can be harmful to the extent of ruining a business, breaking up a family, or even declaring an unnecessary, destructive, long-lasting war.

System 1/ the peripheral route encompasses three different mental processes that might demonstrate some kind of overlapping; however, they are still distinct, as they enjoy quite different natures and cause various effects. Below we shall explore these three processes; heuristics, biases, and fallacies. However, while we will discuss both heuristics and biases thoroughly in this chapter, regarding fallacies, we shall devote the next chapter to discussing their meaning, types, and their expected influences on negotiating parties' decisions and behaviours during mediation, and the impact of these decisions and behaviours on mediation values.

4.2.1 Heuristics

*[P]eople rely on a limited number of heuristic principles which reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations. In general, these heuristics are quite useful, but sometimes they lead to severe and systematic errors.*⁶⁷¹

670 G Gigerenzer, P M Todd, and The ABC Research Group, *Simple Heuristics that Make us Smart* (Oxford University Press 1999) vii.

671 Tversky and Kahneman (n 163) 1124.

One of the simplest ways to describe the concept of heuristics is by regarding them as a “process that may solve a given problem, but offers no guarantees of doing so.”⁶⁷² According to this understanding, a heuristic is a kind of “strategy, trick, simplification, or any other kind of device which drastically limits search for solutions in large problem spaces.”⁶⁷³ But, while limiting the search for solutions to the given problems, heuristics do follow a logic “that is quite different from consequential logic.”⁶⁷⁴ Indeed, by doing so, they “do not guarantee optimal solutions; in fact, they do not guarantee any solution at all; all that can be said for a useful heuristic is that it offers solutions which are good enough most of the time.”⁶⁷⁵ Furthermore, following heuristic logic might lead to dramatic mistakes in thinking and decision making. However, despite these dramatic mistakes that heuristics might cause, avoiding them might not be possible, and indeed might not be useful, as they play a significant role in people’s daily lives, especially when decisions have to be taken unexpectedly and quickly, or when the necessary information to take the decision is not available⁶⁷⁶.

Below we will try to discuss different aspects of heuristics, including their definitions, mechanisms, examples, and their expected consequences. By doing so we are paving the road for discussion of them later in this thesis, involving a better understanding of the whole substitute logic system/route and its impact on mediation.

4.2.1.1 Heuristics definition

The word “heuristic” has lost its meaning. That is to say, researchers have used the word so widely as to render it a vague, catch-all term for explaining decision processes. Oftentimes the

672 E A Feigenbaum and J Feldman (eds), *Computers and Thought, A Collection of Articles* (McGraw-Hill Book Co 1963) 114.

673 *ibid* 6.

674 F M Albar and A J Jetter, ‘Heuristics in Decision Making’ (International Conference on Management of Engineering and Technology, Portland, 2-6 August 2009) <<https://doi.org/10.1109/PICMET.2009.5262123>> accessed 5 Jan 2021, 578.

675 Feigenbaum and Feldman (n 672) 6.

676 Albar and Jetter (n 674).

*word is cursorily defined as a “rule of thumb” or a “mental shortcut” for solving problems, but what does that mean?*⁶⁷⁷

Because of the vagueness of the term “heuristic”, it has been frequently used to describe almost anything, to the extent that “we have reached the point where the literature has become flooded with so many heuristics as to make the term arbitrary.”⁶⁷⁸ However, we need to find a precise definition to this term in order to analyse it for the purposes of this thesis.

Heuristics have been given many definitions, including “efficient cognitive processes, conscious or unconscious, that ignore part of the information”⁶⁷⁹ and “methods for arriving at satisfactory solutions with modest amounts of computation.”⁶⁸⁰ A heuristic, then, can be defined as a snap judgment, effort reduction method, simplification strategy, early assumption, nugget of wisdom,⁶⁸¹ or a “mental shortcut that helps us make decisions and judgments quickly without having to spend a lot of time researching and analysing information.”⁶⁸² These shortcuts can play a significant role in both decision-making and problem-solving, as in our attempts to make a decision or to solve a problem, we repeatedly resort to these easier mental shortcuts in order to obtain a quick result⁶⁸³ and to use “a minimum of time, knowledge, and computation to make adaptive choices in real environments.”⁶⁸⁴

677 A K Shah and D M Oppenheimer, ‘Heuristics Made Easy: An Effort-Reduction Framework’ (2008) 134 Psychological Bulletin 207 <<https://doi.org/10.1037/0033-2909.134.2.207>> accessed 29 Jan 2021, 207.

678 *ibid*.

679 G Gigerenzer and others, ‘Heuristic Decision Making’ (2011) 62 Annual Review of Psychology, 451 <<https://doi.org/10.1146/annurev-psych-120709-145346>> accessed 29 Jan 2021.

680 H A Simon, ‘Invariants of Human Behavior’ (1990) 41 Annual Review of Psychology 1 <<https://doi.org/10.1146/annurev.ps.41.020190.000245>> accessed 29 Jan 2021, 1.

681 D B Lenat, ‘The Nature of Heuristics’ (1982) 19 Artificial Intelligence 189 <[https://doi.org/10.1016/0004-3702\(82\)90036-4](https://doi.org/10.1016/0004-3702(82)90036-4)> accessed 29 Jan 2021, 223.

682 S Dale, ‘Heuristics and Biases: The Science of Decision-Making’ (2015) 32 Business Information Review 93 <<https://doi.org/10.1177/0266382115592536>> accessed 29 Jan 2021, 1.

683 *ibid* 2.

684 P M Todd and G Gigerenzer, ‘Précis of Simple Heuristics that Make us Smart’ (2000) 23 The Behavioral and Brain Sciences 727 <<https://doi.org/10.1017/S0140525X00003447>> accessed 29 Jan 2021.

The reason why people resort to these mental shortcuts is that integral computation, optimal rational thinking rules, and use of a deliberate logical algorithm usually “requires great mental effort; however, people do not have unlimited processing capacity.”⁶⁸⁵ People have to make decisions and react within several constraints that are imposed by their limited cognitive resources and the given environment in which the decision-making task occurs.⁶⁸⁶ These limitations urge people to use various tactics that might help them reducing the necessary effort involved in computation.⁶⁸⁷

4.2.1.2 Heuristics mechanisms

*Heuristics are frugal—that is, they ignore part of the information. Unlike statistical optimization procedures, heuristics do not try to optimize (i.e., find the best solution), but rather satisfice (i.e., find a good-enough solution). Calculating the maximum of a function is a form of optimizing; choosing the first option that exceeds an aspiration level is a form of satisficing.*⁶⁸⁸

While the ways in which heuristics operate are various, tracking these ways and methods requires first a better understanding of the original route, and then the full process which these short cuts are trying to simplify and reduce. Shah and Oppenheimer have presented a clear framework to study both the “Optimal Decision

⁶⁸⁵ Shah and Oppenheimer (n 677).

⁶⁸⁶ These constraints form what is known as “bounded rationality”, see: Simon (n 680).

⁶⁸⁷ Shah and Oppenheimer (n 677).

⁶⁸⁸ Gigerenzer, ‘Why Heuristics Work’ (2008). 3 Perspectives on Psychological Science 20 <<https://doi.org/10.1111/j.1745-6916.2008.00058.x>> accessed 8 Feb 2021, 20.

Rules” and the “Effort Reduction Methods.”⁶⁸⁹ According to Shah and Oppenheimer, the full optimal decision rules require decision makers to fulfil these five tasks:⁶⁹⁰

1. Identifying all cues—all relevant pieces of information must be acknowledged.
2. Recalling and storing cue values—the values for the pieces of information must either be recalled from memory or processed from an external source.
3. Assessing the weights of each cue—the importance of each piece of information must be determined.
4. Integrating information for all alternatives—the weighted cue values must be summed to yield an overall value or utility for the alternative. In the case of inference or judgment, this is the final step, and it produces the target judgment value.
5. All alternatives must be compared, and then the alternative with the highest value should be selected.

However, because following all these logical steps oblige decision makers to spend notable efforts, and requires full access to all necessary information related to the task which is not always available and accessible, people use a substitute method by inclining to use the effort-reduction methods that might apply to one or more of these moves:⁶⁹¹

1. Examining fewer cues.
2. Reducing the difficulty associated with retrieving and storing cue values.
3. Simplifying the weighting principles for cues.

689 Shah and Oppenheimer (n 677) 207-209.

690 *ibid* 207.

691 *ibid* 209.

4. Integrating less information.

5. Examining fewer alternatives.

Shah and Oppenheimer do not assume that decision makers explicitly and deliberately choose one or more of these effort-reduction methods, but rather, they suggest that “the heuristics people use consist of these effort-reduction principles, even if people are not consciously aware of having adopted them.”⁶⁹² This framework shall give us better insights about the way heuristics work and affect people’s thinking and mental processing, by reducing the needed time and effort to reach a rational, sensible, and logical decision.

Gigerenzer then explained⁶⁹³ how the mind selects a method, or multiple methods from the above list, by stating that people are generally guided in selecting a heuristic by one of these three guides:

- (a) individual reinforcement learning⁶⁹⁴;
- (b) social learning, as in medical training in which physicians are instructed on what cues to look up in what order; and
- (c) evolutionary learning, as with rules of thumbs for predation and mate search in animal species.⁶⁹⁵

Thus, a heuristic takes place when a person follows one or more methods presented by Shah and Oppenheimer and this person is inclined to select this method with a proper help of the guides stated by Gigerenzer. The selected move can be one of a long list of heuristics people developed through times. Below we refer to number of them in order to obtain a clearer vision of their application.

692 *ibid.*

693 Gigerenzer (n 688) 24.

694 Reinforcement Learning is a theory that assumes “individuals develop subjective expectations for the strategies they have and select strategies proportional to their expectations, which are then updated on the basis of subsequent experience,” see: J Rieskamp and P E Otto, ‘SSL: A Theory of How People Learn to Select Strategies’ (2006) 135 *Journal of Experimental Psychology* 207 <<https://doi.org/10.1037/0096-3445.135.2.207>> accessed 8 Feb 2021, 207.

695 Gigerenzer (n 688).

4.2.1.3 Examples of heuristics

Gigerenzer listed a wide range of known heuristics with brief explanation/definition of each given one. Here we refer to a number of heuristics from his list: ⁶⁹⁶

- 1- Recognition heuristic: if one of two alternatives is recognized, infer that it has the higher value on the criterion.
- 2- Fluency heuristic: if one alternative is recognized faster than another, infer that it has the higher value on the criterion.
- 3- Satisficing: search through alternatives, and choose the first one that exceeds your aspiration level.
- 4- Tit-for-tat: cooperate first, keep a memory of size 1, and then imitate your partner's last behaviour.
- 5- Imitate the majority: look at a majority of people in your peer group, and imitate their behaviour.
- 6- Imitate the successful: look for the most successful person and imitate his or her behaviour.

In all these examples the decision maker inclined to a faster route that enabled her to reach a decision without following the long list of mental tasks presented above by Shah and Oppenheimer. Such effort and time saving seems very appealing; however, it sometimes comes with a cost.

4.2.1.4 Heuristics' possible side effects

While heuristics can speed up our problem [solving] and decision-making process, they can also introduce errors and biased judgments. Just because something has worked in the past does not mean that it will work again, and relying on heuristics can make it difficult for us to see alternative solutions or come up with new ideas. ⁶⁹⁷

⁶⁹⁶ *ibid.*

⁶⁹⁷ Dale (n 682) 11.

This is the main concern about heuristics; that they don't give flawless solutions to the problem they try to solve and, accordingly, can't ensure that they are able to select the best decision from the available alternatives. They can attempt to offer plausible guesses to help the decision maker select a proper solution, but these guesses which heuristics offer are still fallible.⁶⁹⁸

Furthermore, heuristics can lead to severe errors, by reducing the required mental effort and minimising the necessary data processing before reaching a decision.⁶⁹⁹ For instance, imitating the majority, or imitating the successful heuristics mentioned above⁷⁰⁰ indicate how errant it can be to follow a heuristic in decision making, as imitating a successful person's behaviour as a formula for success ignores individual differences and environmental elements. However, this is just one side of the coin, as heuristics can offer undeniable benefits to the decision makers and problem-solving experts.

4.2.1.5 Heuristics' bright side

*Despite the fact that heuristics use less information from the environment, in practice they can perform very well, often surpassing regression approaches for certain decision problems.*⁷⁰¹

698 Feigenbaum and Feldman (n 672) 192.

699 P E Tetlock, 'Theory-Driven Reasoning about Plausible Pasts and Probable Futures in World Politics: Are we Prisoners of our Preconceptions?' (1999) 43 American Journal of Political Science 335 <<https://doi.org/10.2307/2991798>> accessed 8 Feb 2021, 363.

700 See 4.1.1.3 above.

701 S Bobadilla, and B C Love, 'Fast or Frugal, but not both: Decision Heuristics under Time Pressure' (2018) 44 Journal of Experimental Psychology. Learning, Memory, and Cognition, <<https://doi.org/10.1037/xlm0000419>> accessed 8 Feb 2021, 24.

Gigerenzer⁷⁰² revealed a number of misconceptions people have about , as they have “long been regarded, as an inferior technique for decision making,”⁷⁰³ as we use them because of our cognitive limitations, and resort to them in the event of less important decisions that require modest amounts of computation, despite the fact that optimisation and more information are usually preferable.⁷⁰⁴ Gigerenzer clarified these misconceptions, stating that optimisation in many situations becomes impossible, and we resort to heuristics, because of the characteristics of the mind, the environment and the people who use heuristics in both high and low stakes decision making, and, finally, ignoring part of the information available to the decision maker can produce better decisions.⁷⁰⁵

This example can make the above clarifications more evident; “[c]onsider a scenario in which a child suddenly crosses the street to get his ball. The driver has less than a second to evaluate the situation and decide whether to press hard on the brakes without swerving or press on the brakes and swerve onto the sidewalk. The former option risks hitting the child and the latter option risks hitting other pedestrians. The optimal decision depends on cues such as the speed of the vehicle, the distance from the car to other people, the car’s stopping distance, the number of people on the sidewalk, the driver’s ability, and so forth. What is the best way to integrate all this information quickly? Representing and integrating all this information in an optimal manner may be impossible or too time-consuming.”⁷⁰⁶ In this example, it is obvious that “we are often obligated to use heuristic reasoning.”⁷⁰⁷ This situation usually occurs “when decisions need to be made quickly or unexpectedly, because potential costs are associated with delays, or because of a high level of uncertainty, or because insufficient information pervades the situation.”⁷⁰⁸ Therefore, avoiding using heuristics appears to be neither possible, nor useful.

702 Gigerenzer (n 688) 20.

703 Albar and Jetter (n 674) 578.

704 Gigerenzer (n 688).

705 Gigerenzer referred to a number of studies that supported these clarifications; see *ibid* 20-22.

706 Bobadilla and Love (n 701) 24.

707 G Polya, *How to Solve It: A New Aspect of Mathematical Method* (Princeton University Press 1945) 112-113.

708 Albar and Jetter (n 674) 579.

To summarise, if logic's main focus is truth and the promotion of correct thinking, heuristics, as a substitute logical tool, focuses on situations where people have to act fast. In this view, "the mind resembles an adaptive toolbox with various heuristics tailored for specific classes of problems—much like the hammers and screwdrivers in a handy-man's toolbox."⁷⁰⁹ As this process happens in everyday human activity, accordingly, using heuristics in negotiation and mediation is an expected event that might need no intervention from the mediator. However, when heuristics lead to a biased judgment, or a fallacious statement, the mediator may be expected to take a positive role.

4.2.2 Biases

*The big problem, as it is everywhere, is with unconscious bias. I dare say that we all suffer from a degree of unconscious bias, and it can occur in all sorts of manifestations. It is almost by definition an unknown unknown, and therefore extraordinarily difficult to get rid of, or even to allow for.*⁷¹⁰

Biases are "in substantial parts unconscious and often result from the use of heuristics,"⁷¹¹ and this notion "has logical appeal."⁷¹² However, biases can be genuine, and not exist as a result of using mental shortcuts, as they themselves can "serve evolved functions."⁷¹³ In all scenarios, biases do widely exist and greatly affect

⁷⁰⁹ Gigerenzer (n 688) 20.

⁷¹⁰ Lord Neuberger, 'Fairness in the Courts: The Best We Can Do' (Address to the Criminal Justice Alliance, London, 10 April 2015) <<https://supremecourt.uk/speeches/lord-neuberger-at-the-criminal-justice-alliance>> accessed 9 Mar 2021.

⁷¹¹ E Schirrmester, A Göhring, and P Warnke, 'Psychological Biases and Heuristics in the Context of Foresight and Scenario Processes' (2020) 2 Futures & Foresight Science n/a <<https://doi.org/10.1002/ffo2.31>> accessed 9 Mar 2021, 1.

⁷¹² M G Haselton, D Nettle, and D R Murray, 'The Evolution of Cognitive Bias' in Buss D M (ed), *The Handbook of Evolutionary Psychology* (John Wiley & Sons 2005) 970.

⁷¹³ *ibid* 972.

people's decisions, behaviour, and judgements, by creating a tendency, inclination, or trend, especially one that is unreasoned or preconceived.

A person in a biased position tends to exhibit an unreasonable like or dislike without sufficient justification, which makes her one-sided, and lacking a neutral viewpoint. Bias is, by nature, pitted against logic as a biased person cannot give sound reasoning for her expressed opinion, choice, or argument. When bias takes place in an ongoing negotiation, discussions may be exposed to an impasse at any time, as the other party will not accept this unjustified prejudiced move from her adversary. Such blockage can be avoided if logic is present on the table, and if there is a mediator who can intervene and help.

Here we shall explore the meaning of biases, their forms and examples, particularly during negotiation, and finally the expected mediators' role towards parties' biases. This shall pave the way towards the final destination of this thesis; fallacies' effects on mediation and the mediator's expected role towards managing these effects as a part of her main job to assist parties.

4.2.2.1 Meaning of biases

*Biases are nonconscious drivers — cognitive quirks — that influence how people see the world. They appear to be universal in most of humanity, perhaps hardwired into the brain as part of our genetic or cultural heritage, and they exert their influence outside conscious awareness. You cannot go shopping, enter a conversation, or make a decision without your biases kicking in.*⁷¹⁴

⁷¹⁴ H G Halvorson and D Rock, 'Beyond Bias' (*Strategy Business*, 13 July 2015) <<https://www.strategy-business.com/article/00345>> accessed 9 Mar 2021.

Due to the fact of widespread biases in our daily life, the concept of bias has become profoundly familiar and common, to the extent that most people no longer try to stop and consider what being biased should mean.⁷¹⁵ However, we will try here to define biases, in order to reach an accurate understanding of their meaning.

In dictionaries, bias is “the action of supporting or opposing a particular person or thing in an unfair way, because of allowing personal opinions to influence your judgment.”⁷¹⁶ This action reflects a “mental tendency or inclination, esp[ecially] an irrational preference or prejudice.”⁷¹⁷ Bias, then, is an inclination, tendency, or preference, to favour a particular choice, person, thing, or belief, according to this inclination, even when it might seem irrational to do so.

However, since defining biases is not sufficient in order to understand their nature and mechanism, we will try to explore a number of examples of biases, in order to obtain a better understanding of them and their expected effects on negotiation and mediation.

4.2.2.2 Examples of biases: Biases typology

*Biases are the invisible air we walk through.*⁷¹⁸

Biases come in several shapes and forms. For instance, people can have biases about other people, about situations, or even about themselves, and these biases can widely affect decision making processes.⁷¹⁹ Furthermore, the majority of known biases tend to be manifested in such a way that the people who are subject to them can be neither

⁷¹⁵ D Richbell, *How to Master Commercial Mediation: An Essential Three-Part Manual for Business Mediators* (Bloomsbury Professional 2015) 371.

⁷¹⁶ See Cambridge Dictionary: <<https://dictionary.cambridge.org/dictionary/english/bias>> accessed 9 Mar 2021.

⁷¹⁷ See Collins Dictionary: <<https://www.collinsdictionary.com/dictionary/english/bias>> accessed 9 Mar 2021.

⁷¹⁸ M D Lieberman and others, ‘Breaking Bias Updated: The SEEDS Model’ (2015) 6 *Neuro Leadership Journal* <[http://www.scn.ucla.edu/pdf/Lieberman\(2015\)Neuroleadership.pdf](http://www.scn.ucla.edu/pdf/Lieberman(2015)Neuroleadership.pdf)> accessed 9 Mar 2021.

⁷¹⁹ L L Thompson and B J Lucas, ‘Judgmental Biases in Conflict Resolution and how to Overcome them’ in P T Coleman, M Deutsch, and E C Marcus (eds), *The Handbook of Conflict Resolution: Theory and Practice* (3rd ed, Jossey-Bass 2014) 255.

aware of their presence, or able to consider themselves as “being influenced by bias.”⁷²⁰ This hidden nature of biases has encouraged researchers to try several approaches in recognising, defining, and categorising them.

There are a number of attempts that have been made by researchers to classify biases, for instance, Levy,⁷²¹ who differentiated between ‘unmotivated’ and ‘motivated’ biases. By an ‘unmotivated’ group, he refers to a type of bias that arises from errors that occur in cognitive processing, without any identified connections to any particular need. By motivated biases he means the errors that arise from certain psychological needs and wants such as fears, desires, and reduction of anxiety.⁷²² In a more detailed and comprehensive attempt to classify biases into five clear categories, we shall list them below, with one example for each category:⁷²³

- 1- *Comfort zone biases*: resistance to change.
- 2- *Motivational biases*: wishful thinking.
- 3- *Perception biases*: anchoring.
- 4- *Reasoning fallacies*: misunderstanding of statistical principles.
- 5- *Groupthink*: illusion of consensus.

However, we believe that the first classification doesn’t equip us with practical tools that shall help in dealing with the included biases. Additionally, we disagree with the second categorisation, as it perceives reasoning fallacies as a type of bias, which we believe is not accurate, as we shall explore later in this thesis when we will be exploring fallacies more thoroughly. However, we need to search for a more fulfilling categorisation of biases before we proceed.

720 A Yap, ‘Ad Hominem Fallacies and Epistemic Credibility’ in: T Bustamante and C Dahlman (eds), *Argument Types and Fallacies in Legal Argumentation* (1st ed, Springer 2015) 22-23.

721 J S Levy, ‘Political Psychology and Foreign Policy’ in: D O Sears, L Huddy, and R Jervis (eds), *Oxford Handbook of Political Psychology* (Oxford University Press 2003) 264.

722 E Hudlicka, ‘Modeling Effects of Emotion and Personality on Political Decision-Making’ in: R Trappl (ed.), *Programming for Peace: Computer-Aided Methods for International Conflict Resolution and Prevention* (Springer 2006) 360.

723 *ibid.*

In their article, *Breaking Bias Updated: The SEEDS Model*⁷²⁴, Lieberman and his colleagues suggested a simple framework that allows, we believe, for a better understanding of biases, and a clearer approach towards suggesting applicable strategies to handle them. In this framework, they grouped ¹⁵⁰ known common biases into five categories, “based on their underlying cognitive nature: similarity, expedience, experience, distance, and safety.”⁷²⁵ According to them, these five categories can be seen as follows:⁷²⁶

The similarity biases constitute an essential part of people’s natural cognitive defences, as they protect and promote people who are associated with us, including family, village, team, and company. However, they simultaneously perpetuate prejudice and stereotypes⁷²⁷, even when this seems counterproductive. The two most evident forms of this bias are ingroup and outgroup preferences. People usually conceive and recognise people who are similar to them in a relatively positive way (the ingroup), and in a relatively negative way those who seem different (the outgroup). Even when people are not aware of these two forms of bias, they take place in people’s behaviour. These two forms can have a great influence in job recruitment for example, as research⁷²⁸ shows that managers have tendency to hire applicants from the ingroup, and dismiss the ones who are from the outgroup. The mitigation strategy for this similarity bias is to find commonalities with the outgroup members, and bring them into the affiliation of the ingroup by recategorising them, after paying attention and focusing in experiences, values, preferences, and goals that the decision maker shares with the people of the outgroup.

Expedience Biases are pure heuristics, as they occur in decisions that require concentration, computation, data analysis, and noticeable cognitive effort, as they offer

724 Lieberman and others (n 718).

725 *ibid.*

726 This framework is known as SEEDS Model (Similarity, Expedience, Experience, Distance, and Safety). The next five paragraphs are based on this.

727 For more about stereotyping see: Yap (n 720).

728 Lieberman and others (n 718).

a mental shortcut to produce a quick decision without all slow optimal logic computations.⁷²⁹ The most evident example of expedience bias is availability bias⁷³⁰, which is the tendency to take the decision that comes to mind most quickly and is most readily accessible, instead of considering all other possible perspectives. This bias might help us reach quick decisions, but it hinders people from searching for, considering, and processing all other potentially relevant information, which blocks the mind of the decision maker from selecting the most adaptive and objective choice. Because these biases usually take place when the decision maker is in a hurry or are cognitively exhausted from negotiation stress and multiple decisions, the mitigation strategy of these biases is to provide incentives for the decision maker to leave this fast available path by allowing more time, showing more alternatives, and asking her to lay out the logical steps they have taken to reach their fast expedient decision, which shall encourage them in discovering and identifying the flaws of their logic themselves.

Experience biases refer to people's tendency to consider their own perceptions, viewpoints, and opinions as being correct, complete and accurate.⁷³¹ This happens because a person's personality, past experiences, expectations, and values all colour her perception of what is actually happening in the real world. Accordingly, if a person is strongly convinced that she is correct and accurate in her views about a given matter, she will assume that all who regard this matter differently must be wrong, misguided, or lying. This type of bias has many examples, including the False Consensus Effect⁷³² (overestimating the widespread nature of our own habits, beliefs, and opinions by supposing that everybody shares them with us), the Blind Spot⁷³³ (identifying biases in other people but not in ourselves), and Fundamental Attribution Error⁷³⁴ (supposing that our errors happen because of external circumstances, while others' mistakes are

729 See: N H Nazlan, S Tanford, and R Montgomery, 'The Effect of Availability Heuristics in Online Consumer Reviews' (2018) 17 *Journal of Consumer Behaviour* 449 <<https://doi.org/10.1002/cb.1731>> accessed 9 Mar 2021.

730 See: T Pachur, R Hertwig, and F Steinmann, 'How do People Judge Risks: Availability Heuristic, Affect Heuristic, or both?' (2012) 18 *Journal of Experimental Psychology* 314 <<https://doi.org/10.1037/a0028279>> accessed 9 Mar 2021.

731 For more about these biases, see: Thompson and Lucas (n 719) 255.

732 D Engelmann and M Strobel, 'The False Consensus Effect Disappears if Representative Information and Monetary Incentives Are Given' (2000) 3 *Experimental Economics*, 241 <<https://link.springer.com/article/10.1023/A:1011472501737>> accessed 9 Mar 2021.

733 Yap (n 720).

734 See: L Ross, 'The Intuitive Psychologist and his Shortcomings: Distortions in the Attribution Process' (1977) 10 *Advances in Experimental Social Psychology* 173 <[https://doi.org/10.1016/S0065-2601\(08\)60357-3](https://doi.org/10.1016/S0065-2601(08)60357-3)> accessed 9 Mar 2021, and J H Harvey, J P Town, and K L Yarkin, 'How Fundamental is "the Fundamental Attribution Error"?' (1981) 40 *Journal of Personality and Social Psychology*, 346 <<https://doi.org/10.1037/0022-3514.40.2.346>> accessed 9 Mar 2021.

due to their personality traits). Such biases can be mitigated by revisiting these overestimated ideas and beliefs about ourselves and others in a more rational, calm, and objective manner.

Distance biases refer to the human brain's inclination towards items and people who are closer in terms of space, time, or access, than those further afield. The examples of these biases include Affective Forecasting⁷³⁵ (the tendency to judge future emotional states based on current feelings), and Temporal Discounting⁷³⁶ (the tendency to place less value on outcomes that happen further into the future). The main mitigation strategy for these biases depends on taking the distance element out of the equation and evaluating future rewards as if they were closer to the decision maker in time or space, as this shall help her in recognising their full value.

Finally, there is the *safety bias*, which refers to people's inclination towards avoiding loss (for instance, money) as a priority preference, even more than they prefer to gain. These biases slow down the decision-making process and hold back risk-taking moves, even when they are advisable. A very well-known example of this type is Framing Effect⁷³⁷ where people base their judgment on whether a given decision is presented as a loss or as a gain, instead of relying on objective criteria. The central strategy in mitigating safety biases is by placing distance between the decision maker and the subject matter, by helping her imagine that the decision will be for someone else, or to imagine that the decision has already been taken, and she is seeing it from a future vantage point, in order to be able to gain an objective, less subjective, and emotionally distanced perspective.

4.2.2.3 Biases in negotiation and mediation

Negotiators' cognitions and biases interfere with reaching agreements that reflect their

735 See: T D Wilson and D T Gilbert, 'Affective Forecasting' in: Zanna M P (ed), *Advances in Experimental Social Psychology*, (Vol. 35, Elsevier Academic Press 2003).

736 S Frederick, G Loewenstein, and T O'Donoghue, 'Time Discounting and Time Preference: A Critical Review' (2002) 40 *Journal of Economic Literature* 351 <<https://doi.org/10.1257/002205102320161311>> accessed 9 Mar 2021.

737 See L Xiaoying and L Wenquan, 'How Framing Effect Impact on Decision Making on Internet Shopping' (2015) 3 *Open Journal of Business and Management* 96 <<http://dx.doi.org/10.4236/ojbm.2015.31010>> accessed 9 Mar 2021.

*interests and leverage differences in their priorities.*⁷³⁸

Even with the most talented negotiators, it must be said that “[t]he mind can fool”.⁷³⁹ That is why researchers in the dispute resolution field have paid attention to this topic as “[b]y understanding these biases, negotiators can anticipate these errors in their counterparts and take steps to avoid making these mistakes themselves. In addition, an understanding of these common errors can aid third parties who seek to help negotiators overcome these cognitive traps.”⁷⁴⁰

Among, and along with, the extensive list of biases the above SEEDS Model included, dispute resolution studies have focused on a number of biases that frequently inhibit negotiation and mediation. Indeed, there are several lists of common biases linked to negotiation/mediation. Bazerman and Shonk suggested a list of the seven most common biases that frequently occupy negotiating parties’ minds and, therefore, affect their likelihood of reaching a mutually accepted settlement in negotiation and mediation.⁷⁴¹

1. The Mythical Fixed Pie⁷⁴²: When negotiators assume that negotiation is an unavoidable fixed sum, this assumption makes them unable to notice mutually beneficial resolution opportunities.
2. Egocentrism⁷⁴³: Egocentric or self-serving interpretations of fairness, as each negotiator brings to the negotiation her own understanding of fairness which usually favours her side.

738 J Brett and L Thompson, ‘Negotiation’ (2016) 136 *Organizational Behavior and Human Decision Processes* 68 <<https://doi.org/10.1016/j.obhdp.2016.06.003>> accessed 31 Mar 2021, 70.

739 M H Bazerman and K Shonk, ‘The Decision Perspective to Negotiation’ in: M L Moffitt, R C Bordone, and Program on Negotiation at Harvard Law School (eds), *The Handbook of Dispute Resolution* (1st ed, Jossey-Bass 2005) 62-63.

740 *ibid* 53-54.

741 *ibid* 54-62.

742 See: M H Bazerman, ‘The Mind of the Negotiator: The Mythical Fixed Pie’ (2003) 1 *Negotiation*, 1 <<https://www.hbs.edu/faculty/Pages/item.aspx?num=16100>> accessed 6 Apr 2021, and L Thompson, ‘Negotiation Behavior and Outcomes: Empirical Evidence and Theoretical Issues’ (1990) 108 *Psychological Bulletin* 515 <<https://doi.org/10.1037/0033-2909.108.3.515>> accessed 6 Apr 2021.

743 See: J R Chambers and C K W De Dreu, ‘Egocentrism Drives Misunderstanding in Conflict and Negotiation’ (2014) 51 *Journal of Experimental Social Psychology* 15 <<https://doi.org/10.1016/j.jesp.2013.11.001>> accessed 6 Apr 2021.

3. Overconfidence⁷⁴⁴: When negotiators are overconfident about their judgements and the likelihood of obtaining favourable outcomes, which usually leads to unrealistic and illogical expectations of success.
4. Escalation of Commitment⁷⁴⁵: When negotiators irrationally escalate their commitment to a previously chosen position, even when it is no longer useful, or deserves defending as a best alternative.
5. Overlooking a Counterpart's Perspective⁷⁴⁶: Or the "winner's curse", which refers to situations where the negotiator obtains what she asked for, then feels that the other party's acceptance is giving her some disappointing perception about the real value of this success.
6. Overweighting Vividness⁷⁴⁷: Overweighting vivid qualities (e.g. school prestige) that surround the situation, and underweighting less salient elements (e.g. free time) that might highly influence the negotiator's personal happiness.
7. Errors in Focus⁷⁴⁸: Focusing overly narrowly on information related to the negotiation might cause overlooking long term considerations in favour of instant cravings, and to concentrate too closely on observable factors and disregard less salient elements, even where the latter are important to the negotiator.

One more listing of negotiation/mediation linked biases is proposed by Thompson and Lucas in their study on judgemental biases.⁷⁴⁹ In their list, they classified these biases, according to the negotiation phase in which the bias takes place, as follows:

744 See: R G Lim, 'Overconfidence in Negotiation Revisited' (1997) 8 *International Journal of Conflict Management*, 52 <<https://doi.org/10.1108/eb022790>> accessed 6 Apr 2021.

745 See: D Sleesman, A Lennard, G McNamara and D Conlon, 'Putting Escalation of Commitment in Context: A Multi-level Review and Analysis' (2018) 12 *Academy of Management Annals* <<https://doi.org/10.5465/annals.2016.0046>> accessed 6 Apr 2021.

746 See: W F Samuelson, 'The Winner's Curse in Bilateral Negotiations' (1985) 3 *Research in Experimental Economics* 105.

747 Bazerman and Shonk (n 739) 60-61.

748 *ibid.*

749 Thompson and Lucas (n 719) 257.

1. Biases that negotiators carry into negotiation (this category encompasses the egocentric bias stated above, anchoring⁷⁵⁰, and framing⁷⁵¹).
2. Biases that erupt during negotiation (the biased punctuation of conflict, and the illusion of transparency).⁷⁵²
3. Biases that contaminate negotiators' perceptions of outcomes (egocentric bias, again, and reactive devaluation.)⁷⁵³

In both lists, the authors suggested various strategies, steps, and assistances the third party can use to help negotiators overcome these biases. Below, we shall explore a number of these strategies as these shall pave the way towards our proposed mediator roles in the following chapters.

4.2.2.4 Mediators' role towards parties' biases

*Much more thought goes into examining the nature of bias and error at the bargaining table than to solutions as to how to eliminate or reduce it.*⁷⁵⁴

Because biases mostly happen outside humans' conscious awareness, people are usually unaware of them, and, therefore, most negotiators can't expect the deleterious

750 About anchoring bias, see: A Furnham and H C Boo, 'A Literature Review of the Anchoring Effect' (2011) 40 The Journal of Socio-Economics <<https://doi.org/10.1016/j.socec.2010.10.008>> accessed 6 Apr 2021, F Lieder and others, 'The Anchoring Bias Reflects Rational Use of Cognitive Resources' (2018) 25 Psychonomic Bulletin & Review 322

<<https://doi.org/10.3758/s13423-017-1286-8>> accessed 6 Apr 2021, and T R W Wilde, F S Ten Velden, and C K W De Dreu, 'The Anchoring-Bias in Groups' (2018) 76 Journal of Experimental Social Psychology 116 <<https://doi.org/10.1016/j.jesp.2018.02.001>> accessed 6 Apr 2021.

751 See A Beratšová and others, 'Framing and Bias: A Literature Review of Recent Findings' (2016) 3 Central European Journal of Management, 23 < <https://journals.muni.cz/cejm/article/view/7912>> accessed 6 Apr 2021, and A Tversky and D Kahneman, 'The Framing of Decisions and the Psychology of Choice' (1981) 211 Science 453 <<https://doi.org/10.1126/science.7455683>> accessed 6 Apr 2021.

752 See: R M Kramer, 'The "Dark Side" of Social Context: The Role of Intergroup Paranoia in Intergroup Negotiations' in: M J Gelfand and J M Brett (eds), *The Handbook of Negotiation and Culture* (Stanford Business Books 2004), R M Kramer, D Meyerson, and G Davis, 'How Much is Enough? Psychological Components of "Guns versus Butter" Decisions in a Security Dilemma' (1990) 58 Journal of Personality and Social Psychology 984 <<https://doi.org/10.1037/0022-3514.58.6.984>> accessed 6 Apr 2021, and T Gilovich, K Savitsky, and V H Medvec, 'The Illusion of Transparency: Biased Assessments of Others' Ability to Read One's Emotional States' (1998) 75 Journal of Personality and Social Psychology, 332 <<https://doi.org/10.1037/0022-3514.75.2.332>> accessed 6 Apr 2021.

753 About reactive devaluation see: L Ross and C Stillinger, 'Barriers to Conflict Resolution' (1991) 7 Negotiation Journal 389 <<https://doi.org/10.1111/j.1571-9979.1991.tb00634.x>> accessed 6 Apr 2021.

754 Thompson and Lucas (n 719) 271-276.

effects they might cause.⁷⁵⁵ Indeed, individuals might not be able to be “consciously “watch out for biases,” because there will never be anything to see. It would be like trying to “watch out” for how much insulin you are producing. How then can the negative effects of bias be overcome?”⁷⁵⁶ One of the answers of this question can be: the assistance of the third party; the mediator. For instance, in the SEEDS Model shown above, the authors referred to numerous strategies that can be followed in order to mitigate each of the five categories mentioned in their model. The mediator can be the one who applies these strategies, as the negotiating parties will be in a situation that makes it even harder for them to “watch out for biases” because of the context of conflict⁷⁵⁷ that might blind them from noticing these errors.

Accordingly,⁷⁵⁸ when parties are exposed to similarity biases, where each party may see her counterpart as a member of the “outgroup”, the mediator shall, during the exploration phase⁷⁵⁹, pay attention to and focus on experiences, values, preferences, and goals that the negotiating parties share with each other, as recognising these commonalities should help in recategorising each party in the eyes of her counterpart, and shall move her from the “outgroup” into the affiliation of the “ingroup”.

Particularly in expedience biases, since they usually take place when parties are in a hurry or are cognitively exhausted from negotiation stress and multiple decisions, the mediator can help mitigate their effects by providing incentives to leave this quick, easily available path by allowing more time, showing more alternatives, and asking parties to lay out the logical steps they have taken to reach their fast expedient decision, which shall encourage them to discover and identify the flaws in their logic themselves.

⁷⁵⁵ *ibid* 255.

⁷⁵⁶ Halvorson and Rock (n 714) 2.

⁷⁵⁷ See Chapter Three of this thesis and the description of the effects of emotions on negotiating parties.

⁷⁵⁸ Lieberman and others (n 718).

⁷⁵⁹ See the mediation phases in Chapter Two of this thesis.

In experience biases the mediator, during the private sessions, can help each party review her overestimated ideas and beliefs in a more fresh, calm, and objective light.

Ultimately, in both distance and safety biases, the mediator can apply mitigation strategies by taking out the distance from the equation in the first instance, and adding it in the second. The mediator shall do this by helping parties imagine that the future rewards, in safety biases, are closer to her in time or space, in order to recognise their full value. On the other side, in safety biases, the mediator shall help the negotiating party place distance between her and the subject matter, by helping her imagine that the decision will be for someone else to make, or to imagine that the decision has been already taken and she is seeing it at a later date in order to be able to get an unprejudiced, rational, less subjective, and emotionally distanced standpoint.

These five main strategies are not the only given remedies in mitigating the influences in biases. In fact, there are numerous moves, steps, and tactics mediators can apply, in order to reduce the harmful effects of biases on negotiating parties' behaviours, choices, and chances to reach a mutually accepted satisfying resolution. Many of these moves and actions can be described as genuine aspects of a mediator's job in assisting parties, while others are especially tailored to tackle specific biases. The first group of actions has a "Preventive" nature, while the second has a "Remedial" character.

In the biases' Preventive Actions List, trust building between the negotiating parties can be a main tool. Building trust shall be achieved through encouraging parties to share information and guiding them in "being clear and honest about how much they care about each issue."⁷⁶⁰ This guidance can be done by helping them ask the right

⁷⁶⁰ Bazerman and Shonk (n 739) 55-56.

questions and teaching them to listen positively. Such rich information sharing environment shall reduce the chances that the harmful fixed sum assumption could influence them, as sharing information shall open the gate to more offers, instead of being attached to one fixed figure.⁷⁶¹

Another preventive move is what we call “Positive Labelling”, by which we refer to the mediator’s role in giving the negotiation process friendly/cooperative terms instead of competitive/distributive ones. There is evidence that the participants of the prisoner’s dilemma game⁷⁶² become more cooperative when the conductor of the game describes it as the “community game” rather than when she describes it as the “Wall Street game”.⁷⁶³ Therefore, when the mediator encourages terms such as discussion, conversation, and dialogue process, instead of negotiation, brokering, and bargaining, this might foster an atmosphere of collaboration and understanding. Furthermore, knowing more about the counterpart’s preferences and interests shall mitigate the influence of egocentrism, and encourage the party to consider others’ positions as she will face, and admit, the fact that they are not the only players in the game.

In the Remedial Actions List⁷⁶⁴ there are several tools to apply, one being adopting the role of “Devil’s Advocate” by the mediator.⁷⁶⁵ When one or more party is experiencing egocentric bias, she might need a person who can “play the skeptical role as vigorously as possible.”⁷⁶⁶ By playing this role, the party will see her claim in a new light, one that focuses only on arguments that go against the logic of the egocentric bias. Therefore, the mediator shall help in balancing the biased party, to become freed from

761 *ibid.*

762 About Prisoner’s Dilemma see: P Gumpert, M Deutsch, and Y Epstein, ‘Effect of Incentive Magnitude on Cooperation in the Prisoner’s Dilemma Game’ (1969) 11 *Journal of Personality and Social Psychology* 66 <<https://doi.org/10.1037/h0027030>> accessed 6 Apr 2021.

763 V Liberman, S M Samuels, and L Ross, ‘The Name of the Game: Predictive Power of Reputations Versus Situational Labels in Determining Prisoner’s Dilemma Game Moves’ (2004) 30 *Personality & Social Psychology Bulletin* 1175 <<https://doi.org/10.1177/0146167204264004>> accessed 6 Apr 2021, 1176.

764 R Adler, ‘Flawed Thinking: Addressing Decision Biases in Negotiation,’ (2005) 20 *Ohio State Journal on Dispute Resolution* 683.

765 *ibid* 765.

766 *ibid.*

this bias. Another action from the remedial list is helping parties release emotions⁷⁶⁷ and avoid stifling emotional outbursts, especially when these outbursts accompany a biased move (for instance anger that erupts while vigorously defending an egocentric position, or the fear or anxiety that might accompany safety bias ...etc.) When the mediator helps parties acknowledge these emotions and legitimate them, parties shall become aware of the feeling and the bias that fed that feeling, because “most negotiators are not aware of the existence of cognitive biases and their deleterious effects.”⁷⁶⁸ Such self-awareness should help parties reach self-control⁷⁶⁹ of these emotions and biases.

Both lists can inspire us while exploring fallacies and discussing the possible ways to mitigate their effects on mediation, as from now on we shall focus only on fallacies and on the mediator’s role in dealing with their effects on mediation efficiency and quality. However, before moving to fallacies, we have to mention two caveats that surround the concepts we have explored around biases.

Firstly, in spite the fact that biases are generally harmful, leading to flawed thinking and errant decisions, biases “can improve decision making. Under conditions of uncertainty and asymmetric costs of ‘false-positive’ and ‘false-negative’ errors, biases can lead to mistakes in one direction but – in so doing – steer us away from more costly mistakes in the other direction. For example, we sometimes think sticks are snakes (which is harmless), but rarely that snakes are sticks (which can be deadly).”⁷⁷⁰ Furthermore, biases can be conceived as adaptive and helpful, such as heuristics, as “they enable people to make quick, efficient judgments and decisions with minimal cognitive effort.”⁷⁷¹ However, at the same time, and similarly to heuristics, they can

767 Fisher, Ury and Patton (n 22) 30.

768 Thompson and Lucas (n 719).

769 For more about the relation between the self-awareness and self-control of emotions see: D Goleman, *Emotional Intelligence: Why it can Matter more than IQ* (Bloomsbury 1996).

770 D D P Johnson and others, ‘The Evolution of Error: Error Management, Cognitive Constraints, and Adaptive Decision-Making Biases’ (2013) 28 *Trends in Ecology & Evolution* 474 <<https://doi.org/10.1016/j.tree.2013.05.014>> accessed 6 Apr 2021, 474.

771 Halvorson and Rock (n 714).

“blind a person to new information, or inhibit someone from considering valuable options when making an important decision.”⁷⁷² Therefore, we believe that the deleterious effects of biases still outweigh their useful impacts, as continuing to run away from sticks shall make life hard, while learning about snakes shall help to avoid the damaging effects of the rare chances of meeting them. Nevertheless, the benefits of this learning and its efficiency in avoiding submitting to biases is questionable, which is the second caveat.

The second caution is regarding the usefulness of making parties aware of their biases. It has been argued that educating parties about biases has no guarantee in reducing their influences.⁷⁷³ However, we believe that detecting biases and making parties aware of them can help mitigate their deleterious effects.⁷⁷⁴ Such education is expected to come from the third party as her assistance can include, and shall include, we argue, making parties aware of their own biases.

4.2.3 Fallacies

While fallacies are deviations from logic, like both heuristics and biases, they are more closely attached to the formulation of the argument itself, as they directly defy the known logical steps in reasoning and building arguments.

While biases are “subjective” inclinations to make a given decision, fallacies are faults in reaching this decision, and these faults can be tracked and assessed “objectively”. However, these objectively assessable reasoning faults (fallacies), are usually results of those subjective inclinations (biases). Thus, while biases often result from using heuristics,⁷⁷⁵ fallacies often result from the use of biases.

⁷⁷² *ibid.*

⁷⁷³ *ibid.*

⁷⁷⁴ Thompson and Lucas (n 719).

⁷⁷⁵ Schirrmeister, Göhring, and Warnke (n 711) 1.

In the next chapter we shall explore the concept of fallacies, their definition, types, common examples, and most importantly their effects on the mediation process in terms of efficiency and quality. We will revisit the values of mediation that we introduced in Chapter Two of this thesis in order to examine the expected harms which fallacies could potentially cause to parties' self-determination, informed consent, and fairness.

Chapter Five

Logical Fallacies in The Mediation Room: The Unwanted Harms

*We are all guilty of fallacious arguments.*⁷⁷⁶

In the last chapter, we explored logic as a form of scholarship that guides, or should guide, our thinking, reasoning, and decision making. However, we have learned that what we called “substitute logic” has always been there, displacing logic, encouraging mental shortcuts, and urging us, every day, to deviate from the central persuasion route to the peripheral one. Under the label of “substitute logic”, we explored heuristics and biases, viewed their definitions, investigated their mechanisms, and, particularly for biases, examined their typology and studied the suggested mitigation strategies that can be used to avoid the anticipated harms they might cause to our thinking.

Fallacies are the third item to be examined in this category. We prefer discussing them independently in this chapter, as they are of central importance for our thesis, require further exploration and deeper examination of their definition, and better understanding of their nature, types, mechanism, and the anticipated harms they might cause to mediation as a process, as well as to mediators as practitioners.

There are a number of challenges in studying fallacies. One of these hurdles is that “we have no theory of fallacy at all, in the sense in which we have theories of correct reasoning or inference.”⁷⁷⁷ Furthermore, most of the existing books and papers in the scholarship on fallacies are influenced by each other and repeating the old approaches, as “after two millennia of active study of logic and, in particular, after over half of that most iconoclastic of centuries, the twentieth A.D., we still find fallacies classified, presented and studied in much the same old way.”⁷⁷⁸ However, exploring this long history of fallacies studies indicates that this topic enjoys a remarkable extent of continuity, as “despite the waves of disinterest and rebellion that phase and punctuate it, and despite fundamental changes in logical doctrine, the tradition has been

⁷⁷⁶ S Binoy, ‘Logical Fallacies in Public Discourse and Law’ (2014) 49 Economic and Political Weekly 24 <<http://www.jstor.org/stable/24480818>> accessed 2 Nov 2021, 27.

⁷⁷⁷ Hamblin (n 3) 11.

⁷⁷⁸ *ibid* 9.

unquenchable. The lesson of this must be that there is something of importance in it.”⁷⁷⁹ In spite of this importance, scholarship on dispute resolution has not paid enough attention to fallacies. When it comes to comparing fallacies to biases presence in the mediation library, we can easily notice how rarely, if ever, a researcher can find a book or a paper that discusses the scenario of fallacies being present in the mediation room.

While, like both heuristics and biases, fallacies are deviations from logic, they are more closely attached to the formulation of the argument, as they directly defy the necessary logical steps in reasoning and building arguments. Furthermore, while biases are subjective inclinations which lead us to make a given decision, fallacies are faults in reaching this decision, faults which can be tracked and assessed objectively. Below in this chapter, we shall explore the concept of fallacies, their definition, types, common examples, mechanisms, and, most importantly, their effects on mediation and mediators.

5.1 Fallacies definition

*Two competing conceptions of fallacies are that they are false but popular beliefs and that they are deceptively bad arguments.*⁷⁸⁰

It seems indispensable at the beginning of this section to draw a clear border between the ‘argument’ and ‘belief’ conceptions of fallacies, because scholars who have given the most academic attention to the scholarship of fallacies have preferred the argument conception, while the belief conception of fallacies is more obviously prevalent in laypersons’ use, and most common in non-scholarly

⁷⁷⁹ ibid 190.

⁷⁸⁰ H Hansen, ‘Fallacies’, *The Stanford Encyclopaedia of Philosophy* (Summer edn, 2020) <<https://plato.stanford.edu/archives/sum2020/entries/fallacies/>> accessed 2 Nov 2021.

discussions.⁷⁸¹ Once this distinction is achieved, we shall then be able to proceed to given definitions of fallacies with a clear vision.

Most general dictionaries refer primarily, and sometimes solely, to the “belief conception” of fallacies. For instance, in the Cambridge Dictionary, a fallacy is “an idea that a lot of people think is true but is in fact false” and it is a “a false belief.”⁷⁸² While other dictionaries keep referring primarily to these definitions, there is still reference to the “argument conception” of fallacies, as it is known in logical studies, for example in Merriam Webster, which begins by defining ‘fallacy’ as a “false or mistaken idea”, and then adds the argument conception: “an often plausible argument using false or invalid inference,”⁷⁸³ or in the Oxford Dictionary, where, after raising the common conception of fallacy as a “false idea that many people believe is true,” it states that fallacy is also a “a false way of thinking about something.”⁷⁸⁴ While the Collins Dictionary follows Merriam Webster and Oxford in mentioning the two concepts, Collins articulates its definition by labelling it as “logic”, which gives a scholarly aspect, by defining it as “an error in reasoning that renders an argument logically invalid.”⁷⁸⁵

Thus, we now have the common concept of fallacies as a wrong/false belief, and the scholarly concept, which conceives of it as a logical term. From now on we shall only employ the scholarly, or logical, aspect of the term ‘fallacy’. According to the argument conception, fallacy, or “logical fallacy” is a mistake in reasoning, a fault in an argument⁷⁸⁶, or a “deceptive error of thinking”.⁷⁸⁷ Fallacies, in other words, are arguments that might seem valid but that are not, or as Hamblin has stated, “[a] fallacious argument, as almost every account from Aristotle onwards tells you, is one

781 *ibid.*

782 <https://dictionary.cambridge.org/dictionary/english/fallacy>, accessed 2 Nov 2021.

783 See: <<https://www.merriam-webster.com/dictionary/fallacy>> and in elaboration, the dictionary adds in the same entry: “Philosophers are constantly using the word fallacy. For them, a fallacy is reasoning that comes to a conclusion without the evidence to support it. This may have to do with pure logic, with the assumptions that the argument is based on, or with the way words are used, especially if they don't keep exactly the same meaning throughout the argument”, accessed 2 Nov 2021.

784 See: <<https://www.oxfordlearnersdictionaries.com/definition/english/fallacy>> accessed 2 Nov 2021.

785 See: <<https://www.collinsdictionary.com/dictionary/english/fallacy>> accessed 2 Nov 2021.

786 D N Walton, ‘Why is the “ad Populum” a Fallacy?’ (1980) 13 *Philosophy & Rhetoric* 264 <<http://www.jstor.org/stable/40237163>> accessed 2 Nov 2021, 265.

787 H J Gensler, *Introduction to Logic* (2nd ed, Routledge 2010) 59.

seems to be valid but is not so.”⁷⁸⁸ This nature of fallacies is of central significance, because fallacies are, basically, mistakes in our reasoning which typically do not look like common lies or false statements, and which often manage to mislead people. Indeed, the term fallacy itself “comes from “to deceive” or “deceitful” in Latin and Old French.”⁷⁸⁹ However, while this deceptiveness may be unintentional, from a scholarly point of view, it “doesn’t matter whether the mistake was intended or not; a mistake is a mistake, regardless of the arguer’s intention.”⁷⁹⁰ That’s why it might be better to follow a more cautious definition of fallacies, which conceives of them as “discussion moves that violate in a particular way a particular rule for critical discussion that applies to a particular stage of the discussion.”⁷⁹¹ Indeed, because fallacies usually appear superficially correct and persuasive, it may be necessary to classify, identify, and unmask them.

However, before proceeding to the typology and mechanism of fallacies, it might be useful to differentiate fallacies from other concepts they might be confused with; namely, biases, negotiation tactics, and pure deception.

5.2 Fallacies and possible overlapping concepts

In the previous chapter we explored the concept of bias and the relationship between heuristics and bias. Here we need to investigate the possible links, and significant differences between biases and fallacies. Similarly, there is some intersection between both fallacies and negotiation tactics. Finally, the deceptiveness feature of fallacies requires the drawing of clearer borders between fallacies as reasoning errors, and pure deception, as a contested topic that often comes accompanied by ethical debates.

788 Hamblin (n 3) 12, and in quite similar wording, Whately stated that “By a fallacy is commonly understood “any unsound mode of arguing, which appears to demand our conviction, and to be decisive of the question in hand, when in fairness it is not”” see: R Whately, *Elements of Logic* (Parker and Son 1857) 163.

789 T E Damer, *Attacking Faulty Reasoning: A Practical Guide to Fallacy-Free Arguments* (Wadsworth Cengage Learning 2013) 52.

790 *ibid* 52.

791 F H Eemeren and P Houtlosser, ‘The Development of the Pragma-Dialectical Approach to Argumentation’ (2003) 17 *Argumentation* 387 <<https://doi.org/10.1023/A:1026338402751>> accessed 5 Nov 2021, 389.

5.2.1 Fallacies and biases

Both biases and fallacies are traces of flaws in thinking and errors in decision-making, which can be attributed to personality traits, the influence of identity, or insufficiencies in logical abilities.⁷⁹² However, these two concepts shall not be regarded as synonyms, even if they have quite similar sources and influences. The distinction between them can be stated by conceiving of biases as “only tendencies to think in a certain way that might deviate one's judgment. On the other hand, fallacies refer to wrong and irrational outcomes of an inaccurate mental modeling.”⁷⁹³ Such tendencies are inclinations that can produce logical fallacies, and this interrelationship might be the reason behind the possible confusion between the two terms. A person approaching a situation from a biased perspective is exposed to committing a fallacy that helps her live with her bias and persuade others that she is not biased. For example, when a negotiator is experiencing a Fundamental Attribution Error,⁷⁹⁴ (supposing that our errors happen because of external circumstances, while others' mistakes are due to their personality traits), she is on her way to committing the Ad Hominem fallacy⁷⁹⁵, which she may employ to influence the other party and persuade her that she is responsible for her action as she undertook it, because she is negligent or lazy rather than any possible external reason. In such a situation, the party who accepts the fallacy might notice the fallacy but not the bias behind it. Therefore, the relationship between biases and fallacies can be conceived as a causative relationship in which biases lead to fallacies and pave the way to their occurrence.

Furthermore, and most importantly, even if biases and fallacies are both deviations from logic, fallacies are more closely attached to the formulation of the argument and more engaged with the construction of the negotiation conversation. This allows the

792 See the disputant triangle in Chapter Three of this thesis.

793 S Demir, M Kumral, and D Komljenovic, 'Effects of Cognitive and Motivational Biases on Mine Safety' (The International Symposium on Occupational Health and Safety in Mining, Adana, 2-3 November 2017) <<https://www.mustafa-kumral.research.mcgill.ca/publications.html>> accessed 5 Nov 2021.

794 See: Ross (n 734) and Harvey, Town, and Yarkin (n 734).

795 We will explore this fallacy thoroughly later on this chapter.

fallacy recipient to assess it objectively, as it is an aspect of the argument her counterpart has articulated and used, whether in spoken or written form, while her underlying bias is a subjective matter that might not be objectively assessed. Moreover, where bias is a hidden inclination that might face challenges in evidencing and investigating, logic scholarship offers numerous studies - as we will see later in this chapter - that cover a wide range of fallacies, classified, analysed, and precisely articulated in clear forms that can be tracked through quotidian use of language. This objective assessability of fallacies was one of the reasons behind selecting them over biases and heuristics to be the main theme in this thesis, as we needed a concept that is capable of being evaluated critically and tracked through tangible texts, which is not the case with biases as they are, ultimately, second guesses that might not be easily proven, or even denied with sufficient evidence. To sum up, in simple wording, biases are internal inclinations with possible external signs, but fallacies are expressed flawed arguments that are -mainly- results of those internal inclinations, and tangible evidence of their occurrence.

5.2.2 Fallacies and negotiation tactics

The second concept that needs to be distinguished from fallacies is negotiation tactics. One of negotiation's definitions perceives it as "a process of *potentially opportunistic* interaction by which two or more parties, with some apparent conflict, seek to do better through jointly decided action than they could otherwise".⁷⁹⁶ Such potential in negotiation explains how deep negotiation tactics have been entrenched in the concept itself. Negotiation tactics, in the simplest definition, are planned moves which negotiating parties use in order to "achieve the best possible outcome for their side."⁷⁹⁷ Essentially, because the potentially opportunistic nature of negotiation is more evident in competitive negotiation⁷⁹⁸, tactics are more frequent in this negotiation approach.

796 D A Lax and J K Sebenius, *The Manager as Negotiator* (Free Press 1986) 11.

797 R J Lewicki and R J Robinson, 'Ethical and Unethical Bargaining Tactics: An Empirical Study' (1998) 17 *Journal of Business Ethics* 665 <<http://www.jstor.org/stable/25073113>> accessed 5 Nov 2021, 665.

798 See Chapter One of this thesis, negotiation typology.

However, with this potentially expected opportunistic nature of negotiation, the use of negotiation tactics opens the gate for several questions about the morality of these tactics, and to what extent using them in the negotiation process can be compatible with so called “negotiation ethics”. Ethics in general refer to “the moral principles or values that govern a group of people, which are used to distinguish "right" from "wrong," and thereby guide individuals in their personal and professional decision making.”⁷⁹⁹ In the negotiation context, there are a wide range of negotiation tactics, strategies, and behaviours that can be placed on a “continuum of "ethically appropriate" to "ethically inappropriate”.

Negotiation tactics at the first end of this spectrum can be viewed as morally acceptable and widely common in negotiation sessions, even if they may require a marginal degree of dishonesty. Tactics at the opposite end of the spectrum can be judged as morally inappropriate and very difficult to justify or defend. Between these two polar ends, there is a “grey area”, or a middle ground, in which negotiation tactics are perceived as relatively unethical, defensible under some conditions but not others, and, finally, unclear in regard to their moral appropriateness.⁸⁰⁰ The ethically accepted tactics can include hiding a negotiator’s bottom line, exaggerating claims, or pretending not to be at ease with the timescale for decision-making.⁸⁰¹ Unethical moves might include “misrepresenting information, bluffing, or influencing an opponent's professional network (e.g., encouraging colleagues to defect to your side, paying others for information).”⁸⁰² Although the main criteria here is the extent to which these unethical tactics either infringe the known measures of truth telling or defy the agreed rules and morals of negotiation,⁸⁰³ these criteria are influenced by the context of each negotiation, which includes the time constraints, the location of the process, and the presence of well-equipped representatives.⁸⁰⁴ However, this

799 R J Volkema and M T L Fleury, ‘Alternative Negotiating Conditions and the Choice of Negotiation Tactics: A Cross-Cultural Comparison’ (2002) 36 *Journal of Business Ethics*, 381 <<http://www.jstor.org/stable/25074723>> accessed 5 Nov 2021, 382.

800 Lewicki and Robinson (n 797) 666.

801 Volkema and Fleury (n 799) 383.

802 *ibid.*

803 Lewicki and Robinson (n 797) 665.

804 Volkema and Fleury (n 799) 383.

continuum cannot avoid leaving a “grey area” that adds vagueness and fluidity to the concept, and causes difficulties in judging and evaluating the morality and acceptability of negotiation tactics.⁸⁰⁵

From the above discussion we can state that negotiation tactics have two main connected features; they are planned to influence the other party in order to achieve positional gains, and, because they are intentional, they shall be measured by an ethical scale that takes into consideration the cultural and moral atmosphere that surrounds the negotiation process.

However, on the other hand, fallacies, firstly, can be committed deliberately, in order to deceive the audience, and can also be committed involuntarily by an honest arguer,⁸⁰⁶ who is “blind to weaknesses”⁸⁰⁷ in her argument. Secondly, the moral scale mentioned above in order to judge the acceptability of negotiation tactics is not what we primarily use to investigate and weigh a fallacy, because whether fallacies are intentional or unintentional shouldn’t really matter when it comes to analysing the argument itself and labelling it as a fallacy. What should matter here is “the logical weakness in the argument, or some fault in the pattern of argumentation.”⁸⁰⁸

This objective measurability nature of fallacies was one of the incentives for choosing them as a main theme in our thesis. The feasibility of applying logical criteria makes tracking and weighing fallacies more suitable for this research in that tries to add increased assessability to the field of mediation and negotiation.

805 Lewicki and Robinson (n 797) 665.

806 V Correia, ‘Biases and Fallacies: The Role of Motivated Irrationality in Fallacious Reasoning’ (2011) 3 Cogency Journal of Reasoning and Argumentation 107 <<https://philpapers.org/archive/CORBAF-2.pdf>> accessed 5 Nov 2021, 108.

807 D Walton, ‘Defeasible Reasoning and Informal Fallacies’ (2011) 179 Synthese (Dordrecht) 377 <<https://doi.org/10.1007/s11229-009-9657-y>> accessed 5 Nov 2021, 379-380.

808 *ibid.*

5.2.3 Fallacies and deception

*We should not take deception to be part of the definition of fallacy.*⁸⁰⁹

Deception, like tactics, are both intentional, and target the opponents' willingness to give concessions that benefit the deceiver or the tactic user, while fallacies, as stated above, are not always deliberate moves. A fallacy, in many cases, "is merely a blunder or an error, while in other cases, it is a sophistical tactic used to try to get the best of a speech partner in dialog unfairly, typically by using verbal deception or trickery."⁸¹⁰

Deception is a more general concept than tactics, as it "pervades our interpersonal interactions in negotiations, organizations, and our social lives."⁸¹¹ However, it is more closely linked to dishonesty and illegality, even by dictionary definitions.⁸¹² This illegal/dishonest nature of deception brings up again the ethical criteria in the equation, and recalls the main difference between fallacies and tactics; that logical mistakes and flaws in arguments are what matter most when investigating fallacies, while ethics, morals, and questions of fairness prevail in studies of both deception and negotiation tactics.⁸¹³ This is not to underestimate the unethical nature of intentional fallacies, however, this characteristic is not what makes them fallacies, but rather the manner in which they are articulated and drafted.

This discussion shall make the third-party intervention in order to to mitigate/attack fallacy more systematic, and safer. It is systematic because fallacies', their

809 C Tindale, *Fallacies and Argument Appraisal* (Cambridge University Press 2007) 15.

810 Walton (n 807) 379.

811 J P Gaspar, R Methasani, and M Schweitzer, 'Fifty Shades of Deception: Characteristics and Consequences of Lying in Negotiations' (2019) 33 *Academy of Management Perspectives*, 62 <<https://doi.org/10.5465/amp.2017.0047>> accessed 5 Nov 2021, 63.

812 See: <<https://dictionary.cambridge.org/dictionary/english/deception>, and <https://www.merriam-webster.com/dictionary/deception>> accessed 5 Nov 2021.

813 See: Walton (n 807), Tindale (n 809), and Volkema and Fleury (n 799).

mechanisms and mitigation approaches have been thoroughly discussed and developed in logic studies,⁸¹⁴ which have offered enclosed classifications, categories, and forms of fallacies that shall make the mediator's job in tracking and helping negotiating parties mitigate them become increasingly governed and guided by clear rules and tools. Additionally, it is safer, because raising a discussion about committing a fallacy is not a threat or loss of face to the party who might commit the fallacy, as there is no accusation of any unethical or immoral endeavor which can be attached to this party. However, there is still a possibility of losing face for the party who is being labelled as "unable to articulate a strong argument", as there is a possibility of embarrassment here, but it can't be compared to the situation where she is accused of dishonesty or immorality. However, this embarrassment can be minimised by using the proposed strategies we present in the next two chapters of this thesis. Accordingly, the neutral party who tries to attack the fallacy can, to some extent, avoid risking the rapport she built with this very party. However, being systematic and safe in mitigating/attacking fallacies depends on the approach the mediator follows, as well as the preparation she receives, which shall be proposed and discussed thoroughly in the last chapter, but before doing this, we need to learn more about fallacies, their typology, mechanism, and most importantly, the way in which they harm mediation, justifying the need for proposing new frameworks for mediators to take.

5.3 Fallacies typology

Classification is sometimes a useful preliminary in dealing with unstudied material, and sometimes -not always - it is the upshot of a successful investigation.

*Hamblin.*⁸¹⁵

⁸¹⁴ We shall resort to these studies later on this thesis.

⁸¹⁵ Hamblin (n 3) 191.

Ultimately, according to Hamblin, “In fact, though everyone has his classification, it is commonly argued that it is impossible to classify fallacies at all.”⁸¹⁶ In spite of this difficulty in trying to classify fallacies into clear investigable categories, these attempts have never stopped, and are still ongoing. In this section we shall refer to three known classifications in order to proceed with one of them, the one that is supposed to offer a better help in identifying, understanding, and mitigating fallacies.

The first typology of fallacies was introduced by Aristotle, as he classified fallacies into “those Dependant on Language and those Outside Language.”⁸¹⁷ The first group that depends on language are known as *in dictione* fallacies, and the other group as *extra dictionem*.⁸¹⁸ However, this classic approach has been criticised, in terms of lacking sufficient foundations to offer analytical standards for all fallacies.⁸¹⁹ This insufficiency comes from not presenting satisfactory information about the gravity of the consequences of the two listed types of fallacies, which require coherent frameworks, and a clear plan for dealing with these fallacies.⁸²⁰

The second classification, introduced by Whately, is the division of fallacies into logical fallacies and non-logical fallacies.⁸²¹ Logical fallacies, known later as formal fallacies, encompass all fallacies which have flaws in their logical structure that lead to invalid reasoning. On the other hand, non-logical fallacies (material fallacies), known later as informal fallacies, refer to the kinds of arguments that can be “psychologically persuasive but logically incorrect; that do as a matter of fact persuade but, given certain argumentative standards, shouldn’t.”⁸²² What is wrong with informal fallacies is “some-thing in their semantics or in their strategy, not so much in their

816 *ibid* 13.

817 *ibid*.

818 F H Eemeren, R Grootendorst, and T Kruiger, *Handbook of Argumentation Theory* (Foris 1987) 79.

819 U Hahn and M Oaksford, ‘A Bayesian Approach to Informal Argument Fallacies’ (2006) 152 *Synthese* 207 <<http://www.jstor.org/stable/27653391>> accessed 5 Nov 2021.

820 P I Hurley and L A Watson, *Concise Introduction to Logic*. (13th ed, Cengage Learning 2018).

821 Whately (n 788) 174.

822 I M Copi and K B Jackson, *Informal Logic* (Prentice Hall 1995) 97.

essential structure or form.”⁸²³ However, this classification has been criticised for including in its given categories “not only arguments that are weak or incomplete, but even instances of argument that are basically correct and reasonable as mechanisms of argument in persuasion dialogue.”⁸²⁴ Moreover, this categorisation doesn’t offer sufficient explanation of the rhetorical and dialectical contexts in which different types of fallacies arise.⁸²⁵ Such lack of certainty, inclusivity, and clarity prompts us to attempt a different classification that would be able to produce an accessible framework, supported by everyday examples which shall help us identify fallacies, evaluate them, and, most importantly for this thesis, provide adequate strategies that shall help in mitigating each example in this framework.

The third typology, introduced by Edward Damer, can, we believe, help in producing a clear usable strategy in identifying, understanding, and mitigating fallacies. In his book “Attacking Faulty Reasoning, a Practical Guide to Fallacy-Free Arguments”⁸²⁶, Damer tries to set a reliable framework that would help laypersons in treating fallacies, using simple examples from daily life to counter any faulty arguments they might face.

Damer’s framework starts from a base point through identifying the five essential elements of a flawless argument, by stating that “there are five criteria of a good argument. It must have: a well-formed structure, premises that are relevant to the truth of the conclusion, premises that are acceptable to a reasonable person, premises that together constitute sufficient grounds for the truth of the conclusion, and premises that provide an effective rebuttal to all anticipated criticisms of the argument.”⁸²⁷ By contrast, he proceeds, a fallacy is a violation of one or more of these criteria, as it has to be a product of one of the following:

823 L Floridi, ‘Logical Fallacies as Informational Shortcuts’ (2009) 167 *Synthese* 317 <<http://www.jstor.org/stable/40271193>> accessed 5 Nov 2021, 318.

824 D Walton, *Informal Logic: A Pragmatic Approach* (Cambridge University Press 2008) 15.

825 See: Tindale (n 809).

826 Damer (n 789).

827 *ibid* 30.

A structural flaw in the argument

A premise that is irrelevant to the conclusion

A premise that fails to meet the standards of acceptability

A set of premises that together are insufficient to establish the argument's conclusion

A failure to give an effective rebuttal to the anticipated criticisms of the argument.⁸²⁸

Below, we shall explore Damer's elaboration of these five categories by visiting his explanation of each category, analysing one example of the fallacies which represent that category, and his suggested mitigation/attacking strategies in order to disarm such fallacies and avoid any anticipated harms that might negatively influence ongoing everyday conversation.

5.3.1 Fallacies that violate the structural criterion⁸²⁹

The first criterion Damer used to label an argument as a good one is that of being structurally sound. This means that it has both to work and look like an argument, and its formulation must demonstrate that "the conclusion either follows necessarily from its premises, in the case of deductive arguments, or follows probably from its premises, in the case of inductive arguments."⁸³⁰ In order to achieve this, it must "not use reasons that contradict each other, that contradict the conclusion, or that explicitly or implicitly assume the truth of the conclusion. Neither does it draw any invalid deductive inferences."⁸³¹ The flaw in all fallacies that take place in this category is structural,

⁸²⁸ *ibid* 51.

⁸²⁹ *ibid* 62.

⁸³⁰ *ibid* 31.

⁸³¹ *ibid*.

“because discovering it does not derive from any knowledge of the argument’s content. If symbols were substituted for each of the main parts of the argument, we would see only the form or structure of the argument. By looking solely at that structure, one could determine that it would be inappropriate to draw any conclusion from the argument’s premises.”⁸³²

One of the widely known examples of these fallacies is the “Arguing in a Circle Fallacy” or “Circular Argument”, which occurs when the given premises attempt to presume, covertly or openly, the same conclusion the arguer wants us to reach⁸³³ Here the arguer asserts, explicitly or implicitly, the premises of the given argument, which she asserts in the conclusion of the same argument. Here is an example of how such a fallacy usually goes:⁸³⁴

Dylan: This college is very paternalistic in its student policies.

Roman: What reasons do you have for saying that?

Dylan: Because they treat the students like children.

In this fallacy, the arguer didn’t give any reason for judging the college this way, they just explained their judgement, and instead of giving any proof or reason for using the word “paternalistic”, moved in a circle and just defined the term. Therefore, they considered their conclusion as a part of the necessary evidence, so that the argument is incomplete, which is a structural flaw. The significance of noticing and labeling the structural fallacy, and any other fallacy, while it is being committed, is paving the way towards attacking it.

To attack the circular argument, the targeted victim of the fallacy shall explain to the fallacy committer that she didn’t complete her argument, but just repeated her premises

832 ibid 62-63.

833 See: <<https://www.britannica.com/topic/fallacy#ref1102387>> accessed 5 Nov 2021.

834 Damer (n 789) 64.

in different words. There is no need to make an assumption that the fallacy has been committed intentionally, as “whether it is intentional or unintentional doesn’t really matter.”⁸³⁵ The necessary result here is avoiding the fallacy’s possible harms, which might be creating an impasse in the conversation/negotiation (in case of not seeing the flaw in the argument, but being unpersuaded), escalating disagreement/conflict (in the case of perceiving the fallacious argument as a deceitful move), or, finally, creating an unjust outcome (in the case of not seeing the flaw in the argument, accepting its logic, and giving into according with this acceptance).⁸³⁶ Along with reconstructing this circular argument in a way that exposes the flaw to the committer, and showing her that she just used premises and a conclusion that are almost identical, there is another very common strategy in attacking this fallacy, which is by giving an absurd counterexample of the given argument. For instance, if the arguer stated that “swimming is entertaining because it produces lots of joy,” it must be clear to her counterpart that there is no claim established here.⁸³⁷ There is no need here to embarrass the fallacy committer, who might be genuinely persuaded that she is simply stating an obvious matter, as we just need to avoid the possible fallacy harms without provoking the committer’s hostility. In all cases, arguers shall always remember that the arguer’s personal convictions or beliefs concerning the accuracy or a truth of a given claim shall not be used as proof for the rightness of this claim.⁸³⁸ Such a reminder can be a useful early prevention tool that can be either set by the second party in the conversation/negotiation, or by a third party (e.g., the mediator) while practicing her role in educating the parties and setting the process rules, as we shall see in the next chapters.

5.3.2 Fallacies that violate the relevance criteria

The second requirement for having a good argument is to include reasons that present proofs and evidence for the merit or truth of the conclusion. In other words, the

⁸³⁵ Walton (n 807) 379-380.

⁸³⁶ We shall revisit these possible harms of fallacies later on this chapter.

⁸³⁷ Damer (n 789) 65.

⁸³⁸ *ibid* 65.

premises of the argument has to be relevant to the truth of the argument's outcome - the conclusion. A premise is considered irrelevant "if its acceptance has no bearing on, provides no evidence for, or has no connection to the truth or merit of the conclusion."⁸³⁹ Accordingly, the fallacies of the category of irrelevance "are those arguments that use premises that have no connection to or fail to give support to their conclusions."⁸⁴⁰

One of the very common fallacies in this category is the genetic fallacy, which refers to an argument in which the arguer is "judging the truth of an assertion on the basis of its source rather than by the evidence or argument available for it."⁸⁴¹ This is the fallacy of "confusing temporal or historical origin with logical nature."⁸⁴² The main flaw here is that the arguer is evaluating a person, subject, or item "in terms of its earlier context and then carrying over that evaluation to the thing in the present, while ignoring relevant changes that may have altered its character in the interim."⁸⁴³ Damer gives a good example of this fallacy:

You're not going to wear a wedding ring, are you? Don't you know that the wedding ring originally symbolized the ankle chains women wore to prevent them from running away from their husbands? I wouldn't have thought you would be a party to such a sexist practice.⁸⁴⁴

Confusing the historical origin of the "wedding rings" with its current use and recalling all those irrelevant shades and surroundings of that old tradition composes a clear example of the genetic fallacy. The earlier context of this habit/tradition can't be carried over the centuries, ignoring all historical changes, anthropological evolution, and cultural transformations. The same mistake happens every day when parents

839 *ibid* 32.

840 *ibid* 93.

841 A Kaplan, *The Conduct of Inquiry: Methodology for Behavioural Sciences* (Routledge 2017) 13.

842 Hamblin (n 3) 45.

843 Damer (n 789) 93, and see also: Ward A C, 'The Value of Genetic Fallacies' (2010) 30 *Informal Logic* 1 <<https://doi.org/10.22329/il.v30i1.1237>> accessed 9 Dec 2021.

844 Damer (n 789) 94.

judge/treat their daughters and sons while carrying over all previous perceptions from former times when they were children and, accordingly, refuse to trust them in driving a car or running a business. This is fallacious because, basically, the significance of things in their origins can't necessarily be seen as relevant to what they should mean in the present, precisely, when those given things are no longer now like their origins.⁸⁴⁵

The difficulty in mitigating/attacking this fallacy is the strong emotional memories, impressions, and viewpoint which the arguer keeps, appreciates, and involuntarily recalls from the original context. However, it is crucial to attempt to eliminate such elements from our discussions about them. When the counterpart uses these considerations, it can be beneficial to ask her to separate the past context from the current one. A very common strategy in achieving this separation is to use "an absurd counterexample to convince another of the irrelevance of origins, try this: "you say that John is a great chef, but I remember how as a kid, he used to make pies out of mud. I'm not about to eat any food he prepares. There's no telling what might be in it." No person would consider John's mud-pie past as relevant to his present cooking skill, but the form of the argument is no different from many other arguments that some people unfortunately seem to find convincing." ⁸⁴⁶ Such separation between those considerations and the current context can be done by the other arguer in the conversation, or by a third neutral party.

5.3.3 Fallacies that violate the acceptability criteria

The third requirement for having a good argument is to include reasons that are most likely to be accepted by a rational, mature person, and to meet specific standard criteria that reach the meaning and applications of "acceptability."⁸⁴⁷ By standard criteria of acceptability, Damer means expressing one of these standards:⁸⁴⁸

⁸⁴⁵ *ibid* 93.

⁸⁴⁶ *ibid* 94-95.

⁸⁴⁷ *ibid* 120.

⁸⁴⁸ *ibid* 34-35.

1. A claim that is a matter of undisputed common knowledge
2. A claim that is confirmed by one's personal experience or observation
3. A claim that is adequately defended in the context of the argument, or at least is capable of being adequately defended by some other accessible source
4. An uncontroverted eyewitness testimony
5. An uncontroverted claim from a relevant authority
6. The conclusion of another good argument
7. A relatively minor claim that seems to be a reasonable assumption in the context of the argument

The premises of the fallacies in this category either fail to meet any of the above acceptability standards, or confronts one of them. The significance of the main concept of this category comes from the nature of the arguments, as in most argumentative conversations, the main barrier to reaching an agreement on the targeted conclusion is establishing acceptance of the given premises. The arguer usually begins her argument by introducing premises that are likely to be accepted by any rational receiver. Upon this acceptance, assuming that all other good argument criteria – as stated above- are fulfilled, the receiver is logically motivated to accept the conclusion.⁸⁴⁹

One of the very common fallacies in this category is “wishful thinking fallacy”. Wishful thinking is a “logical fallacy, depending on the agent's genuine beliefs as an epistemic dilemma or merely a harmless fantasy.”⁸⁵⁰ The arguers who commit this fallacy “desire and often hope for something with little or no evidence that it can be obtained or attained, or the evidence is misinterpreted or not examined.”⁸⁵¹ The arguer here has a strong belief or wish without any strong reason or evidence and, in spite of

⁸⁴⁹ *ibid.*

⁸⁵⁰ M Maller, 'The Best Essay Ever: The Fallacy of Wishful Thinking' (2013) 12 *Review of Contemporary Philosophy* 30 <<https://link.gale.com/apps/doc/A347404974/AONE?u=ustrath&sid=bookmark-AONE&xid=4ad72c42>> accessed 9 Dec 2021 30.

⁸⁵¹ *ibid.*

this, she continues arguing, relying on this “thinking” because her beliefs, desires, and hopes are strong, therefore she believes it will happen, and expects the other party in the conversation to accept this unsupported conclusion, asking that party to become fully persuaded by such a leap from wishes to reality. The fallacious element in wishful thinking is that the central premise relies on the assumption that the arguer’s own emotion or feelings about a specific claim, shall provide enough support for the merit or truth of this claim.⁸⁵² This does not mean that “the absence of emotion and feeling is no less damaging, no less capable of compromising the rationality that makes us distinctively human and allows us to decide in consonance with a sense of personal future, social convention, and moral principle.”⁸⁵³ The error begins when the emotions start to decide for us, and the fallacy constitutes what the arguer believes, and wants her opponent to believe, that these emotions about a particular claim are able to prove it’s truth.

In order to observe how this fallacy works, we look at this example: “My husband has been missing for more than ten years, but I know he’s still alive. He just couldn’t be dead.”⁸⁵⁴ The conclusion in this argument is not necessarily false, however, the given support is not adequate to prove it. Thus, this fallacy “doesn’t work directly, but by distorting the evidence to enable you to give too much credence to propositions you would like to be true, too little credence to propositions you would prefer to be untrue.”⁸⁵⁵ In order to attack this fallacy, the targeted arguer, or the third party, can offer strong evidence that supports a claim that is clearly contrary to the wished claim, then the fallacy committer can be asked to evaluate this counter evidence. Another way to mitigate the wishful thinking fallacy is to assume a conclusion that directly contradicts the fallacy committer’s conclusion, depending, solely, on a wish that contradicts the arguer’s wish. Here the fallacy committer shall notice that there are two contradicting conclusions, none of which has any acceptable evidence other than personal hopes and optimistic wishes. At this point, and because the two contradicting

852 Damer (n 789) 147.

853 Damasio (n 501) xii

854 Damer (n 789) 147.

855 S Haack, *Defending Science-Within Reason: Between Scientism and Cynicism* (Prometheus Books 2003) 292.

claims can't be both true at the same time, the two parties can try "a cooperative evaluation of independent evidence—evidence that has nothing at all to do with wishes."⁸⁵⁶

5.3.4 Fallacies that violate the sufficiency criterion

After assuring the listener that the argument is structurally sound, with relevant and acceptable premises, the arguer needs to fulfill the requirements of the fourth element of a good argument, namely, the sufficiency criterion.⁸⁵⁷ This principle is the most difficult one to apply, as there are no clear unified guidelines that can constitute sufficient basis for the merit or truth of a solid proofed conclusion. The lack of such a unified list of guidelines comes from the fact that argumentative situations and contexts are usually different. Accordingly, they shall create different demands for what can be considered to constitute sufficient proof. For instance, the sufficient grounds a voter uses to decide her chosen candidate in the elections are different from the grounds she uses to decide while buying a car.⁸⁵⁸ The fallacies in this category might have a proper structure, relevant premises, and rationally acceptable evidence, while the proof stated in these fallacious arguments are not sufficient in terms of persuading the other party that the conclusion represents the truth. The premise in the sufficiency violating fallacy is not enough to, solely, prove the rightness of the conclusion. Those premises might be insufficient in kind, number, or weight, which make them not strong enough to "establish the truth of the conclusion."⁸⁵⁹

One of the very common examples of the sufficiency criterion violating fallacy is the "Slippery Slope Fallacy." It has several different names such as "the thin edge of the wedge argument, the dam burst argument, the Pandora's box argument, the domino argument, the snowball argument and the camel's nose in the tent argument."⁸⁶⁰ The

856 Damer (n 789) 148.

857 *ibid* 36.

858 *ibid* 37.

859 *ibid* 160.

860 Walton D, 'Slippery Slope' in: Have H (ed), *Encyclopaedia of Global Bioethics* (1st ed, Springer 2015) 2623.

slippery slope fallacy can be defined as “one in which the agent initially has control over its actions and can still stop the descent towards the ultimate catastrophic outcome, but at some point loses control, so that after that point the catastrophic outcome has become inevitable.”⁸⁶¹ Thus, the slippery slope fallacy is a sort of prediction about what shall happen in the coming future, and is basically a gradual exaggeration that aims to claim that the predicted final outcome is inevitable, as it affirms that the agent shall lose control at some unknown point throughout the upcoming series of actions.⁸⁶² The fallacious aspect of this argument is that the arguer doesn’t give sufficient evidence that the agent will definitely lose control, and that the claimed conclusion will undoubtedly occur. To show this fallacy in use, we can explore this example:

*If adult voluntary and consented assisted suicide is permitted, then our convictions about the wrongness of murder will be weakened, and we could slowly abandon our convictions against homicide, thereby progressively increasing the number of accepted exceptions: not only legitimate defence and other current legal justifications, but also mercy murder of very ill elder people, of very handicapped children, and so on.*⁸⁶³

In this argument there are three main elements: (1) An early, apparently acceptable decision and argument; (2) A dangerous event-a later decision and argument that are obviously unacceptable; (3) A “mechanism” or “process” by which accepting the early argument and taking the initial decision shall inevitably raise the possibility of accepting the subsequent argument and taking the latter decision.⁸⁶⁴

⁸⁶¹ *ibid* 2626.

⁸⁶² *ibid*.

⁸⁶³ J J Moreso, ‘The Uses of Slippery Slope Argument’ in: Bustamante T and Dahlman C (eds), *Argument Types and Fallacies in Legal Argumentation* (1st ed, Springer 2015).

⁸⁶⁴ M J Rizzo and D G Whitman, ‘The Camel’s Nose is in the Tent: Rules, Theories, and Slippery Slopes’ (2003) 51 *UCLA Law Review* 539, 544.

In order to mitigate/attack the slippery slope fallacy, it can be useful to ask the arguer who uses it to present an autonomous explanation for every event of the series of her claimed events.⁸⁶⁵ Such an explanation might be sufficient in supporting a number of the steps to the slope, but not the whole series. At some point, the arguer shall realise that the later unacceptable conclusion can't naturally be justified. Another tactic the other, or neutral party, can apply is using an absurd counterexample, that contains a series of obviously disconnected events which lead to an end that no one could accept as an inevitable necessary conclusion to the given initial event in this series. For instance, she can suggest that if she uses a credit card in shopping, she shall quickly purchase more than she can afford, then won't be ready to pay her bills, her bank will retrieve her car because she is behind in her payments, she would lose her job as she wouldn't be able to go to her workplace, and she will be consequently unhappy enough to the extent that she would kill herself—all because she used that credit card.⁸⁶⁶ By giving such a counterexample, the fallacy committer shall see clearly that there is no reason to believe that just by using a credit card, the card user will necessarily consequently commit suicide, and her mind will see the link between this absurd counterexample and her fallacious argument. This would provoke her mind to use analogy to discover, within her own argument, the error in her claim.

5.3.5 Fallacies that violate the rebuttal criterion

The final and most critical requirement for a good argument is the rebuttal criterion. In order to meet this requirement, the argument has to comprise all expected proper criticisms of the given argument that might be used against this argument or shall contradict the position it attempts to support.⁸⁶⁷ There are three deviations from this criterion that shall turn a good argument into a fallacious one. Firstly, the arguer might deny or ignore the counterevidence that the other party uses or might use (fallacies of counterevidence). Secondly, where the arguer attacks the person behind the criticism instead of addressing, discussing, and rebutting the criticism itself (*ad hominem*

⁸⁶⁵ Damer (n 789) 186.

⁸⁶⁶ *ibid.*

⁸⁶⁷ *ibid* 38.

fallacies). Finally, the arguer might attempt to divert attention away from the weakness of her argument or from the strength of the opponent's criticism by directing the audience's attention away from the original topic, as happens frequently in political debates when a politician uses a straw man fallacy⁸⁶⁸ by misrepresenting her opponent's argument or position, in order to make it easier for her to attack (fallacies of diversion).⁸⁶⁹

The most known application of the rebuttal criterion is the ad hominem fallacy. An ad hominem fallacy can be defined as "an error in reasoning in which an interlocutor attacks a person making an argument rather than the argument being made,"⁸⁷⁰ or "attacking the personal trustworthiness of the arguer in an attempt to rebut her arguments."⁸⁷¹ We will discuss here the ad hominem fallacy as it is of special significance in the context of negotiation and mediation. The importance of this comes from the fact that attacking the person, instead of her argument, constitutes possible psychological coercion, because directing "ad hominem criticism at the person with whom I am negotiating. I may believe that by focusing my attention on you rather than on our substantive differences, I will coerce you into giving in."⁸⁷² Such personal attacks are simply designed to put "psychological pressure on the will of the negotiating partner. All such tactics will feel coercive and tend to damage the ability of the people to work together in the future."⁸⁷³

One of very clear and illustrative example of the ad hominem fallacy with simple analysis is presented by Damer as follows:⁸⁷⁴

868 For more about the straw man fallacy see: T Herman and S Oswald, 'Pragmatics, Cognitive Heuristics and the Straw Man Fallacy' in: Herman T and Oswald S (eds), *Rhetoric and Cognition: Theoretical Perspectives and Persuasive Strategies* (Peter Lang 2014), and M Lewinski, and S Oswald, 'When and how do we Deal with Straw Men? A Normative and Cognitive Pragmatic Account' (2013) 59 *Journal of Pragmatics* 164 <<https://doi.org/10.1016/j.pragma.2013.05.001>> accessed 9 Dec 2021.

869 Damer (n 789) 193.

870 Yap (n 710) 19.

871 Binoy (n 776) 26.

872 R Fisher and S Brown, *Getting Together: Building Relationships as We Negotiate* (Penguin 1989) 139.

873 *ibid* 140.

874 Damer (n 789) 199.

“No wonder you think sexual promiscuity is all right. You know you’ve never had a really good relationship with a woman. So it’s not strange that you’d resort to recreational sex.” If we put this argument into standard form, the abusive ad hominem should become quite clear:

Since you think that sexual promiscuity is morally acceptable, (premise) and
you have never had a good relationship with a woman, (premise)

[and because your position stems from your own lack of a good sexual
experience,] (implicit premise)

[Therefore, your position or argument about sexual promiscuity is without
merit.] (implicit conclusion)

The arguer here, instead of addressing and discussing the merit and truth of her opponent’s statement about sexual promiscuity, uses what she thinks to be a shameful personal fact about her opponent as a persuasive reason to not logically engage with the opponent’s claim or argument, but rather “to abuse a person rather than rebut his or her criticisms or argument is a violation of the rebuttal criterion of a good argument. Therefore, the conclusion of the argument does not follow.”⁸⁷⁵

The main challenge in attacking an ad hominem fallacy is the very common temptation to counterattack the committer in the same offensive manner. However, following such temptations only serve to deepen the disagreement and escalate the conflict. The most constructive strategy is to “point out to the arguer that he or she is being abusive and then politely ask for an evaluative response to your argument or criticism. Sometimes a simple “But what do you think of my argument?” will do.”⁸⁷⁶ The same strategy can be followed in most rebuttal criterion fallacies. In fallacies of counterevidence, the targeted victim can gently remind the committer of the fallacy of the original

⁸⁷⁵ *ibid.*

⁸⁷⁶ *ibid* 200.

counterevidence she denied or ignored. With fallacies of diversion, the straw man fallacy for example, the targeted victim of the fallacy can always remind the committer of her original argument before any misrepresentation. Such reminders shall keep the conversation focused on the subject matter instead of denying it, ignoring it, or distracting the audience.

Some of the above fallacies might violate more than one of the good argument criteria. In these instances, the error in reasoning should be considered as “belonging to the criterion that describes the error’s most serious infraction of the criteria.”⁸⁷⁷ One of the most significant examples of this overlapping are ad hominem fallacies. Those fallacies can be “classified as fallacies of relevance, in which something irrelevant to the quality of the interlocutor’s argument is cited.”⁸⁷⁸ The importance of finding the most accurate category is to identify the most suitable strategy that can be used in attacking it. However, this overlapping feature shall encourage us to investigate further in order to try finding other unifying themes that all the above various fallacies might share. We propose that tracking the roots, evolution, and emergence of most known fallacies shall indicate to what extent they might share a quite similar mechanism, or a type of “life circle”. Detecting such mechanisms shall be very helpful in mitigating the anticipated harms of fallacies.

5.4 Fallacies’ life circle

*Fallacies can be deceitful in two very different senses: in the sense that they can be committed intentionally to deceive an audience, to be sure, but also in the sense that they can be committed unintentionally by honest arguers.*⁸⁷⁹

⁸⁷⁷ ibid 55.

⁸⁷⁸ Yap (n 720) 20.

⁸⁷⁹ Correia (n 806) 108.

As mentioned above in this chapter,⁸⁸⁰ we don't need to know whether the fallacy was planned or not. Moreover, we might not be able to confidently know this, as "all we know with a certain degree of certainty, thanks to the work of psychologists, is that people's judgments and inferences are frequently *biased* both unconsciously and involuntarily."⁸⁸¹ The key starting point here is to explore the direct and instant cause of resorting to fallacies. Arguers who are in a position to commit fallacies are *biased*, as "their attachment to a given position is so strong that it becomes tempting to 'jump to conclusions'."⁸⁸² Those arguers look for plausible reasons to "justify an opinion they are eager to uphold. From an argumentative perspective, they do this not to convince themselves of the truth of their opinion but to be ready to meet the challenges of others. If they find themselves unprepared to meet such challenges, they may become reluctant to express an opinion they are unable to defend and less favorable to the opinion itself, but this is an indirect individual effect of an effort that is aimed at others."⁸⁸³ Accordingly, their "tendency to arrive at desired conclusions hinges on their ability to construct plausible justifications for those conclusions."⁸⁸⁴ However, this strong tendency, which might blur arguers' vision and hinder their efforts to arrive at desired conclusions, is not the only reason for failing to construct good flawless arguments. In fact, ordinary arguers' abilities to rationalise their biased views and build persuasive arguments are constrained by their limited logical abilities and poor reasoning skills, which are essential to construct apparently reasonable justification for their desired conclusions.⁸⁸⁵ However, this limited logical ability, and expected ignorance of good argument requirements, are sub-catalysts that might increase the opportunity of producing fallacies, but as we have seen in the above five categories of fallacies, the arguer who is about to commit a fallacy, regardless of her education or logical capacities, is extremely prone to cling to the truth of her desired conclusion even if there is no relevant, acceptable, and sufficient evidence to support it. That is

880 See above 5.3.1 in this chapter.

881 Correia (n 806) 111.

882 *ibid* 108.

883 H Mercier and D Sperber, 'Why do Humans Reason? Arguments for an Argumentative Theory' (2011) 34 *The Behavioral and Brain Sciences* 57 <<https://doi.org/10.1017/S0140525X10000968>> accessed 12 Jan 2022, 66.

884 Correia (n 806) 107.

885 Z Kunda, 'The Case for Motivated Reasoning' (1990) 108 *Psychological Bulletin* 480 <<https://doi.org/10.1037/0033-2909.108.3.480>> accessed 12 Jan 2022, 480.

why this section started by asserting that we don't need to know if the fallacy was planned or not.

The arguer, in all given examples, believes profoundly that she has to reach that conclusion, even if the argument includes errors in reasoning. In structural fallacies, for instance, the arguer keeps arguing in a circle without giving any proof for her claim because she has a biased judgment, even if she can't see it. The same happens with the genetic fallacy, where the arguer can't see any changes in the original perspective she had, by which her prejudiced and strong emotional memories maintains her bias, and profound attachment to the historical origin of the matter of the discussion/negotiation, pushing her to justify, rationalise, and defend her outdated views, even with flawed irrelevant arguments, just to jump to her desired conclusion. A very similar process happens with the wishful thinking fallacy, where the arguer's predetermined hopes regarding an outcome creates a strong tendency to see it happen and to defend its truth and merit using all available justifications, even if these justifications lack the acceptability requirements. In the slippery slope fallacy, we have observed that the arguer is already persuaded, and eager to persuade the other party in the conversation, that the ultimate catastrophic final outcome of the given series of actions will inevitably happen, even without any sufficient evidence that can prove the unavoidability of this outcome. Finally, when it comes to those fallacies that violate the rebuttal criterion, we have noted that in the ad hominem fallacy, the arguer is apparently biased against the person who has been targeted by this fallacy, and makes it worse by declaring this bias in an abusive way instead of trying to rebut this person's claim. Indeed, in this very same category, it is easy to recognise the bias behind the straw man fallacy, in which the arguer interprets the opponent's view in an unconsciously biased fashion."⁸⁸⁶ Therefore, reviewing the five fallacies categories shows that they are often products of biases, but where do those biases come from? What are the previous stages of this life circle?

⁸⁸⁶ Correia (n 806) 110.

If biases are “systematic errors that invariably distort the subject’s reasoning and judgment,”⁸⁸⁷ these errors “are often motivated, i.e., induced by a particular desire or emotion.”⁸⁸⁸ These desires and emotions work as an engine that pushes our beliefs and shapes our biases.⁸⁸⁹ Moreover, emotions do not only affect our cognition and preferences, but it has become very clear that the role of emotions is very central to human cognition functioning.⁸⁹⁰ There is a range of evidence that “emotions can induce biases in decision making.”⁸⁹¹ Regardless of whether we admit it or not, emotions “directly bias decision making,”⁸⁹² and this influence is not limited to our decision making process because emotions, to varying levels, “affect all our relationships. They affect how we think and how we behave.”⁸⁹³ The way in which emotions shape our biases and increase, accordingly, the chances of committing fallacies, is very direct and simple to observe and analyse. Emotions practice this influence by preventing us from “having access to all that we know, to information that would be at our fingertips if we were not emotional but that during the emotion is inaccessible to us.”⁸⁹⁴ In such influence of strong feelings, people work hard to stay rational, as engaging with emotions “is messy, clouds good judgment, and in some contexts-for example, at work- can seem just plain inappropriate.”⁸⁹⁵ Emotions not only cloud our judgment, and prevent us from having easy access to the necessary information and knowledge, they also urge us to interpret what we see in a way that completely fits with how we feel, and ignore our previous knowledge if it doesn’t fit with them. They change how we perceive the world around us and change the way we imagine and interpret the opinions and actions of other people. They are dominant to the extent that “we do not seek to challenge why we are feeling a particular emotion; instead, we seek to confirm it. We evaluate what is happening in a way that is

887 *ibid* 109.

888 *ibid*.

889 T Gilovich, *How we Know what isn’t so: The Fallibility of Human Reason in Everyday Life* (1st ed, Free Press 1993) 45.

890 M Fenton-O’Creevy and others, ‘Thinking, Feeling and Deciding: The Influence of Emotions on the Decision Making and Performance of Traders’ (2011) 32 *Journal of Organizational Behavior* 1044 <<https://doi.org/10.1002/job.720>> accessed 12 Jan 2022, 1045.

891 *ibid* 1046.

892 *ibid*.

893 Fisher and Brown (n 872) 43.

894 P Ekman, *Emotions Revealed: Recognizing Faces and Feelings to Improve Communication and Emotional Life* (New York Times Books 2003) 55.

895 Stone, Patton, and Heen (n 115) 13.

consistent with the emotion we are feeling, thus justifying and maintaining the emotion.”⁸⁹⁶

The reason behind this involuntary nature of emotions is the way and rhythm with which they occupy us. When we are under the influence of emotions, “a cascade of changes occurs in split seconds, without our choice or immediate awareness, in: the emotional signals in the face and voice; preset actions; learned actions; the autonomic nervous system activity that regulates our body; the regulatory patterns that continuously modify our behavior; the retrieval of relevant memories and expectations; and how we interpret what is happening within us and in the world. These changes are involuntary; we don't choose them.”⁸⁹⁷ This central role of emotions in shaping the way we see the world, creating beliefs and biases, and, consequently, paving the way to produce fallacies, can interpret why we usually see logic textbooks discuss emotions in treatments of fallacies.⁸⁹⁸ This can explain why negotiation and mediation textbooks, practical manuals, and mediators’ qualifying programs, as we shall see in the next chapter, have paid attention to the way emotions should be dealt with. However, the more important issue here, in order to complete the circle, is to answer this question: if emotions are the main feeder of biases and the essential contributor in shaping them, what causes emotions to erupt? What are the initial, original, and final stages in this “fallacies life circle” before biases and emotions?

In Chapter One⁸⁹⁹ we explored the concept of “interests/concerns” as the first negotiation element that both negotiating parties are aiming to meet and as a main orientation for one of the best known negotiation styles: “the interest based negotiation.” Later, in Chapter Two,⁹⁰⁰ we revisited this concept while exploring different mediation approaches and explored the problem-solving models. And finally,

896 Ekman (n 894) 56.

897 *ibid* 82.

898 A Brinton, ‘Pathos and the “Appeal to Emotion”: An Aristotelian Analysis’ (1988) 5 *History of Philosophy Quarterly*, 207 <<http://www.jstor.org/stable/27743856>> accessed 12 Jan 2022, 207.

899 See above 1.4 Negotiation Elements.

900 See above 2.1 Mediation Definition.

in Chapter Three, we mentioned contradicting interests while defining conflicts/disputes as the main engine for erupting disagreement and creating conflicts. In daily conversations, negotiations, or mediations, parties' interests and concerns can be the starting point. The same observation applies here in the context of completing the process of tracking fallacies' life circle. Emotions come from unacknowledged concerns and unaddressed interests, as they trigger feelings and emotions which involuntary impose their own effect on perception that leads to biased and unjustified conclusions.⁹⁰¹ The need for tackling the emotions' sources instead of trying to deal with them directly is because this is a very challenging process, especially during an ongoing negotiation, "where you also need to spend time thinking about each person's differing views on substantive issues and the process for working together. It can feel as though you are trying to ride a bicycle while juggling and talking on a cell phone."⁹⁰² Accordingly, instead of feeling obviously powerless in the face of these dominating emotions, negotiators should be assisted to overcome negative emotions, and to stimulate positive ones.⁹⁰³ Negotiators should be guided in how to avoid getting trapped and caught up in every influential emotion they experience, and, instead, turn their attention to the generators of these emotions.

Those generators, or what Roger Fisher and Daniel Shapiro called *Core Concerns*, are "human wants that are important to almost everyone in virtually every negotiation."⁹⁰⁴ While these concerns/interests/wants are often unspoken, this doesn't imply that they are, by any means, less real, crucial, or decisive than tangible interests. The unspoken nature of these concerns makes even knowledgeable and experienced negotiators surprisingly unaware of the varied ways in which these concerns affect their emotions and motivate most of their decisions. That is why Fisher and Shapiro affirm that knowing these concerns shall offer "a powerful framework to deal with emotions

901 Stone and Heen (n 500) 154.

902 Fisher and Shapiro (n 10) 12.

903 *ibid* 14.

904 *ibid* 15.

without getting overwhelmed by them.”⁹⁰⁵ These five core concerns are⁹⁰⁶: appreciation, affiliation, autonomy, status, and role. Addressing these concerns to avoid negative emotions and generate positive ones requires three conditions in dealing with them: to be fair, honest, and consistent. With this treatment, by making the parties feel appreciated (appreciation), treated as colleagues (affiliation), their freedom to decide is acknowledged (autonomy), their high status is recognised where deserved (status), and their roles are fulfilled in a way that convinces them that they can make a difference (Role). By doing this, negative emotions⁹⁰⁷ that make parties feel angry, guilty, anxious, sad or jealous, can be changed to positive ones that shall make them feel enthusiastic, affectionate, proud, happy, calm, and hopeful. This switch shall change their thinking and behaviour, and instead of making them biased, prejudiced, prone to react deceptively, and think rigidly, they shall be ready to cooperate, work together, and be trustworthy.⁹⁰⁸ A well-prepared negotiator can use a checklist before negotiation to avoid ignoring these concerns, and a well-qualified mediator can assist her in this mission, as we shall see in the next chapter.

To sum up the above three paragraphs, we can have an illustrative simple timeline that can describe the evolutionary journey for most known examples of the fallacies reviewed above. This timeline can be shown as follows:

Concerns → Emotions → Biases → Fallacies

In this timeline we can track the origins of most well-known fallacies as unspoken or undisclosed concerns, until they reach their final shape as written or spoken errant arguments. Each stage of this circle/timeline is a challenge that needs to be faced, handled, neutralised, or, at least, mitigated. We don’t have to wait until the circle is complete; what we need is to defuse it, to cut the chain, and interrupt the evolution of the journey - the earlier the better. However, even if all early interventions failed, and

905 *ibid.*

906 In the next chapter, where we shall introduce our proposed model to tackle each stage of the fallacies life circle, we won’t limit ourselves to these five concerns, as we shall expand our model to include all anticipated interests/concerns that might trap parties in mediation.

907 In our proposed model we shall not limit ourselves to negative emotions such as anger, fear, or jealousy, but instead encompass in our framework any strong emotion that has the potential of creating an unwanted bias; for instance, feeling overly fascinated, or excessive gratitude towards someone or something, especially when it is expected to be temporary, might create a bias that might lead to errant arguments, mistaken decisions, and unjustifiable concessions which might be regretted later, when this fascination is over.

908 Fisher and Shapiro (n 10) 19.

the fallacy was produced, we should still have a reliable strategy to attack it. But who should be the person to attribute this mission to in the context of mediation? Obviously, we would claim, the mediator. However, before we proceed to the next chapters in which we discuss our suggested framework, to examine the mediator's approach towards fallacies, we need to take a quick look at the anticipated harms that fallacies might cause. These harms include those that can occur to mediation as a process, and mediators as both practitioners and lay persons. In fact, these anticipated harms are the main motivation behind our pursuit in this thesis, one that we have kept postponing mentioning, as we wanted to progress step by step in a logical order by giving all necessary supported premises before arriving to the conclusion which we aim to present in our next chapters.

5.5 The anticipated impact of fallacies on mediation and mediators

Reaching agreement requires that both sides agree, and seeking to persuade the other side with good arguments can be among the most expeditious routes to that end.⁹⁰⁹

From the beginning of the first chapter of this thesis, and through consequent chapters, we have seen that reason, mind, and flawless arguments are essential in understanding the core concept of both negotiation and mediation. This thesis claims that failing to produce and exchange good persuasive arguments in mediation, and allowing fallacies to exist, shall incite concessions and influence parties' outcomes, directly contradicting the meaning of the process itself, and threatening the main feature of the process as a fair, balanced, and supposedly rational pursuit, by turning it into a manipulative, deceptive, unjust, and potentially coercive process. Such threats would be evident in most fallacy occurrence scenarios, whether in the case of being oblivious to the flaw in the argument but still not being persuaded as the fallacy makes the

909 Patton (n 26) 285-296.

argument loses its persuasive power regardless of the grade of awareness of its existence, which might lead to an impasse; in the case of perceiving the fallacious argument as a deceitful move which might escalate the conflict and create distrust; or, finally, in the case of not seeing the flaw in the argument, accepting its logic and giving in, which might result in an unjust settlement, which the accepting party could either realise later, or remain unaware of the bogus nature of the argument concerned. Below, we are going to explore the anticipated fallacies' harms based on our understanding of mediation as a process, the mediator's job as a conductor of this process, and of the conflict/dispute as a context where the process takes place. As we have done previously, through initiating this thesis with exploring negotiation as the core ingredient of the mediation process, we will begin by exploring the expected harms which fallacies can have on negotiation. Then, we shall elaborate on the consequences of having them in the mediation room.

In Chapter One⁹¹⁰ we discussed the list of negotiation goals given by Bruce Patton, where he provided⁹¹¹ an enumeration for successful negotiation goals which included: allowing for reaching a solution that is legitimate, where no one might feel taken advantage of, and sustainable, where parties shall keep committed to it. This solution should be the outcome of a process that is both built on good communication and able to build a future good relationship. However, when fallacies inhabit this process, achieving such goals is endangered. These aimed legitimate solutions can't be produced in a context where "more powerful interests could prevail over the weaker."⁹¹² Such prevalence is expected to be more evident where we have a party with modest bargaining ability⁹¹³ in face of a skilled manipulative party who can use fallacies to take advantage of her opponent. This manipulation shall endanger the sustainability of the outcome, as the weaker party is always susceptible to "late realisation" of the nature of the reasoning error she has been victim of. In this case, the settlement that such reasoning has led to might face resistance after such late

910 See above 1.3, Negotiation Goals.

911 Patton (n 26) 285-286.

912 Roberts (n 348) 167.

913 See: Waldman (n 228) 118, and Ark. Alternative Dispute Resolution Commission, Requirements for the Conduct of Mediation and Mediators, Standard B (2004), available at https://www.sos.arkansas.gov/uploads/rulesRegs/Arkansas%20Register/2004/feb_2004/187.00.03-002.pdf, and Fla. Rules for Certified and Court-Appointed Mediators, Rule 10.420(b) (4) (2006), available at: <https://www.flcourts.gov/content/download/216759/file/rules-certified-court-appointed-mediators.pdf>.

recognition, which could threaten the enforceability of the agreed upon settlement. Moreover, this party's future relationship with the committer of the fallacy may not be any more described as a "good relationship." Either of these two scenarios - not recognizing the fallacy or late recognition of it - might raise concerns about the fairness and sustainability of the outcome, and the state of the parties' future relationship. The third scenario, where the fallacious argument has been detected by the targeted party, might foster distrust and hostility that would reduce the available room for cooperation, create an unwanted impasse which requires extra efforts to overcome, or, even worse, bring the negotiation process to an early failed end, which might not be wanted by either party. In this scenario where the fallacious attempt is exposed, the negotiation defence motivation is more likely to be pervasive and the accuracy motivation is more likely to fade.⁹¹⁴ With the presence of these two influencing motivations, the parties' tendency to cooperation and working together becomes less pronounced, diminishing the prospect of enduring agreement.⁹¹⁵

All of the above fallacies' anticipated harms are valid when it comes to mediation. However, they garner more importance and may trigger more alarms due to the distinct nature of mediation. By the distinct nature of mediation we mean an image of it as a systematised process that is supposed to respect certain values and follow predetermined phases, with potential sponsorship/observation from the formal justice system, and, most importantly, with assistance from a neutral third party. This neutral party is expected to help negotiating parties experience better communication channels, build a rapport with them, protect them from disadvantageous situations, guarantee respect of mediation values, shield her own reputation as a reliable mediator, safeguard her self-esteem, and maintain her self-care.

The systematic nature of mediation places an extra burden on the process to minimise the errors that might inhabit negotiation and hinder the reaching of a mutually agreed fair settlement. In Chapter Two of this thesis⁹¹⁶ we discussed mediation phases, and observed that the mediation process is divided into subsequent phases in order to

914 We reviewed parties' motivations in negotiation in chapter one of this thesis, see also: Ledgerwood, Callahan, and Chaiken (n 56).

915 See above in Chapter One 1.6.

916 See above 2.6.

“secure quality standards.”⁹¹⁷ These standards have been developed through both practice and research in order to mitigate the influence of negotiators’ behaviours, perceptions, and attitudes that can profoundly limit the useful outcomes both parties can reach in direct negotiation.⁹¹⁸ However, this organisation of mediation phases might be disturbed by fallacies. For instance, a mediator might find herself in a situation where she could interrupt a joint meeting and separate the parties into private sessions in order to handle a party’s fallacious argument, a situation that might provoke a storm of anger on the other side because of this seemingly deceitful manifestation, even if this fallacy was unintentional. In such a situation, the mediator might need to end the joint meeting and start caucusing with the parties to deal with the fallacy, even if she was planning to invest more time in that joint meeting. However, such harm can be avoided by better preparation and enhanced flexibility in the mediator’s performance. Nevertheless, this flexibility and ease are not always available when mediation values are threatened, as the mediator here might need to exert a further intervention which exceeds that procedural effort with the phases.

Two mediation values can be the second victim of fallacies, immediately after, or along with, mediation systematic feature. However, the threat that fallacies can cause to these values differs, depending on the scenario in which that fallacy take place, and the significance of the change the fallacy makes on the targeted party’s position. Those endangered mediation values are parties’ self-determination and substantive fairness.

Parties’ self-determination, or parties’ autonomy, as explained in Chapter Two of this thesis,⁹¹⁹ in order to be meaningful needs a full achievement of the “informed consent” principle, and in order to be rationalised, requires a guarantee of a “good faith” duty. However, both informed consent and good faith can be significantly harmed by fallacies.

917 Hopt and Steffek (n 176) 53.

918 Kovach (n 174) 305.

919 See above 2.7.1.1.

One of the main roles of informed consent is to help turn the mediation process into a practice that is “free of fraudulent and coercive influences.”⁹²⁰ Accordingly, in order to fulfil this requirement, there is an obvious duty to take all necessary efforts to “prevent deliberate fraud, manipulation, and trickery.”⁹²¹ These efforts are needed to avoid not only intentional deception, but also to keep parties away from “common decision-making traps like selective perception and advocacy bias.”⁹²² However, such efforts can be directly disturbed by the presence of fallacies. When a party becomes persuaded by fallacious arguments, and gives concession after concession relying on these errant arguments to finally reach a settlement which she might never have accepted if the conversation was fallacy free, informed consent here will be simply absent.

A quite similar harm fallacy might be cause for a good faith requirement. Both general and mediation-context definitions of good faith⁹²³ include elements that can’t be fulfilled in the presence of fallacies. A general definition of good faith requires the “absence of intent to defraud or to seek unconscionable advantage.”⁹²⁴ Similarly, the good faith elements in a mediation context requires “making no affirmative misrepresentations or misleading statements to the other parties or the mediator during the mediation.”⁹²⁵ Fallacious arguments are clearly, and by definition, misrepresentations and misleading moves, precisely so in the case of committing fallacies intentionally. Therefore, having fallacies during mediation can endanger the necessary fulfilment for good faith requirements.

Substantive fairness, as a mediation outcome, is a core mediation value, in spite of the considerable debate around whether fairness of the mediation outcome should be the mediator’s responsibility. We explored in Chapter Two the various arguments used in

920 Haley (n 256) 792.

921 *ibid* 792.

922 Colatrella (n 264) 773.

923 See above in Chapter Two of this thesis: 2.7.1.2 Good Faith and Parties’ self-determination.

924 Black’s Law Dictionary 762 (9th ed. 2009).

925 Kovach (n 278) 623.

this debate, and ended up choosing the viewpoint which asserts that “an optimal dispute resolution system is one that produces just results at the end of just proceedings.”⁹²⁶ However, the type of justice which mediation aims to apply is not necessarily the same as the formal justice system applies in a state’s courts. It is rather a form of justice reached by parties that relies on their perceptions of fairness, as we concluded in Chapter Two of this thesis. Nevertheless, such fairness can’t be reached in the case of having one party who has made a concession, accepted an offer, or agreed to settle, while her persuasion was relying on a fallacious argument. The question that needs to be asked here is whether this party would be still willing to sign this final agreement if she realised that the argument used by the other party in persuading her to sign was fallacious. If the answer is no, then it will be difficult to claim that this mediated agreement was fair. Beside harming party made justice in this scenario, mediation fairness might be harmed by fallacies in another way, namely, by allowing a power imbalance resulting in unfair settlements. In spite of the fact that it doesn’t matter whether fallacies have been committed intentionally or unintentionally, the power imbalance can be very evident, worrying, and alarming in situations where fallacies are planned, designed, articulated, and delivered by a knowledgeable, experienced, and eloquent party, against a less experienced, less attentive, and less educated party.⁹²⁷

Finally, fallacies have severe potential harms that mediators themselves might suffer in terms of two concepts; the mediator’s image/reputation as a trustworthy person, and her self-esteem as a capable practitioner and person of value. Both the mediator’s persona and the way in which parties picture her rely significantly on the amount of trustworthiness she enjoys.⁹²⁸ Trust, in dictionaries, is “to believe that someone is good and honest and will not harm you, or that something is safe and reliable.”⁹²⁹ In the context of conflict resolution, trust can be defined as “an individual’s belief in, and

926 M Rosenberg, ‘Resolving Disputes Differently: Adieu to Adversary Justice’ (1987) 21 Creighton Law Review 801, 809.

927 We covered the concept of power imbalance in Chapter Two of this thesis while discussing mediation criticisms.

928 S N Exon and S Lee, ‘Building Trust Online: The Realities of Telepresence for Mediators Engaged in Online Dispute Resolution’ (2020) 49 Stetson Law Review 109 <<https://ssrn.com/abstract=3403279>> accessed 11 Feb 2022.

929 <https://dictionary.cambridge.org/dictionary/english/trust>, and in the Oxford Dictionary, trust is “to have confidence in somebody; to believe that somebody is good, sincere, honest, etc.”, see:

https://www.oxfordlearnersdictionaries.com/definition/english/trust_2, accessed 11 Feb 2022.

willingness to act on the basis of, the words, actions, and decisions of another.”⁹³⁰ Building trust, then, requires a trusted person to do what is expected from her, assisting the vulnerable party where necessary, and adhering to mediation values, precisely the element of fairness. Therefore, in order to provide this help and achieve this adherence, a mediator shall intervene, show up, and raise her hand, to aid the individual party when this party seems vulnerable or endangered. The way in which she offers this help, and the approach she shall follow to prove this adherence might vary depending on her style⁹³¹, but in all scenarios, the assistance has to be provided. Otherwise, the necessary level of trust shall be susceptible to decrease, if not completely destroyed.⁹³² Correspondingly, distrust is only to be expected when a fallacious argument takes place in a mediation setting, and the targeted party discovers that she was becoming persuaded by this “argument”, being ready to give a concession according to this persuasion, and showing willingness to sign the settlement, without any attempt to help from the mediator, who is expected to assure informed consent, ensure good faith, and guard fairness as the parties perceive it. When this party realises that the expected assistance, help, and protection haven’t been offered by the mediator where needed, she can’t then be blamed for not trusting this mediator. Such a transformation of how parties picture the mediator is a clear damage to her reputation.

The above scenario, where the party realises the error in her counterpart’s argument in the absence of the mediator’s help, might harm not only the mediator’s reputation, but it can also influence the mediator’s self-esteem. Self-esteem as a concept refers to “an individual’s overall positive evaluation of the self.”⁹³³ Such an evaluation has two distinct dimensions; the competence dimension (or what is known as efficacy-based self-esteem), which refers to the extent to which a person regards herself as an

930 R J Lewicki, ‘Trust, Trust Development, and Trust Repair’ in P T Coleman, M Deutsch, and E C Marcus (eds), *The Handbook of Conflict Resolution: Theory and Practice* (3rd ed, Jossey-Bass 2014) 94, and for relatively similar definitions, see: R C Mayer, J H Davis, and F D Schoorman, ‘An Integrative Model of Organizational Trust’ (1995) 20 *The Academy of Management Review* 709 <<https://doi.org/10.2307/258792>> accessed 11 Feb 2022, and D J McAllister, ‘Affect- and Cognition-Based Trust as Foundations for Interpersonal Cooperation in Organizations’ (1995) 38 *The Academy of Management Journal* 24 <<https://doi.org/10.2307/256727>> accessed 11 Feb 2022.

931 See above: Chapter Two, 2.8, mediation styles.

932 Exon and Lee (n 928) 113, 114, and A Stimec and J Poitras, ‘Building Trust with Parties: Are Mediators Overdoing it?’ (2009) 26 *Conflict Resolution Quarterly* 317 <<https://doi.org/10.1002/crq.235>> accessed 11 Feb 2022.

933 A D Cast and P J Burke, ‘A Theory of Self-Esteem’ (2002) 80 *Social Forces* 1041 <<https://doi.org/10.1353/sof.2002.0003>> accessed 27 Feb 2022, 1042.

efficacious and capable person, where the dimension of worth (or what is known as worth-based self-esteem) refers to the extent to which a person feel she enjoys a moral integrity that makes her “a person of value”.⁹³⁴ When the mediator fails to offer the expected assistance to a vulnerable party, there is a possibility that the way she regards herself as an efficient, capable, professional, neutral party, and as a person that is guided by moral values, might be affected. Being unable to offer this help might be a result of not receiving adequate preparation that equips the mediator with the proper tools and skills, leaving the mediator with doubts about her capability as a well-trained ADR practitioner, and uncertain about the degree she was attached to her ethical duties towards mediation values. These doubts and worries (with their possibilities of lowering the mediator’s self-esteem) should be avoided, as low self-esteem is usually associated with anxiety, depression, and maladjustment.⁹³⁵ Moreover, it has been proven “that people with low self- esteem experience virtually every negative emotion more commonly than those with high self-esteem.”⁹³⁶ All these emotional harms should be avoided to maintain the mediator’s self-care, and the one who should take all necessary steps to guarantee this protection, this thesis claims, is the mediator herself.

To illustrate the above harms, we can try analyzing two examples from the famous fallacy types which we examined thoroughly on this chapter, in order show the different scenarios in which fallacies can endanger mediation. In the first scenario we will be visiting a straw man fallacy example, in which the arguer misrepresents her opponent's actual position to make it easier to attack or reject. On the second example we shall work with an ad hominem fallacy which occurs when the arguer attacks her counterpart’s character, past mistakes, or personality traits instead of addressing the actual argument or issue at hand. In both examples we shall see how letting these bad arguments go might cause harms to the process, the parties, and the mediator.

934 *ibid.*

935 M R Leary and others, ‘Self-Esteem as an Interpersonal Monitor: The Sociometer Hypothesis’ (1995) 68 *Journal of Personality and Social Psychology* 518 <<https://doi.org/10.1037/0022-3514.68.3.518>> accessed 27 Feb 2022, 518.

936 *ibid.*

In the first example, there are two negotiators, a buyer and a seller, discussing a suggested price increase while a mediator is present in the room to assist:

The first party: I cannot accept the 10% price increase because the company budget is already determined for this current year. We have to go for a lower rate.

The second party: You want us to completely abolish all scrutiny measures and quit quality control checks, but I'm not ready for this.

The first party never asked to eliminate quality control, she just wanted to negotiate the amount or structure of the asked price increase. However, the other party created an unreasonable extreme scenario which is easy to attack and reject and making the first party position seem rigid and dangerous. If the first party did not counter it professionally, and felt embarrassed, vulnerable, and apologetic due to her poor argumentation and logical skills, the mediator here has to step in and intervene before any unfair concession takes and before any impasse takes the whole process to an unsolvable deadlock. However, the grade and manner of intervention the mediator can apply in order to pin the conversation back to the original track shall depend on various factors as we shall explore later in Chapter Seven of this thesis.

In the second example, we will see here the ad hominem fallacy in a family dispute where arguer “in this case the wife” attacks the person behind the criticism “the husband” instead of addressing, discussing, and rebutting the criticism itself:

The first party “the husband”: I am deeply alarmed and seriously uncomfortable with how aggressively you scream at our kids when you get stressed. This will damage their self-confidence and endanger their emotional well-being. You need a specialized family consultation expert to change how you deal with them, otherwise the custody arrangements must be revised.

The first party “the wife”: You are in no position to give advice on self-confidence and emotional well-being issues as you have been in deep depression, obvious vulnerability, and continuous traumas for the first three years of our relationship, don’t you remember?

The wife here ignored her husband's legitimate concern regarding her obvious aggressive behaviour toward their children and focused only on his previous mental health history and old psychological status record. In this fallacy, the wife attacked the personality of her husband not his argument. This classic example of the ad hominem fallacy is expected to take place in mediation while the mediator is attending, watching, and prepared to assist. This assist aims to avoid the escalation of the dispute that shall follow such attack. The husband here may explode and respond aggressively, steered by his anger and defence motives which can make the whole process come to a premature end. Conversely, he might surrender as a result of his feeling of vulnerability and embarrassment and submit to his wife's power and give concessions that might be unfair and against the best interest of their children. In both scenarios, the mediator needs to offer her help to protect the process and the parties from these unwanted harms. Again, the role of the mediator here, the possible tools she might use, and the level of confrontation she may adopt, all depends on several factors including mediator chosen style, the way she was qualified and prepared, the parties' perception of the mediator's role and duties, the available time and resources, and various other elements that affect the mediator readiness to fulfil her duty on keeping the mediation protected from these possible harms. However, this understanding of the mediator's job, by adding the duty of keeping the mediation room as a “fallacy free zone,” shall be clarified further in the next chapter. Yet, we shall not leave mediators unequipped in the face of this new additional role, thus we shall try in the final chapter to arm with multiple roles, tools, and ways of assistance that shall make her job more systematic and well structured.

Chapter Six

Mediators and Fallacies: Revisiting the Job Description

*Anyone who has taught logic to undergraduates knows that logical fallacies are very common and hard to eradicate.*⁹³⁷

In Chapter Five, we concluded that fallacies can cause significant harm to the mediation process, its values and the mediator's reputation and self-esteem. Therefore, we ended up stating that when fallacies occur in mediation, action is necessary. Here, we shall investigate our premise that the mediator is the one who should take this action. Such an investigation shall be initiated by reviewing the mediator's known lists of duties and responsibilities, in order to examine their suitability and capability in helping with this necessary action towards fallacies. Next, we shall examine our given definition of mediation as a minded/rationalised persuasion game, in order to ascertain whether this shall help in understanding mediators' role towards fallacies, and if this shall help us, in the next and final chapter, present a series of suggested new roles that we believe will be useful in filling this gap in the field.

6.1 What do mediators do in the mediation room?

*[H]elping disputants arrive at internally coherent decisions is at the core of what mediation is all about.*⁹³⁸

The mediator's job description list is one of the most debated topics in mediation scholarship. The contested nature of this subject is an expected result of the nature of mediation as a flexible creative alternative dispute resolution. In Chapter Two of this thesis, we visited the various mediation styles, where every single style has its unique "to do and not to do" lists for mediators to follow. The only agreed upon item in all

⁹³⁷ Floridi (n 823) 324.

⁹³⁸ Waldman (n 228) 27.

styles' "to do list" is assisting/helping parties, and the only "not to do list" that achieved unanimity among scholars is forcing/coercing parties to accept any suggested settlement.

6.1.1 Guide lists: To do and not to do

Bernard Mayer suggested a list of mediator's activities that parties shall expect her to do. This list is divided into three phases as follows:⁹³⁹

- 1- In the Beginning, they assess the possibility and style of the needed intervention, establish a suitable atmosphere for negotiation, encourage parties to participate, and negotiate with them the guidelines, structure, and purpose of mediation.
- 2- During the Process, they focus in helping parties to feel fully heard, identifying the core matters and needs, framing and reframing concerns and suggestions, managing emotions, dealing with power imbalances, working across parties' cultural differences, dealing with impasses.
- 3- In the Problem-Solving Stage, they encourage creative thinking, help parties discuss their options together, solidify and articulate potential settlements, apply suitable amounts of influence, discuss ways of implementation.

Mayer asserts that this list is not, by any means, inclusive or complete, as it didn't include many of the other normal mediators' activities such as "drafting agreements; designing ongoing systems for conflict resolution; dealing with intraparty conflicts; communicating with such others as lawyers, judges, and substantive experts; following up on agreements; or teaching communication or conflict resolution skills."⁹⁴⁰ He simply lists the core duties that many mediators usually perform, regardless of their preferred personal assortment of approaches, and even "without consciously thinking

⁹³⁹ Mayer (n 11) 201-202.

⁹⁴⁰ *ibid* 201.

them through.”⁹⁴¹ However, this list didn’t include the “not to do” activities, which might have a rather similar importance for practitioners.

In their book *The ADR Practice Guide*⁹⁴², Mackie and his colleagues presented a number of core activities parties shall expect mediators to do, and another two that mediators ought to avoid. In the To Do List they mentioned:⁹⁴³

- 1- Building trust: as we discussed in the previous chapter, mediators need to get the parties to trust them by assuring their compliance with core mediation values. Showing sincere adherence to respecting parties’ self-determination, neutrality, and confidentiality shall encourage parties to engage in the process with a feeling of safety and hope.
- 2- Calming parties: the authors here refer to the informality aspect of mediation as a main factor in helping parties to settle in. It is the mediator’s job to let the parties feel that they are not entirely in a court room. Creating this feeling shall be achieved by following, carefully and gently, several techniques including working in shirt-sleeves, or encouraging using first names.⁹⁴⁴
- 3- Helping parties to reach a ‘workable agreement’: this role is dominant in many mediation styles, where mediators are mainly oriented to “end the dispute” and “reach a settlement.” However, ensuring that this agreement is “workable” is a significant job mediators might do by eliminating doubts that might indicate that the agreement “will break down soon afterwards”.⁹⁴⁵ This task shall indicate why mediators need to handle fallacies in mediation, as we discussed in the previous chapter, and as we shall explore later on below.

If the final activity is relevant to the role that we believe mediators shall be asked to do regarding fallacies, Mackie’s “Not to Do” activities, below, mention two activities

⁹⁴¹ *ibid* 202.

⁹⁴² Mackie (n 30).

⁹⁴³ *ibid* 282-284.

⁹⁴⁴ *ibid* 282.

⁹⁴⁵ *ibid* 284.

that have significant relevance to our proposed mediator duties towards handling fallacies, as the first explains why mediators need to handle/mitigate fallacies, and the second gives a precaution which mediators need to follow while handling fallacies:

- 1- Not allowing unethical conduct: Mediators should not help any party to make misrepresentations or to lie in the mediation room. This is not an idealistic perspective, as “no mediator expects to be told everything by a party or for that party to be entirely frank either with the other side or the mediator, but that does not go so far as in effect colluding with a party who reveals an intention to mislead”.⁹⁴⁶ Similarly, mediators shouldn’t convey untruths, without trying to “strongly test out whether it is good sense for a party to try to do so. Untruths or misrepresentations can easily emerge later, and will shatter the reputation of a party who has represented themselves as acting in good faith within a consensual process.”⁹⁴⁷
- 2- Not arguing/challenging parties’ positions: Even when the mediator is trying to apply some reality testing, she needs to avoid being confrontational, challenging, or judgemental. The core duty here for the mediator is “to be able to discuss the issues with each party in an analytical and objective way, which will help that party to reach a better understanding of the strengths and weaknesses of their position. They should feel that the mediator has not judged them or ‘come down in favour of the other side’”.⁹⁴⁸ However, avoiding being judgemental and confrontational might make the mediator’s job more difficult while handling fallacies in the mediation room, as we shall see later in this chapter and the next chapter.

One more simple list has been introduced by Pynchon and Kraynak,⁹⁴⁹ who introduced an enumeration of dos and don’ts for mediators. Both lists include insightful practices and attitudes that are of importance for mediators while handling fallacies, as we shall see later in this chapter. Among the recommended practices listed in the book

⁹⁴⁶ *ibid* 285.

⁹⁴⁷ *ibid*.

⁹⁴⁸ *ibid* 283.

⁹⁴⁹ Pynchon and Kraynak (n 63).

mentioned are: remaining humble, expecting the best from parties, and adjusting to their preferences and characteristics. On the other hand, the mistakes list included: arguing/judging⁹⁵⁰, underestimating parties' concerns, and failing to master their own emotional reactions to the dispute.⁹⁵¹ Each activity in these two lists contains a lesson for mediators to learn if they wish to handle fallacies in the mediation room.

Being humble is a key attitude which a mediator needs to adopt during the process. She has to constantly remember that she is not the decision maker in the dispute, and she is just there to assist and help. This understanding can help her get rid of experiencing the status of the gatekeeper who corrects others' mistakes, the village elder who directs their deeds, or the inspector general who inspects their intentions. Achieving that shall be complemented by the next attitude, expecting the best in parties.

Expecting the best in parties and supposing that they have come with good faith can be helpful in encouraging them to actually do so. Such an attitude shall urge parties to behave honestly, in a truthful manner, because "if you expect people to be sly and duplicitous, they will reward you by exhibiting those characteristics. If you expect them to be honest, speak frankly, and work hard on the task before them, they'll reward you by exhibiting those attitudes and behaving in that manner."⁹⁵² This equation may inspire mediators to escape the frame of mind that incites anticipating deception, fallacies, and untruthfulness from others.

Adjusting to parties' preferences and characteristics means that the mediator shall align herself with the parties' "deepest hopes, and make enough of an effort to understand the culture in which the dispute arose."⁹⁵³ Such adjustment and understanding shall reduce the chances of misunderstanding parties' standpoints, and can help avoid misgivings about their intentions and motivations.

950 This one is quite similar to "not arguing/challenging parties' positions" in Mackies' list above.

951 *ibid* 305-316.

952 *ibid* 309.

953 *ibid*.

Underestimating parties' concerns and not taking seriously what they believe is serious, and can lead to a gap in communicating with them, hindering one from seeing where their worries, biases, and mistakes in thinking come from. Even when their worries seem irrelevant to the case, mediators need to take care of these concerns, as "nothing a party to a dispute says is irrelevant to its settlement."⁹⁵⁴ Thus, taking into account each party's concern, regardless of its relevance to the merits of the conflict, is key to gaining a clearer image of their frame of mind.

Finally, mediators need to avoid any failure to master their own emotional reactions to the dispute. Such failure can be avoided by trying to be "mindful, nonjudgmental, curious, and compassionate."⁹⁵⁵ Being mindful can be achieved by getting "plenty of sleep and lots of exercise so that they don't get swept up in the parties' strong emotions."⁹⁵⁶ This mindful and compassionate attitude is what parties expect and require from the mediator, as the person who should "hold the center, maintain a calm demeanor, and help the parties withstand the powerful emotional responses they feel and are subject to from the other party."⁹⁵⁷

Our exploration of these lists focuses on obtaining a clear image of the mediators' job description in order to examine to what extent handling fallacies is a part of mediators' duties' lists. A further look at the suggested lists above, in the light of fallacies' expected harms, as we explored on the previous chapter, shall confirm the conclusion we ended up with: mediators are responsible for handling parties' logical fallacies. To elaborate, mediators - as stated above - need to use their tools and skills to keep parties' unethical conduct away from the mediation room. This conduct can vary from straightforward lies to deceptive moves, and from deliberate misrepresentation to intentional fallacies. Accordingly, handling/mitigating fallacies shall become one of the items in their job description duties list. Furthermore, mediators' duty to help parties reach "workable" agreements or to "articulate and solidify potential agreements"⁹⁵⁸ requires them to make sure that the agreed upon settlement is an

954 *ibid* 314.

955 *ibid* 315.

956 *ibid*.

957 *ibid*.

958 Mayer (n 11) 202.

outcome of free will and informed consent. This informed consent can't be guaranteed, as discussed in Chapter Five of this thesis, in the presence of logical fallacies, with all the thinking errors and reasoning mistakes they include. Finally, the mediators' mission to build trust shall urge them to keep parties fully informed about each other's position without misrepresentation or misunderstanding that might be caused by mistakes in thinking or reasoning errors. While these three main activities (building trust, avoiding unethical conduct, and solidifying workable agreements) can explain why mediators should be responsible for handling fallacies, a number of other duties shall govern and direct the way in which mediators shall handle fallacies. These later duties include: not arguing with parties' positions, being humble, and expecting the best in parties. However, we will be discussing these duties later in this chapter, after outlining our proposed framework/model/role which we believe shall help mediators while handling fallacies. Before presenting our model, we will examine some existing known mediators' roles, with more attention paid to the roles of relevance to the mediator's proposed duties towards fallacies.

6.2 The varied landscape of labels given to mediator roles

*Mediators may undertake a wide variety of roles in a single mediation process. These will vary in balance and intensity according to the needs of the parties and the context of the dispute.*⁹⁵⁹

In fact, there is a long list of labels/metaphors that have tried to summarise the mediator's job description. Each label in this list attempts to capture the main/core expected role from the mediator and shed more light on it. Along with this core labels' list, there is a minor one that describes a number of mediators' tasks, duties, and activities. While the core labels list reflects/represents compliance with one specific (and sometimes more than one) mediation style, as we explored in Chapter two, the labels in the minor list shall comply with most mediation styles. However, besides these two lists, there is another informal list that tries to envisage a proximate image

⁹⁵⁹ Mackie (n 30) 285.

of what mediators do in a metaphorical formula. Here we shall visit the three lists in order to figure out the necessary roles mediators need to adopt to deal with fallacies.

6.2.1 Figurative/metaphorical/rhetorical roles labels

If the mediator does not manage the conflict, then the conflict may manage both the mediator and the mediation process.”⁹⁶⁰

Metaphorical labels are articulated in order to capture the main theme of the roles we expect from mediators. As there might often be a number of readers and students in mediation scholarship who haven’t tried mediation themselves or even shadowed any mediation session before, presenting explanatory metaphoric labels might help them in encapsulating the core nature of each role and make it more recognisable and perceivable.

In their book *Mediator Skills and Techniques*, Boule and Nesic listed a number of metaphorical mediation labels including: Traffic Warden, Sports Umpire, Play Director, and Puzzle Supervisor.⁹⁶¹ Each label introduces a role which the mediator can play, and represents a viewpoint about the type of help parties shall expect from the mediator.

In the Traffic Warden metaphor, the mediator’s mission becomes akin to directing traffic, showing the limits and blowing their whistle if necessary⁹⁶². In this role, the parties/car drivers are doing all the driving, while the mediator/warden only enforces the previously agreed upon regulations. Picturing mediators as traffic wardens

⁹⁶⁰ T Whatling, *Mediation Skills and Strategies* (Jessica Kingsley 2012) 140.

⁹⁶¹ Boule and Nesic (n 344) 21.

⁹⁶² In American English, the phrase “Traffic Cop” might be used more frequently than “traffic warden” to express this meaning, see: <https://www.collinsdictionary.com/dictionary/english/traffic-cop>, accessed 27 Feb 2022.

positions them as Guardian mediators rather than Interventionists.⁹⁶³ The Traffic Warden metaphor suggests that while the parties are intelligent and mature enough to drive themselves, they do need protection without control, and safeguarding without dominance. Such safeguarding is applied here through reminding all parties of the processes' rules and regulations, and the consequences of breaking them. Such a label is not far from another metaphorical one that perceives the mediator as a sports umpire, whose role is "controlling the game and making important decisions, but leaving the actual playing to the parties."⁹⁶⁴

The Play Director label perceives the mediator as the director of a play in which the parties participate as the actors. The difference here is that the final script in this play has not been written, but is rather a product of the actors'/parties' lives. This perception recalls one of the mediation styles we discussed in Chapter Two, the narrative mediation.⁹⁶⁵ In this style, the mediator and the process are successful "if participants walk away with a new story about their interaction with one another."⁹⁶⁶ Helping parties produce a new narration through the mediation session becomes the mediator's role in this style.

In the Puzzle Supervisor label, mediation is perceived as a jigsaw puzzle where the mediator's role is to supervise the participating parties while putting all the game's pieces into place.⁹⁶⁷ This label can be linked to one of the classic metaphors used to describe mediation as a chess game. In this framing, the mediator is perceived as a "Game Master" whose role is managing/mastering the game between the two parties/players.⁹⁶⁸ The difference here between the puzzle and the chess game is that in the puzzle game, cooperation between parties is evident, while in chess, competition is the main theme. Parties in chess games take turns and make their moves by guessing the other party's response and doing their best to place limits on the other side's capacity to harm them. However, while in chess, game players operate from different

963 See Chapter Two of this thesis: 2.7.1. Mediator positivity classification: Interventionist and Guardian Styles.

964 Boulle and Nesic (n 344) 21.

965 See Chapter Two of this thesis: 2.7.2. Mediation Goal classification: Healing and Terminal styles.

966 Waldman (n 228) 23.

967 Boulle and Nesic (n 344) 21.

968 Beer and Stief (n 13) 82.

sets of undeclared rules (expectations from earlier experiences, cultural norms, legal and social rules, etc.), in mediation the mediator becomes another player who participates, makes moves, and tries to anticipate how negotiating parties shall respond to her facilitation approaches. Moreover, the mediator becomes a “game master”, as she works to encourage the players to talk and discuss instead of taking unilateral moves. Such a role means “checking out their assumptions about each other and discussing what the rules of the game should be - how do they interact with each other? How do they decide what a fair resolution is? The chess metaphor recognizes that people are not helpless in the face of conflicts: they have made active choices before, and they can take action now.”⁹⁶⁹

6.2.2 Factual roles labels

These factual roles tend to be more attached to academic wording and more dependent on the actual description of mediator roles. They resort to more precise and concise terms and do not tend to use rhetorical expressions. Factual labels can either be central or minor.

6.2.2.1 Central factual mediator labels

This type of label is a variation of mediation types and styles presented in Chapter Two of this thesis. These labels are central, because they highlight the core role expected from the mediator. However, focusing on that central chief role doesn't exclude any other supporting/complementing minor role which mediators could resort to in the same mediation session. Furthermore, these core roles do not exclude each other, as the mediator can apply more than one in the same session. We shall explore below a number of these labels/roles that are of relevance to our suggested model, and that can help us draw a clear picture of it.

⁹⁶⁹ *ibid.*

The Negotiation Coach⁹⁷⁰ can be a very helpful role, especially where the mediation uses private sessions throughout the process. Such role can be used, for example, when “one party intends to send an insult by way of a nuisance value offer to other side, but if their real intention was to propose something credible, the mediator may well be able to give guidance, even if bound by confidentiality over matters of detail.”⁹⁷¹ However, the coach’s role “may need to go further than that.”⁹⁷² The mediator who holds this coaching label can assist parties where she finds that they are negotiating in a clumsy or unsophisticated way. She can help them express themselves better by formulating offers, bids, and messages that can be more psychologically appealing to the other party, and more accurate in representing their real interests and positions. This role can help each party in moving reasonably through the process, and express themselves in the correct way, with well formulated arguments and clearly justified offers.

Another label/role with relevance to the role/model we are suggesting in this thesis is the role of Protector.⁹⁷³ This type of mediator is mainly “concerned with preventing any principal (especially those perceived to be weaker) from experiencing an unfair process and/or receiving an adverse outcome.”⁹⁷⁴ Protectors perceive their main role as ensuring that no one in the mediation room is being harmed or taken advantage of during the mediation process, “and—in some cases—that not only the process but the final outcome is basically fair.”⁹⁷⁵ Mediators carrying this label are interested in assuring the quality of the mediation outcome through helping the negotiating parties enjoy a safe zone in which they wouldn’t be taken advantage of, or treated unfairly. This unfair treatment shall include any deceptive move, misrepresentation, or clear false statement. This protection might require the mediator to act as an Observer or Witness, who is “able to control and step in if matters go wrong, and also to reflect back to each party in later sessions what went on during that meeting.”⁹⁷⁶

970 Mackie (n 30) 288.

971 *ibid.*

972 *ibid.*

973 J Lande, ‘How Will Lawyering and Mediation Practices Transform each other?’ (1997) 24 Florida State University Law Review 839 <<https://ssrn.com/abstract=2560514>> accessed 6 Mar 2022, 852-853.

974 *ibid.*

975 *ibid.*

976 Mackie (n 30) 287.

One final relevant role/label which shall be presented here is that of Communication Director.⁹⁷⁷ This mediator is more than just a Messenger⁹⁷⁸ who might limit her role to just conveying messages from a room to another. The Communication Director is an active Messenger who is not only ready to translate /interpret the parties' mutual offers, messages, and arguments. In this style, "if the mediator feels, from what has been learned of the views of the recipient of the proposed message, that the message or bid to be misunderstood or counter-productive, he will probably say so and seek to persuade the party to adopt an approach which is more likely to be conducive to progress."⁹⁷⁹ Again, such a counter-productive message should include any deceptive move, misrepresentation, or clear false statement, and the communication director's job is to help filter these messages in order to turn them into productive ones.

6.2.2.2 Minor/supporting mediator roles/labels

The above central/core roles may be complemented by subordinate minor roles that shall assist the mediator in her job. Some of these roles might suit most mediation styles, while others may be limited to specific approaches. These minor roles resemble elements in the To Do List mentioned above in this chapter. We shall explore some of these roles that will be of importance for our proposed model.

The information-gatherer is one of the roles mediators might need to adopt "by way of filling gaps in knowledge in a way that improves the parties' assessment of risk."⁹⁸⁰ Knowing more about parties, and allowing them to know more about themselves and about each other shall reduce the chances of misunderstanding and misrepresentation, and add more clarity and accuracy to their communication. Such clarity/accuracy is useful in producing better arguments, as we have seen in Chapter Four of this thesis while exploring the logic domain. Being an Information-gatherer can't be accomplished without also being a Listener, which is perhaps "the most important role of a mediator,"⁹⁸¹ not only to fill the gaps in knowledge, but also because "mediators who actively engage in listening also may serve as a model for the

977 Kovach (n 174) 308-309.

978 Mackie (n 30) 287-288.

979 *ibid* 287-288.

980 *ibid* 286.

981 Kovach (n 977) 308-309.

parties, potentially encouraging them to listen to each other.”⁹⁸² Creating room for careful listening shall, again, reduce the chances of misunderstanding.

The Reality-tester is another assisting role which mediators can resort to in order to “help shift party positions by questioning and reviewing their evidence and arguments in a non-partisan manner as a ‘devil’s advocate.’”⁹⁸³ However, this role can’t be achieved before gathering all possible information that shall help the mediator in her job as a Reality- tester, sometimes known as an Agent of Reality,⁹⁸⁴ who encourages parties to “face the realities of their situations where they are being unrealistic, uninformed or just intransigent.”⁹⁸⁵ The purpose of these roles/jobs is to make sure that the relevant party is aware of the consequences of her behaviour, position, and attitude, and to consider the anticipated response of the other party if she has not considered it previously. Such awareness shall encourage this party to change this attitude, move, or argument that might worsen the situation.⁹⁸⁶

A relevant role to the Reality-tester and Agent of Reality is the Doubt Creator.⁹⁸⁷ In creating doubt, the mediator might work “over the facts, over evidence, over rules and precedents, over likely court outcomes, and even over the personality and behaviour of the other party.”⁹⁸⁸ Her aim in doing this is that “creating doubt in a negotiating party’s mind is to cause them to move off their current positional claim to one which is more likely to result in settlement.”⁹⁸⁹ Parties’ minds can be targeted by the mediator using several tools including questions, absurd counterexamples, paraphrasing and other tactics, as we shall see later in this chapter while presenting our proposed model.

Reflecting on the above three groups of role labels, along with the mediators’ job lists, in the light of the previous five chapters, shall lead us towards a clearer image of our proposed model for mediators to adopt. Below, we shall begin with presenting our suggested metaphorical/rhetorical mediator role, then move to suggesting a central

982 *ibid.*

983 Mackie (n 30) 286-287.

984 Boulle and Nestic (n 344) 212.

985 *ibid.*

986 *ibid.*

987 *ibid.* 180.

988 *ibid.*

989 *ibid.*

factual role that can precisely describe the main mediation role as we perceive it. Finally, we will present a series of minor roles that shall help the mediator in her main job.

6.3 Our proposed fallacy handling roles

The above roles, this thesis proposes, do not offer sufficient protection on the face of fallacies and their anticipated harms. This insufficiency comes from the fact that none of the given roles presented any full structured scenario of the situation of having a logical fallacy in the mediation room. While they endeavour towards strengthening mediators and equipping them with systematic tools that help them addressing parties' concerns, handling their emotions, and mitigating their biases, we cannot find a germane role to the needed task towards fallacies. Without envisaging negotiation as a persuasion process, mediators shall still be not aware enough of the significance of argumentation scholarship and reasoning studies. This lack of awareness shall leave mediators disarmed, helpless, and defenceless in the face of logical fallacies. On Chapter Two of this thesis, we explored mediation styles and revisited the various mediation grids. On this exploration we resorted to three criteria; mediator positivity, mediation goals, and disputes' aspects. Yet, all included styles on these grids did not engage with the challenge of logical fallacies' harms. Even when the imbalance in reasoning abilities has been explored to some extent in some studies, as we showed in chapter two when we discussed mediation values, namely, fairness, however, these studies did not investigate the detailed scenarios of committing fallacies, either intentionally or unintentionally and the various possibilities of endangering mediation they might cause. Thus, we shall introduce here three proposed roles which we believe can describe our approach towards, not only handling fallacies, but also providing mediators with a comprehensive approach that shall help her to get her To Do List done, as explained earlier in this chapter.

The metaphorical role is made to simplify the idea behind the proposed role, and to make it realistic by avoiding strict academic wording or the precise researchers' terminology. As we have seen above, labels like 'coach', 'traffic warden', and 'play director' are from outside the academic world, but mediation scholars have been

regularly using them, in order to make this relatively new practice familiar and recognisable. By contrast, the central factual role is, as stated above, another edition of mediation styles/approaches that aim to use and apply academic, concise and precise descriptions, that target specialists more than laypersons. Finally, our proposed minor roles are tailored to support and help the mediator while applying her central factual role.

The proposed roles we are going to present below will be, respectively; the Persuasion Game Master (as a metaphorical label), the Rationaliser (as a central factual label), and finally a series of minor/supporting roles/labels that form what we call the CEBF Model.

6.3.1 The persuasion game master

In Chapter Two of this thesis, we proposed a mediation definition that introduces mediators as Party-minders. The rationale behind that approach was our initial premise that negotiating parties are “playing” a “persuasion game” and the mediator’s role is to master the game and supervise the players, which is quite similar to what child-minders do; they leave the actual play to the players/children, but they suggest the rules, teach them about these rules, and intervene whenever required to do so, in order to protect all parties from any anticipated harm.

Our persistence in using “the game metaphor” throughout our thesis comes from features of the concept of “gaming” in general, as analysing this concept shows that games share the following qualities:

- Games have rules and don’t occur spontaneously. By having a closer look at known games, we can end up with a simple fact that every game has its own set of rules, that aims, generally, to guarantee fair practice, encourage moral behaviours, and avoid all unnecessary pain/harm, even in martial games such as judo and wrestling.⁹⁹⁰ These objectives are quite similar to the mediation values we explored in Chapter Two of this thesis, and the

⁹⁹⁰ For instance, see the International Olympic Committee Code at: <<https://www.olympic.si/datoteke/Code-of-Ethics-2018.pdf>> accessed 6 Mar 2022.

expected harms of the absence of game rules quite similar to the harms which fallacies might cause to the mediation process, as we discussed in Chapter Five.

- Games are, usually, “group activities” rather than being a “one-man show”. This applies not only to team sports/games, but also in individual sports/games, as behind this individual there is usually a full crew, including a coach, a doctor, a nutritionist etc. This nature adds what’s known as “team spirit⁹⁹¹” and maintains a “healthy synthesis between individual and collective needs and expectations.”⁹⁹² This cooperative/collective spirit is what we mean by labelling mediation as a “game” other than a “legal battle” or “power struggle”, as this shall emphasise and encourage the necessary cooperative behaviour. We have learned from the well-known experiments that examined the influence of labelling on encouraging/discouraging cooperative behaviours by conducting (Wall Street Game vs. Community Game)⁹⁹³ which indicated that “the relevant labeling manipulations exerted far greater impact on the players’ choice to cooperate versus defect,”⁹⁹⁴ as participants in the Community Game were more cooperative and less defensive than those in the Wall Street Game, in all of the games’ rounds,⁹⁹⁵ without any changes to the two games’ rules or procedures. The labeling, solely, made the difference.
- Sportsmanship is an essential concept in the gaming and sports world, as it encourages the characteristics of “fellowship, courage, patience, self-control, self-confidence, being non-disdainful toward others, respecting the ideas and morals of others, courtesy, kindness, nobility, honour, cooperation and generosity.”⁹⁹⁶ This sportsmanship morals list concurs

991 For more about the concept of team spirit and its influence see: T Silva and others ‘Smells Like Team Spirit: Opening a Paradoxical Black Box’ (2014) 67 Human Relations 287 <<https://doi.org/10.1177/0018726713492349>> accessed 6 Mar 2022.

992 *ibid* 287.

993 Liberman, Samuels, and Ross (n 763).

994 *ibid*.

995 *ibid* 1177.

996 See: A K Akbulut, ‘Sportsmanship Behavioral Tendencies of the Students Athletes in Turkey: Ardahan Example’ (2020), 9 Journal of Education and Learning 76 <<https://doi.org/10.5539/jel.v9n2p76>> accessed 6 Mar 2022.

with the good faith requirements list in many areas, as we have seen in Chapter Two of this thesis.⁹⁹⁷

As a sequence of the above understanding, we presented mediators in our thesis as masters of three games; the containment game in Chapter Three, the displacement game in Chapter Four, and the persuasion game in Chapter One. These three games share the same content, but each one approaches this content from a slightly different angle.

The containment game is an insider game where each party tries, internally, to win the dispute via the conversation she is having, and the mediator's role is to help each party win her inner game. The displacement game is more concerned with the applicable set of rules in the process, and whether those are the logical rules or the substitutes (heuristics, biases, and fallacies). The mediator's role here is to create an atmosphere where logic can stand a better chance. The persuasion game (in Chapter One and Two) is the back-and-forth arguments parties send and receive (like a table tennis game) while negotiating. In this game, every party tries to persuade the other one that her position is reasonable and fair. The mediator's role in this persuasion game is, again, to help parties present less flawed arguments by helping each party get over her own unaddressed concerns, uncontrolled emotions, unmoderated biases, and unhandled fallacies. Once the mediator managed to help each party to get her concerns addressed, her emotions calmed, her biases mitigated, and her fallacies handled, then the way to resolution with the other party becomes better paved, as we shall see in the model we suggest below.

6.3.2 The Rationaliser

One of the most vital jobs mediators need to master, we believe, is bringing more rationality to the mediation room. To rationalise, in dictionaries⁹⁹⁸, is either to attempt to find/create an explanation/justification/excuse for something using logical reasons,

997 See above 2.6.1.2.

998 See: <<https://dictionary.cambridge.org/dictionary/english/rationalize>> accessed 6 Mar 2022, <<https://www.merriam-webster.com/dictionary/rationalize>> accessed 6 Mar 2022 and <<https://www.collinsdictionary.com/dictionary/english/rationalize>> accessed 6 Mar 2022.

or to make an effort to influence a process/company/industry into a more efficient condition, especially by getting rid of unnecessary elements and components. This last factor is mainly British, and widely used in the business sector. We mean here by rationalisation in the context of negotiation and mediation, as in the British use of the term. The rationaliser core role of mediation is conditioning parties to consider thinking logically, while negotiating by redesigning the mediation atmosphere to make it “logic friendly.” This mission/role can’t be achieved without several subordinate actions/jobs/roles, in which the mediator needs to help parties getting rid of the hurdles that face them during the process.

In Chapter One of this thesis, we explored the concept of negotiation, and concluded this investigation by stating that persuasion is the key word to perceive and understand the essence of negotiation. The reason behind this conclusion is that negotiation involves parties’ use of logic, reason, and judgment, as it is a decision-making process at the very end. Therefore, parties might need to be empowered regarding their persuasion/argumentative practices, but without challenging or exposing their lack of logical abilities or reasoning skills. For parties, it becomes a matter of dignity and respect to prove that their reasoning was correct, as “most men will admit that they are not handsome. Many will concede they are not strong. But none will acknowledge that he is not logical. This is no peculiarity of our own age, for three centuries ago La Rochefoucauld remarked that men will often apologize for their memory, but never for their judgment.”⁹⁹⁹ Being logical is an advanced human ability that people are usually confident in obtaining, even if it’s not exactly the case, and this ability is the prime tool, or should be the prime tool of any decision-making process, and a central skill at any persuasion or influence attempt. Being a Rationaliser Mediator, however, despite its independent structure and nature as we shall explore below, can still benefit from the central factual roles presented above; the negotiation coach, the protector, and the communication director.

The Rationaliser can achieve her goal by acting as a Negotiation Coach in an attempt to bring rationality to the mediation room. Here, the mediator can teach parties and

⁹⁹⁹ Loevinger (n 9) 471.

condition them to be ready to avoid unwanted reactions,¹⁰⁰⁰ not ignore their opponent's emotions,¹⁰⁰¹ be explicit in expressing themselves, be specific in expressing their feelings and ideas,¹⁰⁰² accept responsibility and be ready to apologize,¹⁰⁰³ acknowledge others' feelings after learning that "acknowledging is not agreeing."¹⁰⁰⁴ All these skills and behaviours, and more, can be taught by the Rationaliser Mediator who, in general, is often expected to help in "teaching communication or conflict resolution skills."¹⁰⁰⁵ However, the Rationaliser should be able to teach more skills, as we shall see below while presenting the minor supporting roles that shape our proposed model.

The Rationaliser Mediator shall also act as Protector Mediator throughout her process. To elaborate, in our approach it is expected for the mediator to intervene, in order to practice her role in "protecting vulnerable parties,"¹⁰⁰⁶ and to empower the threatened weaker voices in the mediation room. By vulnerability and weakness here, we don't limit ourselves to a lack of resources, including money, time, or legal representation. We are more concerned here with parties' logical abilities, bargaining competences, and persuasion skills, that can be advantageous personal traits in mediation for the party who masters them.¹⁰⁰⁷ The concern here is that "one party's mastery of quick, slick, or sly rhetoric may lead the less skilled wordsmith to make concessions that do not reflect her true preferences."¹⁰⁰⁸ Some ethical mediation codes have given sufficient attention to this risk and advised mediators who participate in such situations to withdraw.¹⁰⁰⁹ Withdrawing is not - and shouldn't be - the sole reaction mediators can try where they find imbalances in these capabilities. Rationaliser Mediators can protect the party who may have less logical reasoning skills by deploying several tools and by applying a wide range of systematic moves that we shall present in our model later in this chapter.

1000 W Ury, *Getting Past no: Negotiating with Difficult People* (Bantam Books 1991) 15.

1001 *ibid* 41.

1002 Fisher and Brown (n 872) 56.

1003 *ibid* 57.

1004 Stone, Patton, and Heen (n 115) 182-183.

1005 Mayer (n 11) 202.

1006 Waldman (n 228) 7.

1007 *ibid* 94.

1008 *ibid* 97.

1009 *ibid*.

Finally, the Rationaliser Mediator can learn from the Communication Director mediator. In order to do so, she might need to get trained on how and when to step in and persuade the party who is willing to send a counter-productive message to change her move, and try a more rationalised and logical move. Learning to recognise illogical moves and fallacious arguments when they enter the communication is a skill the rationaliser will need to obtain, as we shall see later on this chapter. Another skill she needs is to know how to help parties filter their offers, statements, and arguments from a harmful irrational/illogical nature. Finally, the mediator shall be able here to guide parties in their mutual communication on how they should respond to/deal with fallacious arguments and illogical moves.

However, before wearing any of the above three hats (coaching parties, protecting them, and directing their communication), the Rationaliser Mediator needs to accept that “the mediator is responsible for promoting a reasonable negotiating atmosphere.”¹⁰¹⁰ Additionally, she has to be aware that the core of her role is conditioning parties to consider thinking logically while negotiating. She needs to realise that her first important job is to redesign the mediation atmosphere to make it “logic friendly”, by switching the participants’ attitude and thinking from using their emotional mind to depending more on their rational mind,¹⁰¹¹ from the peripheral route of persuasion to the central one,¹⁰¹² from system one (fast thinking) to system two (slow thinking),¹⁰¹³ or from what we framed in Chapter Four as from substitute logic to original logic. The dichotomy between these two worlds is what the Rationaliser Mediator needs to understand in order to be able to move parties from the first position to the second. She needs to realise that there is a “steady gradient in the ration of rational-to-emotional control over the mind; the more intense the feeling, the more dominant the emotional mind becomes-and the more ineffectual the rational.”¹⁰¹⁴ Thus, she needs to perceive her main job as decreasing domination of the emotional mind/peripheral route/system, by tracking/tackling/ handling irrationality drivers and

1010 Standard 3 (6) of: Rule 187.00.01-001 - Requirement for the Conduct of Mediations and Mediators- Rules of conduct to which mediators on the Arkansas Alternative Dispute Resolution Commission's Roster of Mediators must adhere.

1011 Goleman (n 769) 8-9.

1012 We have explored these routes in Chapter One of this thesis, for more about this model see: Petty and Cacioppo, (n 1b).

1013 Kahneman (n 2).

1014 Goleman (n 769) 8-9.

encouraging/supporting/promoting rationality, logical reasoning, and organised flawless thinking.

This rationalisation role we present here can't be implemented, or even fully understood, without being accompanied by a wide range of minor/supporting roles/jobs that form an integrated model, as we shall see below. However, before moving to our detailed model, we might need to shed some light on two relevant concepts that might help our understanding of the Rationaliser Mediator role better. These two concepts are Mindfulness and Mentalisation.

6.3.2.1 Rationalisation and mindfulness

Mindfulness is an approach that has been introduced to the negotiation and mediation domain by Leonard Riskin who has been inspired by meditation practices, and Buddhists rituals. He means by this term “a certain way of paying attention - intentionally, moment-to-moment, with equanimity and without attachment - to whatever passes through the conventional senses and the mind.”¹⁰¹⁵ He then makes a clear useful explanation of Mindfulness, or what he sometimes calls mindful awareness, by explaining its opposite; Mindlessness. By this later he refers to the status of being in an "entrapment in old categories; by automatic behaviour that precludes attending to new signals; and by action that operates from a single perspective. Being mindless, colloquially speaking, is like being on automatic pilot.”¹⁰¹⁶ People who act without mindfulness are usually driven by their habitual or automatic emotions, thoughts, and bodily sensations, which makes them prone to noticeably behave in a reactive way instead of adopting a responsive thoughtful fashion. By contrast, “when a person is mindful, however, she can experience and observe thoughts, emotions and body sensations - be ‘present’ with them - and yet enjoy a degree of freedom from them, which enables the person to behave skilfully or responsively.”¹⁰¹⁷

1015 L L Riskin, 'Further Beyond Reason: Emotions, the Core Concerns, and Mindfulness in Negotiation' (2010) 10 Nevada Law Journal 289, 308.

1016 *ibid* 309 where Riskin refers to Langer, E. J. (1997). *The power of mindful learning*. Addison-Wesley/Addison Wesley Longman.

1017 *ibid* 310-312

The advantages that mindfulness, or what's called "engaged detachment"¹⁰¹⁸, can bring to mediation and negotiation can be significant. It provides mediators with skilled observation abilities which sharpen their capability to recognise emotions and to identify their root causes,¹⁰¹⁹ arming them with flexibility, calm, perspective, and openness. This shall help mediators become fully aware of the emotions that are generated, or caused, by the conflict, without being overcome by them. This engaged detachment shall also help mediators to keep a clear head, which appreciates emotions, instead of suppressing them or acting as if they do not exist. This clear calm head "provides a better approach to negotiation and facilitates an examination of the actual interests of the disputants."¹⁰²⁰ Furthermore, mindfulness "connotes the ability to recognize (without being overcome or clouded by emotion) when one or more of the interested parties is insufficiently willing to negotiate in good faith."¹⁰²¹ Such early recognition should help the mediator in her efforts in preventing "the bad faith disputant from taking unfair advantage of those acting in good faith."¹⁰²²

Mindfulness can be learned systematically through a set of techniques. These techniques can be formal or informal. Formal ones have been developed by Buddhists through learning to "pay attention to the breath, body sensations, thoughts, and emotions-one at a time, at first, and then simultaneously."¹⁰²³ Informal techniques include a number of practices that can produce "present-moment, non-judgmental awareness in daily life, such as deciding to be mindful during certain tasks or events - for example, brushing your teeth, answering the phone, waiting for a stop light to change, or standing in line at the grocery store."¹⁰²⁴ By learning this, mediators can become able to obtain what's called "emotional sensitivity" or "external mindfulness."

1018 J W Stempel, 'Feeding the Right wolf: Niebuhrian Perspective on the Opportunities and Limits of Mindful Core Concerns Dispute Resolution' (2010) 10 Nevada Law Journal 472 <<https://scholars.law.unlv.edu/nlj/vol10/iss2/9>> accessed 12 Apr 2022, 510.

1019 Riskin (n 1015) 315.

1020 Stempel (n 1018) 510.

1021 *ibid* 511.

1022 *ibid*.

1023 Riskin (n 1015) 314.

1024 *ibid* 314-315.

This sensitivity encompasses several features, including “curiosity about the other person, an ability to be ‘present’ to the suffering of another, an acceptance of one's own reactions to the emotions of others, and positive emotions, including compassion, for the other.”¹⁰²⁵ Again, and similarly to the above informal practices, the mediator's systematic observation of her own emotions, thoughts, and body sensations might aid her in obtaining this sensitivity.¹⁰²⁶

Rationalisation and mindfulness find their common ground in awareness of emotions, a responsive thoughtful fashion, and not being driven by their habitual or automatic emotions, thoughts, or body sensations. However, rationalisation claims that it might have more to offer to the mediation scholarship and practice. The Rationaliser Mediator is concerned with the argumentation used during the mediation session. She is interested in helping parties produce flawless, reasonable, non-fallacious arguments. Her interest in recognising and observing parties' emotions, as mindful mediators do, comes as a prerequisite and essential requirement to achieve her main goal; adding logic to the conversation in the mediation room. Such an addition requires more effort from rational mediators that exceeds what Riskin and his colleagues asked from mindful mediators. We shall explore later in this chapter the detailed structure of the rationaliser's role, and the necessary steps to gain this proposed approach /framework/model, workable.

6.3.2.2 Rationalisation and mentalisation

*Mentalization denotes the process by which a brain becomes a mind.*¹⁰²⁷

1025 *ibid* 322-323 and C Freshman, ‘After Basic Mindfulness Mediation: External Mindfulness, Emotional Truthfulness, and Lie Detection in Dispute Resolution’ (2006) 7 *Dispute Resolution* 511

<https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1171&context=faculty_scholarship> accessed 12 Apr 2022, 506-520.

1026 *ibid*.

1027 E L Jurist, ‘Mentalized Affectivity’ (2005) 22 *Psychoanalytic Psychology* 426 <<https://doi.org/10.1037/0736-9735.22.3.426>> accessed 15 Aug 2022, 428.

While mindfulness was, originally, a meditation activity and Buddhist practice, mentalisation is a psychological process that was introduced and used by both psychoanalysts and developmental psychologists to refer to a specific capacity linked to people's mental states. And while mindfulness focuses more on recognising emotions and feelings (without neglecting thoughts and beliefs), mentalisation is more centered around cognition and mental states (without ignoring emotions and desires). However, both concepts share a core feature of *developing awareness of self and others* which make them both use quite similar terms in numerous studies.¹⁰²⁸

One precise definition of mentalisation is to conceive of it as the “capacity to situate oneself as a mental subject within a world of other mental subjects.”¹⁰²⁹ Another short, yet concise definition, refers to it as “core process of human social functioning and self-regulation, involved in the establishment of robust links between personally meaningful early experiences and their representation.”¹⁰³⁰ A more elaborate one presents mentalisation as “the process by which we make sense of each other and ourselves, implicitly and explicitly, in terms of subjective states and mental processes. It is a profoundly social construct in the sense that we are attentive to the mental states of those we are with, physically or psychologically.”¹⁰³¹ Mentalisation, then, is a skill that can enable us to read and interpret other people's minds, which “developmentally precedes and then fosters the ability to read and understand one's own mental states”.¹⁰³² By reading other people's minds we mean interpreting and understanding their desires, beliefs, and other affective and cognitive states.¹⁰³³ In other words, when we try to mentalise, especially when this happens in an unrestricted manner, we become able to recognise and fully understand “what our own motivations might have been in a particular situation and what the motivations of the others with whom we

1028 See for example: A Bateman and P Fonagy, ‘Mentalization Based Treatment for Borderline Personality Disorder’ (2010) 9 World Psychiatry <<https://doi.org/10.1002/j.2051-5545.2010.tb00255.x>> accessed 15 Aug 2022, E Galgut, ‘Reading Minds: Mentalization, Irony and Literary Engagement’ (2010) 91 International Journal of Psychoanalysis 915 <<https://doi.org/10.1111/j.1745-8315.2010.00279.x>> accessed 15 Aug 2022, and M A Bouchard and others, ‘Mentalization in Adult Attachment Narratives: Reflective Functioning, Mental States, and Affect Elaboration Compared. (2008) 25 Psychoanalytic Psychology 47 <<https://doi.org/10.1037/0736-9735.25.1.47>> accessed 15 Aug 2022.

1029 Galgut, *ibid* 916.

1030 Bouchard and others (n 1028) 48.

1031 Bateman and Fonagy (n 1028) 11.

1032 Jurist (n 1027) 428.

1033 Galgut (n 1028) 916.

were interacting might have been. When we are mentalizing well, we are able to plausibly read situations and, therefore, we are able to understand other people's behavior better. This gives us a sense of being in control of our behaviors and of ourselves and enables us to communicate more clearly about our situation.”¹⁰³⁴

The essence of mentalising is derived from supposing that no one can know another's mind, and that every single person's mind, experience, and feelings are unique. Therefore, “the main skill for someone trying to encourage mentalizing is to take a curious or naive inquirer role to draw out the nuances of the person's unique experience and perspective.”¹⁰³⁵ In order to achieve this successfully, practitioners might need to apply a wide range of techniques that shall aid them in doing so. Not surprisingly, “many of these techniques might appear common to mediators- for instance, being curious, asking open-ended questions, and actively listening for differences in perspective.”¹⁰³⁶ The link between mentalisation and mediation can be seen through one of the main concepts of mentalisation; a “Reflective Function” which refers to “the capacity to envision and think about mental states, in one-self and in others, in the service of building realistic models of why they behave, think, and feel as they do.”¹⁰³⁷ RF aims to recognise the reasons and incentives that urge people to think and behave in specific ways. This objective can be linked to the efforts of Riskin's efforts to build his mindfulness model on the Fisher and Shapiro Core Concerns System¹⁰³⁸ which searches for the interests/concerns that invoke negative emotions in negotiation and mediation, as we shall explore later in this chapter. If mindfulness, as stated above, can be taught and developed through practice and training, then, by the same token, mentalisation as a process and skill can be learned and developed through a wide range of training courses that target various levels of audience, from ordinary people to

1034 J Howieson and L Priddis, ‘Mentalizing-Based Approach to Family Mediation: Harnessing our Fundamental Capacity to Resolve Conflict and Building an Evidence-Based Practice for the Field’ (2015) 53 Family Court Review 79 <<https://doi.org/10.1111/fcre.12132>> accessed 15 Aug 2022, 80.

1035 *ibid* 81.

1035 Bouchard and others (n 1028) 48.

1036 Howieson and Priddis (n 1034) 81.

1037 Bouchard and others (n 1028) 48.

1038 See: Riskin (n 1015) 290-291, and Fisher and Shapiro (n 10).

skilled professionals.¹⁰³⁹ One of the applications of linking mentalisation skills and techniques to advanced mediation practices is family mediation. There is “some strong evidence that the concept of mentalizing has potential to provide an underpinning theory to explain how family mediation processes work.”¹⁰⁴⁰ However, this link between mentalisation and mediation is not limited to family mediation, as the “mentalising approach to mediation could assist mediators and parties to bridge the tension gap between mediation process and mediation outcome.”¹⁰⁴¹ Such bridge can be built by “paying particular attention to the parties mentalising abilities throughout the mediation process and by using a mentalising stance when required.”¹⁰⁴² By doing this, mediators can forge the necessary conditions to lead the negotiating parties towards better, constructive, and realistic outcomes.

Rationalisation and mentalisation can find common ground in reading people’s minds and interpreting/understanding their desires, beliefs, and other affective and cognitive states. They both focus on fully and correctly recognising and understanding peoples’ motivations and the development of their thoughts and mental states. However, while mentalisation has an observational and analytical nature that pays more attention to recognising and understanding both our and others’ mental states, rationalisation focuses primarily on parties’ compliance with logic. Rationalisation is more interested in the formulation of parties’ arguments, and the way they are used, which might have more to offer to mediation scholarship and practice, through helping parties produce flawless, reasonable, and non-fallacious arguments. As stated above when we drew a connection between rationalisation and mindfulness, the Rationaliser Mediator’s interest in recognising and observing parties’ emotions comes as a prerequisite and essential requirement to achieve her main goal; adding logic to the conversation in the mediation room. Such an addition requires more effort from rational mediators that

1039 See for example the courses delivered by Anna Freud Centre in London: <https://www.annafreud.org/training/training-and-conferences-overview/online-training-live-and-self-directed-courses/mentalizing-and-mentalization-based-treatments-with-children-young-people-and-families-mbt-cyp-an-introduction/>, accessed 15 Aug 2022.

1040 Howieson and Priddis (n 1034) 93.

1041 J Howieson and L Priddis, ‘Mentalising in Mediation: Towards an Understanding of the Mediation Shift’ (2012) 23 *Australasian Journal of Dispute Resolution* 52 <<https://ssrn.com/abstract=2304540>> accessed 15 Aug 2022, 59.

1042 *ibid* 60.

exceeds ordinary mentalisation activities and techniques, as we shall explore later in this chapter.

Next we shall proceed to explore our proposed minor roles that shall help mediators fulfil their role as rationalisers, but before we proceed, we want to answer one important question: Would mediators really prefer to be rationalisers? This question is triggered by the study¹⁰⁴³ carried out by Scott Jacobs and Mark Aakhus in which they raised a significant discussion regarding the “characteristic tension between the conduct of mediators and the conduct of disputants.”¹⁰⁴⁴ They suggested that mediators and parties have competing perspectives regarding the most rational and successful way to proceed in dealing with disagreements. The parties pursue a vision that seems like a debate, while mediators pursue a different vision that seems more like bargaining.¹⁰⁴⁵ This tension evolves from the common-sense vision parties bring to mediation, that their ongoing dispute shall be settled and resolved through following reasonable argumentation. This vision makes them expect that rational discussion shall lead to justice, and they “expect that mediation should help in this respect”.¹⁰⁴⁶ However, Jacobs and Aakhus suggest that mediators “typically do not encourage this type of dialogue or attempt to improve it. Instead, mediators usually show lack of interest in such matters, often actively discouraging argument or otherwise redirecting the discussion away from argument.”¹⁰⁴⁷ The authors suggest that there are three models of mediators’ rationality, which are: critical discussion, bargaining, and therapeutic discussion.¹⁰⁴⁸

The critical discussion model makes an assumption that both disputants are capable of producing and distinguishing good arguments from bad ones, and assumes that both

1043 S Jacobs and M Aakhus, ‘What Mediators do with Words: Implementing Three Models of Rational Discussion in Dispute Mediation’ (2002) 20 Conflict Resolution Quarterly 177 <<https://heinonline-org.proxy.lib.strath.ac.uk/HOL/P?h=hein.journals/cfltrq20&i=180>> accessed 15 Aug 2022.

1044 *ibid* 178.

1045 *ibid* 183.

1046 *ibid* 178.

1047 *ibid*.

1048 *ibid* 185.

of them are generally willing to accede to more persuasive, less flawed argument. The ideal settlement according to this model, if everything works perfectly, will occur when both negotiating parties reach a mutual conviction that all given claims and arguments are correct. When mediators follow this model, they might need to intervene from time to time during the mediation session, in order to enhance the quality of parties' arguments and to guide the discussion in more constructive ways. However, Jacobs and Aakhus assert that mediators, in general, do not prefer this route.¹⁰⁴⁹ The reason behind this, the authors believe, is that even if the argument produced by one party was sound and persuasive, it seldomly succeeds in making the other party give a concession, but on the contrary, it's usually faced by another good counterargument from their counterpart.¹⁰⁵⁰

In the bargaining model of dispute resolution, there is an assumption that the core of the dispute is not the disagreement over values and facts and values, but rather the core is the conflicting interests and needs. In other words, disputes are "over not what the parties believe but, rather, what they want."¹⁰⁵¹ The ideal settlement, according to this model - if everything works perfectly - will occur when both negotiating parties reach a mutual conviction that the suggested solution is able to accommodate the self-interests of all negotiating parties. Ultimately, this agreed upon solution, in this model, shall be reached through a series of offers and counteroffers that lead to mutual concessions within the given options.¹⁰⁵² In this model, contrary to the critical discussion model, mediators tend to "interpret arguments as attempts to resist proposals rather than as attempts to reason together. Rather than finding in the back and forth of argument and counterargument an opportunity for resolving disagreement, mediators usually see evidence of entrenched resistance and an unwillingness to accommodate to the other party."¹⁰⁵³

¹⁰⁴⁹ *ibid* 186.

¹⁰⁵⁰ *ibid* 190.

¹⁰⁵¹ *ibid* 191.

¹⁰⁵² *ibid*.

¹⁰⁵³ *ibid* 192.

Finally, the therapeutic model of dispute resolution makes an assumption that the dispute usually erupts from a misunderstanding of the counterpart's viewpoint, or from failing to show sufficient respect for the other party's rights or standpoints. Disagreements here are more relational, and the core of the dispute is not over the facts or the interests, but rather over feelings and emotions. The ideal settlement, according to this model, if everything works perfectly, will occur when both negotiating parties reach a mutual conviction that the suggested solution is able to help disputants "recognize and accept each other's point of view."¹⁰⁵⁴ Mediators, according to this model, need to treat messages advanced by negotiating parties as "assertions aimed at resolving a difference of opinion in their own right but are, instead, treated as expressions symptomatic of underlying frustrations and unresolved emotions."¹⁰⁵⁵

The question here is: if mediators do not tend to follow the critical discussion model that fosters rationality, why should we ask them to be Rationaliser Mediators? The answer, we believe, is simple; being a Rationaliser Mediator doesn't mean that they need to keep the conversation/discussion/negotiation focused solely on the facts or values of the dispute, ignoring the interests and wants of the parties, or overlooking emotions and feelings. Rationaliser Mediators, as we conceive of them, are responsible for helping parties avoid misrepresenting the three above core components of the disputes; facts, interests, and emotions. Because fallacies are the ultimate, precise, manifestation of this misrepresentation, Rationaliser Mediators need to focus on avoiding the expected harms that might be caused by these manifestations/fallacies. Thus, when the Rationaliser Mediator tries to help each party think logically or avoid harmful deviations from logic, this doesn't mean that she follows the critical discussion model. Even if the mediator believes that parties' interests or emotions are the core of the conflict, she can still be a Rationaliser Mediator. In the bargaining model, for example, Rationaliser Mediators can keep an eye on the offers and

¹⁰⁵⁴ *ibid* 196.

¹⁰⁵⁵ *ibid* 197.

counteroffers that each party sends and receives during the process towards the mutual concessions that shall lead to the settlement. Then, she shall intervene when she notices that the representation of this offer/counteroffer has included a fallacy that might lead to any of the harms we discussed in the previous chapter. This intervention doesn't mean that she is adopting the critical discussion model, but simply means that she protects the process and the parties from unwanted harms.

Accordingly, being a Rationaliser Mediator, we believe, can help mediators avoid unwanted characteristic tension between their conduct and the conduct of the negotiating parties. In other words, both mediators and parties can enjoy the expected benefits of our proposed rationalisation role without feeling that tension caused by their possibly contradictory understanding of the most rational path to proceed in reaching a resolution of the dispute. The Rationaliser Mediator doesn't need to believe that disputes shall be resolved through argumentation over facts solely. In fact, she believes that if parties are going to use arguments during the mediation session, then they need to protect these arguments from the expected harms of fallacies. Moreover, even mediators who are more convinced of bargaining or therapeutic models can still be rationalisers, and might often need to do this because both interests and emotions can be expressed and exchanged through arguments. To summarise, mediators in all models might experience fallacies - and other substitute logic practices - and they should be ready to handle all these practices, especially when these practices/deviations indicate a possible threat to the process. And in order to achieve this, the Rationaliser Mediator shall resort to a series of minor roles to track these deviations and handle them, as we shall see now.

6.3.3 The CEBF Model

Remember what the doctors tell us about tuberculosis: in its early stages it's easy to cure and hard to diagnose, but if you don't spot it and treat it, as time goes by it gets easy to diagnose and hard to cure. So it is with affairs of state. See trouble in advance (but you have to be

*shrewd) and you can clear it up quickly. Miss it, and by the time it's big enough for everyone to see it will be too late to do anything about it.*¹⁰⁵⁶

Machiavelli

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Our proposed minor roles are tailored to support and help mediators while applying their central factual role as *Rationalisers*. The CEBF Model is a series of minor/supporting roles that can show, in a detailed fashion, how the Rationaliser Mediator shall work. This model is based on our understanding of what we call Irrationality Evolution, or what can be termed the Fallacies Life Circle. This evolutionary journey is an approach to understanding how flawed arguments are developed and produced in the context of disagreement and conflicts.

In Chapter Three of this thesis, we examined various conflict/dispute definitions. A wide range of these definitions focused on the interests/concerns in the conflict by stressing the link between not addressing/satisfying those interests/concerns/needs/wants and the creation/manifestation/eruption of disagreement/dispute. Since negotiation/mediation scholarship is mainly designed to deal with these disagreements/disputes, the notion of interests/concerns is central in the domain of negotiation and mediation. In Chapters One and Two, we explored the various negotiation/mediation approaches/styles that seem to have evolved from the conception of parties' interests/concerns. In a number of these approaches, the starting point was the interests/concerns themselves, and the reader can easily track the escalation of the contradicting needs or conflicting interests to become overt disputes and a declared power struggle. In the overt conflict/disagreement stage, disputing parties usually use arguments to support and justify their opposing positions. When these arguments contain errors of thinking, it might be helpful, we suppose, to investigate the possible causes and roots of these mistakes in order to handle them. Below, however, we shall be following a backward path by trying to track the possible roots of irrationality/fallacies in negotiation and mediation.

¹⁰⁵⁶ N Machiavelli, *The Prince* (Penguin Classics 2009) 11.

6.3.3.1 Fallacies' life cycle

*Fallacies can be deceitful in two very different senses: in the sense that they can be committed intentionally to deceive an audience, to be sure, but also in the sense that they can be committed unintentionally by honest arguers.*¹⁰⁵⁷

As mentioned above in the previous chapter,¹⁰⁵⁸ we don't need to know whether the fallacy was planned or not. Moreover, we might not be able to confidently know this, as "all we know with a certain degree of certainty, thanks to the work of psychologists, is that people's judgments and inferences are frequently *biased* both unconsciously and involuntarily."¹⁰⁵⁹ The key starting point here is to explore the possible direct and instant cause of resorting to fallacies. We believe that arguers who are in a position of committing fallacies, mainly do this because they are *biased*, as "their attachment to a given position is so strong that it becomes tempting to 'jump to conclusions'."¹⁰⁶⁰ Those arguers look for plausible reasons to "justify an opinion they are eager to uphold. From an argumentative perspective, they do this not to convince themselves of the truth of their opinion but to be ready to meet the challenges of others."¹⁰⁶¹ However, this eagerness and strong tendency to convince/persuade their counterparts of their desired conclusions "hinges on their ability to construct plausible justifications for those conclusions."¹⁰⁶² Nevertheless, this strong tendency, which might blur arguers' vision and hinder their efforts to arrive at desired conclusions, is not the only reason for failing to construct good flawless arguments. In fact, ordinary arguers' abilities to rationalise their biased views and build persuasive arguments might be constrained by their limited logical abilities and poor reasoning skills, which are essential to construct an apparently reasonable justification for their desired

1057 Correia (n 806) 108.

1058 See above 5.3.1 in Chapter Five.

1059 Correia (n 806) 111.

1060 *ibid* 108.

1061 Mercier and Sperber (n 883) 66.

1062 Correia (n 806) 107.

conclusions.¹⁰⁶³ Indeed, this limited logical ability and expected ignorance of good argument requirements are sub-catalysts that might increase the opportunity of producing fallacies, but as we have seen in the five categories of fallacies in the previous chapter, the arguer who is about to commit a fallacy, regardless of her education or logical capacities, is strongly inclined to cling to the truth of her desired conclusion, even if there is no relevant, acceptable, or sufficient evidence to support it. That is why this section began by reasserting that we don't need to know if the fallacy was planned or not.

The arguer, in the given fallacy examples in Chapter Five, profoundly believes that she has to reach that conclusion even if the argument includes errors in reasoning. In structural fallacies, for instance, the arguer keeps arguing in a circle without giving any proof for her claim, because she has a biased judgment, even if she can't see it. The same happens with the genetic fallacy, where the arguer can't see any changes in the original perspective she holds, by which her prejudiced and strong emotional memories keep her biased and profoundly attached to the historical origin of the matter of the discussion/negotiation and pushes her to justify, rationalise, and defend her outdated views, even with flawed irrelevant arguments, just to jump to her desired conclusion. A very similar process happens with the wishful thinking fallacy, where the arguer's predetermined hopes regarding an outcome create a strong tendency to see it happen and defend its truth and merit using all available justifications, even if these justifications lack acceptability requirements. In the slippery slope fallacy, we have seen that the arguer is already persuaded, and eager to persuade the other part of the conversation, that the ultimate catastrophic final outcome of the given series of actions will inevitably happen even without any sufficient evidence that can prove the unavoidability of this outcome. Finally, when it comes to the fallacies that violate the rebuttal criteria, we have indicated that in the ad hominem fallacy, the arguer is apparently biased against the person who has been targeted by this fallacy, and she makes it worse by declaring this bias in an abusive manner instead of trying to rebut

1063 Kunda (n 885) 480.

this person's claim. And in this very same category, it is easy to recognise the bias behind the "Straw Man" fallacy, in which the arguer interprets the opponent's view in an unconsciously biased fashion."¹⁰⁶⁴

Therefore, reviewing the five fallacies categories demonstrates that they are often products of biases. While we do not claim that all fallacies derive from biases, it is common and evident that in most examples of fallacy we observe, there is a bias lying beneath. If noting the existence of biases behind fallacies is not a challenging or puzzling mission, it's workable through just analysing the structure of the fallacy and comprehending its nature, using basic knowledge of logic and fallacies scholarship, which schools of law have taught for a long time, as we mentioned in Chapter Four. In fallacies, there is a predetermined desire to reach a specific conclusion which is, simply, a predetermined desire, a bias towards that conclusion. The difference between bias and fallacy, as we explored in the previous chapter, is that although both have an inclination/tendency/leaning towards a specific conclusion that might have no fair/sufficient/ related justification, biases often keep this inclination relatively hidden, without explicit manifestation in tangible sentences. However, fallacies usually interpret this tendency in full formulated arguments that can be examined, analysed and attacked, using logical tools and approaches, as we have seen in the previous chapter. To put it simply, while biases distort judgment and reasoning, fallacies are the declaration of these distorted judgments after being articulated. Accordingly, the method of dealing with these two phenomena is expected to be different. Thus, when the mediator notices that the party who might have a strong bias towards a specific conclusion, and manages to present a well-structured, sufficient, related, acceptable, and irrebuttable justification for this aimed conclusion, the bias should be dealt with by using different approaches other than those given by logic studies. In the previous chapter, we visited some strategies and approaches that were tailored to mitigate biases, and we shall revisit them later in this chapter, but before that, we might need

1064 Correia (n 806) 110.

to take a closer look at the roots of biases, in order to complete our proposed “irrationality circle”.

If biases can be regarded as “systematic errors that invariably distort the subject’s reasoning and judgment,”¹⁰⁶⁵ these systematic errors “are often motivated, i.e., induced by a particular desire or emotion.”¹⁰⁶⁶ These desires and emotions work as an engine that pushes our beliefs and shapes our biases.¹⁰⁶⁷ Moreover, emotions not only affect our cognition and preferences, but it has become very clear that the role of emotions is central to human cognition functioning.¹⁰⁶⁸ There is a wide range of evidence that “emotions can induce biases in decision making.”¹⁰⁶⁹ Regardless of whether we admit it or not, emotions “directly bias decision making,”¹⁰⁷⁰ and this influence is not only limited to our decision making process, because emotions, to varying levels, “affect all our relationships. They affect how we think and how we behave.”¹⁰⁷¹ Accordingly, the way emotions shape our biases and increases the chances of committing fallacies is very direct and evident to observe and analyse. Emotions practice this influence by preventing us from “having access to all that we know, to information that would be at our fingertips if we were not emotional but that during the emotion is inaccessible to us.”¹⁰⁷² In such an influence of strong feelings, people work hard to keep rational, as engaging with emotions “is messy, clouds good judgment, and in some contexts - for example, at work - can seem simply inappropriate.”¹⁰⁷³ Emotions not only cloud our judgement, and not only prevent us from having easy access to the necessary information and knowledge, but also urge us to interpret what we see in a manner that completely fits with how we feel and ignore our previous knowledge if it didn’t fit with them. They change how we perceive the world around us, and change the way we imagine and interpret the opinions and actions of other people. They are dominant to the extent that “we do not seek to challenge why

1065 *ibid* 109.

1066 *ibid*.

1067 Gilovich (n 806) 45.

1068 Fenton and others (n 890) 1045.

1069 *ibid* 1046.

1070 *ibid*.

1071 Fisher and Brown (n 872) 43.

1072 Ekman (n 894) 55.

1073 Stone, Patton, and Heen (n 115) 13.

we are feeling a particular emotion; instead, we seek to confirm it. We evaluate what is happening in a way that is consistent with the emotion we are feeling, thus justifying and maintaining the emotion.”¹⁰⁷⁴ The reason behind this involuntary nature of emotions is the manner and rhythm with which they occupy us. When we are under the influence of emotions, “a cascade of changes occurs in split seconds, without our choice or immediate awareness, in: the emotional signals in the face and voice; preset actions; learned actions; the autonomic nervous system activity that regulates our body; the regulatory patterns that continuously modify our behavior; the retrieval of relevant memories and expectations; and how we interpret what is happening within us and in the world. These changes are involuntary; we don't choose them.”¹⁰⁷⁵ This central role of emotions in shaping the way we see the world, creating beliefs and biases, and, consequently, paving the way to produce fallacies, can interpret why we usually see logic textbooks discuss emotions in treatments of fallacies.¹⁰⁷⁶ This can explain why negotiation and mediation textbooks, practical manuals, and mediators’ qualifying programs, as we have seen on Chapter Two, paid attention to the way emotions should be dealt with.

In this approach of conceiving emotions and their relation to the mind/body split, we don’t strictly follow the Cartesian approach which separates our emotions from reason and consider the three parts (brain, mind, emotions) as completely independent from each other. We are rather, in fact, on the other side. I agree with Damasio¹⁰⁷⁷ that “reason may not be as pure as most of us think it is or wish it were, that emotions and feelings may not be intruders in the bastion of reason at all: they may be enmeshed in its networks, for worse and for better.”¹⁰⁷⁸ We do agree with him that in the effective deployment of reasoning strategies referred to in previous chapters, they most likely rely on people’s ability to experience emotions and feelings. However, this important role of emotions in decision making and reasoning, according to Damasio himself, shouldn’t urge us to deny that “emotions and feelings can cause havoc in the processes

1074 Ekman (n 894) 56.

1075 *ibid* 82.

1076 Brinton (n 898) 207.

1077 Damasio (n 501).

1078 *ibid* xii.

of reasoning under certain circumstances. Traditional wisdom has told us that they can, and recent investigations of the normal reasoning process also reveal the potentially harmful influence of emotional biases.”¹⁰⁷⁹ To maintain balance, which we aim to do during this entire thesis, we need to accept the fact that the significance of our feelings in our decision-making processes shall urge us to enhance “their positive effects and reducing their potential harm. Specifically, without diminishing the orienting value of normal feelings, one would want to protect reason from the weakness that abnormal feelings or the manipulation of normal feelings can introduce in the process of planning and deciding”.¹⁰⁸⁰ However, in order to keep this balance and reduce these potential harms, we need to dig deeper, to investigate the main causes of these negative emotions erupting, so that we might reach a more effective way in achieving this.

In Chapter One¹⁰⁸¹ we explored the concept of “interests/concerns” as the first negotiation element that both negotiating parties are aiming to have met, and as a main orientation for one of the most known negotiation styles: The Interest Based Negotiation. Later, in Chapter Two,¹⁰⁸² we revisited this concept while exploring different mediation approaches, and explored the problem-solving models. And finally, in Chapter Three, we mentioned contradictory interests while defining conflicts/disputes as the main engine for erupting disagreement and creating conflicts. In daily conversations, negotiations, or mediations, parties’ interests and concerns might be the starting point. The same observation applies here in the context of completing the process of tracking fallacies’ life circle in a backward direction, moving from fallacies to biases, and then from biases to emotions.

Emotions come from unacknowledged concerns and unaddressed interests, as they trigger strong feelings and negative emotions, which create tendencies that lead to

¹⁰⁷⁹ *ibid.*

¹⁰⁸⁰ *ibid* 246.

¹⁰⁸¹ See in Chapter One: 1.4 Negotiation Elements.

¹⁰⁸² See in Chapter Two: 2.1 Mediation Definition.

biased pathways and unjustified conclusions.¹⁰⁸³ We agree here with Roger Fisher and Daniel Shapiro that any approach towards handling emotions should begin by tackling their main causes.¹⁰⁸⁴ The need for tackling these emotions' sources instead of trying to deal with them directly is because it is very challenging to attempt this direct engagement with emotions, especially during an ongoing negotiation "where you also need to spend time thinking about each person's differing views on substantive issues and the process for working together. It can feel as though you are trying to ride a bicycle while juggling and talking on a cell phone."¹⁰⁸⁵ Accordingly, instead of feeling obviously powerless in the face of those dominant emotions, negotiators should be aided to overcome negative emotions and to stimulate positive ones.¹⁰⁸⁶ In mediation, negotiators shall be guided in how to avoid getting trapped and caught up in every influencing emotion they experience, and, instead, turn their attention to the generators of these emotions. Those generators, or what Roger Fisher and Daniel Shapiro called *Core Concerns*, are "human wants that are important to almost everyone in virtually every negotiation."¹⁰⁸⁷

While these concerns/interests/wants are often unspoken, they aren't by any means less real, crucial, or decisive than explicitly exposed interests. The unspoken nature of these concerns makes even experienced negotiators, surprisingly, unaware of the varied ways in which these concerns generate their emotions and motivate most of their decisions. This is why, as Fisher and Shapiro affirm, knowing those concerns shall "offer you a powerful framework to deal with emotions without getting overwhelmed by them."¹⁰⁸⁸ These five core concerns are:¹⁰⁸⁹ appreciation, affiliation, autonomy, status, and role. Addressing these concerns to avoid negative emotions and generate positive ones requires three conditions in deal with them: to be fair, honest, and consistent.¹⁰⁹⁰ With this treatment, by making parties feel appreciated

1083 Stone and Heen (n 500) 154.

1084 Fisher and Shapiro (n 10).

1085 *ibid* 12.

1086 *ibid* 14.

1087 *ibid* 15.

1088 *ibid*.

1089 In our proposed model, we don't limit ourselves to these five concerns, as our model encompasses all anticipated interests/concerns that might trap and grip parties in mediation.

1090 Fisher and Shapiro (n 10) 15.

(appreciation), treated as colleagues (affiliation), their freedom to decide is acknowledged (autonomy), their high status is recognized where deserved (status), and their roles are fulfilled in a way that convince them that they can make a difference (role). By doing this, negative emotions¹⁰⁹¹ that make parties feel angry, guilty, anxious, sad or jealous can be changed to positive ones that shall make them feel enthusiastic, affectionate, proud, happy, calm, and hopeful. This switch shall change their thinking and behaviour so that instead of making them biased, prejudiced, prone to react deceptively, and think rigidly, they shall be ready to cooperate, work together, and be trustworthy.¹⁰⁹² A well-prepared negotiator can use a checklist before negotiation to avoid ignoring these concerns, and a well-qualified mediator can assist her in this mission, as we shall see later in this chapter.

To sum up the above, we can use a simple illustrative timeline:

Unaddressed Concerns → Negative Emotions → Prevailing Biases → Logical Fallacies

This timeline doesn't claim that every step is the sole generator for the next one. We only propose that they are the main ones, according to studies reviewed above which showed the central role of each element in causing the other. Moreover, the circle phases can perform a mutual influence; for instance, fallacies might cause negative emotions when the party targeted by the fallacy feels misled and taken advantage of. However, tracking and recording human emotional and mental activities will be debatable and the frameworks that attempt to figure them will most probably be approximate. Yet, the value this timeline might present is that of enabling mediators to track a "possible" subsequent order of roots of fallacy from unspoken or undisclosed concerns, until they reach their final shape as written or spoken errant arguments. Each stage of this circle/timeline is a challenge that needs to be faced, handled and neutralised, or, at least, mitigated. We don't have to wait until the circle is complete; what we need is to defuse it, to cut the chain, and interrupt the evolution of the journey,

¹⁰⁹¹ Again, in our proposed model we shall not limit ourselves to negative emotions as anger, fear, or jealousy, but rather we encompass in our framework any strong emotion that has potential for creating an unwanted bias; for instance, feeling overly fascinated, or excessive gratitude towards someone or something, especially when it is expected to be temporary, and might create a bias that might lead to errant arguments, mistaken decisions, and unjustifiable concessions, which might be regretted later when this magical fascination is over.

¹⁰⁹² Fisher and Shapiro (n 10) 19.

the earlier the better. However, even if all early interventions failed, and the fallacy was produced, we should still have a reliable strategy to attack it. But, who should be the one to attribute this mission to in the context of mediation? Obviously, we claim, the mediator.

This model/timeline can be seen in a better light by revisiting the “full optimal decision rules”¹⁰⁹³ we presented in Chapter Four of this thesis while explaining the heuristics mechanism, and by viewing the concept of “the Ladder of Inference”¹⁰⁹⁴, in order to gain a deeper insight into our model.

The optimal decision as a full ideal process for decision-making requires identifying all relevant information, recalling from memory all relevant memories that have relevance to the identified information, assessing the weight of each identified piece of information, assessing all available alternatives, comparing all alternatives and then selecting the one that has a best value. However, with heuristics, the decision-maker might tend to ignore this sequence and apply a shortcut. This shorter pathway might require examining fewer pieces of information, retrieving less value data from memory, using less information weighting rules, or examining a lower number of available alternatives. This tendency for selecting, examining, and relying on fewer pieces of information while trying to reach a decision/conclusion is quite similar to what the fallacy committer does while experiencing the journey of the CEBF model. Unaddressed concerns and heated negative emotions shift the focus towards specific pieces of information and selecting them, while ignoring/not considering other available relevant data and facts. There, biases begin the weighting step by leading the decision-maker towards a desired conclusion, and fallacies encapsulate this chosen conclusion in a written or spoken argument.

1093 See Chapter Four: 4.2.1.2 Heuristics mechanisms.

1094 See: C Argyris, R Putnam and D M Smith, *Action Science* (1st ed, Jossey-Bass 1985), A Fiester, ‘The “Ladder of Inference” as a Conflict Management Tool: Working with the “Difficult” Patient or Family in Healthcare Ethics Consultations’ (2024) 36 HEC Forum, 31 <<https://doi.org/10.1007/s10730-022-09476-w>> accessed 6 Nov 2022, and Reilly (n 16) 454.

A similar approach can be used by comparing the CEBF model to the Ladder of Inference concept. The ladder of inference¹⁰⁹⁵ is a useful model in helping us understand why and how we might erroneously jump to certain conclusions without sufficient reasons. It is a “a symbol or metaphor representing the process by which people typically arrive at their conclusions - the analytical "path" they travel, usually unconsciously and quite speedily, in reaching their conclusions in a given matter.”¹⁰⁹⁶ With this tool, we can see a metaphor or symbol showing an imagined ladder that emanates from a pool, with three rungs above the water level. This pool shall represent all observable and unobservable available facts, data, and pieces of information a person can process. In the first rung, we select data, in the second we interpret the selected data, and in the third we represent the final conclusion. At each stage of this process, from selecting, through interpreting, to finally reaching conclusions, “people are influenced by various factors, including: past experiences, assumptions, values, beliefs, feelings and emotions, and the context of the particular situation.”¹⁰⁹⁷ These influencing factors decide for us what data and facts we shall select, then shape the way we interpret and process the selected data. Thus, we might reach the final rung/stage without examining “all” given data, and without using “all” possible interpretation tools. As a result of this insufficient selecting and interpreting effort, the final step of reaching conclusions becomes more like a jump or a leap, and the final rung might be, accordingly, slippery and errant. This understanding creates common ground between the ladder of inference concept and the CEBF model. In both frameworks, along with the heuristics mechanism revisited above, there is a decision/conclusion/argument which the decision-maker/negotiator reaches without following the correct pathway, which affects the integrity/flawlessness of this conclusion. Meanwhile, in the three frameworks, the solution for the dilemma of living with an unjustifiable conclusion shall be reached through developing strategies and tools that tackle each stage of every rung/stage of these models/frameworks.

1095 Reilly, *ibid* 454.

1096 *ibid*.

1097 *ibid* 455.

However, the CEBF evolutionary journey can't be presented as a fully inclusive explanation for all fallacies. Fallacies might derive from logical ignorance, or they might come from a deliberate deception where the fallacy committer is in control of her emotions and tendencies. However, we proposed this explanatory timeline in order to introduce a workable framework that shall arm mediators with a variety of step-solutions by which she can tackle most known fallacies before their early emergence. If the unaddressed concern was the first feeder of the negative emotion, and the mediator addressed it - using Fisher and Shapiro strategies - in an early stage during mediation, then there is a possibility that the fallacy might not have had a chance to occur. The same process can be observed with the negative emotion; if the mediator managed to handle this feeling, using a suitable one, or more, of the available wide range of strategies that negotiation studies tailored for this purpose, as we shall see later in the next chapter, then there is a better chance to avoid committing a fallacy later. Finally, if the mediator managed to mitigate the prevailing bias that might strongly push the negotiating party towards justifying an unjustifiable conclusion, using one of the biases' mitigating strategies presented by the SEEDS team, or by other studies as we shall see later in the next chapter, then there is a better chance to prevent fallacies from being introduced in the mediation room. Two possibilities are left to her: first, what if the mediator was unable to discover the unaddressed concern, to notice the negative emotion, and to identify the type of bias the parties are experiencing during the mediation session? What shall we do where the fallacy invades the conversation immediately before the mediator manages to tackle and handle the above three possible earlier catalysts? In this case, the mediator shall resort to Damer's "attacking fallacies' strategies" mentioned in the previous chapter, after identifying the fallacy's correct category and apply the designated strategy for it. Secondly, what if the fallacy was not a product of this model? What if the fallacy was simply a result of ignorance and lack of logical and argumentative abilities? We propose that mediators can here perform as thinking/decision coaches, as we shall see below in the next chapter.

Chapter Seven

Mediators and Fallacies:

Updating the Job

Description

In Chapter Six, we visited and examined the mediators' roles and "to do lists" in order to explore their efficiency in dealing with fallacies. We ended up by asserting the validity of our proposed central mediators' role as Rationalisers, as they are able to redesign the atmosphere of the mediation to make it "logic friendly", by switching the participants' attitude and thinking from using their emotional mind to depending more on their rational mind, from the peripheral route of persuasion to the central one, from system one (fast thinking) to system two (slow thinking), or from what we characterised in Chapter Four as from substitute logic to original logic.

However, we suggested that this role can't be fulfilled without the full support of minor roles that track the illogical moves taking place in the mediation room and deal with them. In order to do so, we analysed the structure and evolution of these fallacious arguments by the building on the CEBF's framework, which shall aid in pointing out the areas of intervention that our rationaliser mediator needs to recognize and step in.

Here, in this chapter, we shall present the ways of intervention the rationaliser mediator shall follow. This includes proposing new roles towards fallacies which we believe mediators might need to adopt in order to prevent the harms which fallacies might cause. However, these new roles shall require some moves, and incite some challenges. We conclude this chapter - and thesis - with insights and suggestions regarding these moves and challenges.

7.1 Putting the CEBF Model into practice

The suggested CEBF framework we presented in the previous chapter can be useful in understanding the mechanisms of fallacious arguments that might occur in the

mediation room. However, in order to add a practical value for this model, we need to propose a series of practical moves mediators should apply regarding four elements of the model: unaddressed concerns, negative emotions, prevailing biases, and expressed fallacies.

7.1.1 Unaddressed concerns: The Concerns Manager

*“Interest” is a dry word for passionate matters. Interests are the fire in your belly. The desire to be treated kindly. The fantasy living unconstrained by other people, of easing out the thorn in your heart.*¹⁰⁹⁸

Concerns, interests, needs, or wants are core features in every mediation process, to the extent that they have become part of some given mediation definitions.¹⁰⁹⁹ However, many negotiating parties fail to recognise/identify the other party’s concern, and even their own real concerns due to a wide range of possible obstacles including “an excessively self-centred focus; strong negative emotions; automatic, habitual ways of thinking, feeling, and behaving; insensitivity to emotions; insufficient social skills; or a distracted, wandering mind.”¹¹⁰⁰ These challenges are also responsible for making the mediators’ role in helping parties discover and discuss their interests, one of the most significant roles in their *to do list* in most mediation sessions. This role becomes more challenging when we ask mediators to explore parties’ concerns and needs in sufficient depth, or as Mayer confirms, “at a deep enough level that the real forces driving the conflict can be addressed.”¹¹⁰¹ Mediators shall help each party explore the matters at the grade of depth which is relevant to her, and then attempt to find the best approach to discussing every party’s needs, that includes all aspects that are of relevance to each party.¹¹⁰² Digging to reach an acceptable depth shall allow the mediator discover layers of interests as “when you dig into a concern, you are likely

1098 Beer and Stief (n 13) 145.

1099 See *ibid* at page 3, when they define mediation as “A process for resolving disputes where an intermediary helps conflicting parties have a conversation to jointly resolve their concerns”.

1100 Riskin (n 1015) 304.

1101 Mayer (n 11) 207.

1102 *ibid*.

to bring up several layers of interests - from relatively predictable and public ones, to ones that are strategically or emotionally sensitive.”¹¹⁰³ The possible range of interests this digging might discover can be endless. For instance, when the mediator is trying to encourage parties to explore themselves what they really might want by asking for a specific amount of money, she shall realise that they don’t actually want just “money”, they rather “want what money buys - peace of mind, financial security, a trip around the world, a gift for their aging parents, or a down payment on a house. People also want money to have their adversaries pay for what they have done, in which case the money serves as a proxy for an apology, a sense of justice, or revenge.”¹¹⁰⁴ Mediators are expected here “to point out what is going on, walk it back to the ignition point, and de-escalate the situation.”¹¹⁰⁵ This *walk back* process needs a workable plan to be carried out systematically.

The challenge of tracking concerns back in a productive manner has inspired many dispute/conflict resolutions researchers to try several approaches that might help mediators succeed in this role. One of these approaches that we believe is of importance and potential success, along with relevance to the theme of our thesis, is the one presented by Fisher and Shapiro which we just summarised above. The significance of their approach is that they enlisted the core human concerns, presented workable strategies to address them, and linked them to relevant negative emotions they might cause if not addressed properly. Their five proposed core concerns, as stated above, are: appreciation, affiliation, autonomy, status, and role. Failing to address any of their concerns shall leave the party exposed to a wave of negative emotions that might affect her behaviour, and influence her final decision. To address these five concerns, the mediator needs to help parties taking positive moves towards satisfying them. This help can’t be achieved, we believe, without the following indispensable steps:

1103 Beer and Stief (n 13) 146, then the author gives examples for four layers of interests of a couple in a conflict.

1104 Pyncheon and Kraynak (n 63) 125.

1105 Calloway (n 14) 339.

- 1- Recognising/identifying the concern/interest; its category, history, level of depth, and its possible links to other relating concerns. This recognition shall require investing sufficient time and effort on the exploration phase,¹¹⁰⁶ and applying a wide range of mediation tools and skills including: active listening, asking the right questions at the right time with the correct wording and tone, reading carefully non-verbal messages and body language signals... etc.
- 2- Deciding the suitable level of the parties' awareness of their own concerns and engaging them in the process of diagnosing and acknowledging these concerns. The degree of subtlety whereby a mediator might achieve this awareness and engagement may depend on several elements, including her mediation style, her understanding of parties' self-determination and informed consent as core mediation values¹¹⁰⁷, the type of concern and level of sensitivity, and the amount of trust she has gained from the parties through the process.
- 3- Determining the necessary degree of the other party's awareness/recognition of her opponent's core concern/s. This decision shall depend on several factors including the mediator's style¹¹⁰⁸, the parties' relationship, and - most importantly - the chances of affecting confidentiality as an essential mediation value.
- 4- Preparing a list of possible addressing/fulfilling moves/alternatives that shall be used in order to achieve satisfaction of the identified/diagnosed unaddressed core concerns.
- 5- Choosing and applying/deploying the most appropriate move according to the elements and factors mentioned above in steps three and four, and this application/implementation of the chosen move needs to be agile, adjustable, and replaceable by other moves from the prepared alternatives list, if the chosen one did not succeed in achieving the necessary degree of satisfying/addressing the diagnosed concern(s).

1106 See mediation phases on Chapter Two of this thesis.

1107 See Mediation Values on Chapter Two of this thesis.

1108 Problem solving approach -for instance- might encourage the mediator to engage both parties in discussing each other's unaddressed concerns as a reflection of this style perception of mediation as a process in which the negotiating parties are "partners" in solving the problem caused by the conflict rather than competing "opponents", see Chapter Two of this thesis.

Applying the suggested steps above to the given core concerns presented by Fisher and Shapiro shall show how they might work. The first diagnosing/identifying step shall require sufficient awareness and deep understanding of the two triangles we presented in Chapter Three of the thesis. The mediator might need to get a glimpse of each party's triangle; personality, identity, and mentality¹¹⁰⁹. Such a view of this first triangle shall help the mediator understand - to some extent - this party's overall traits, social values, and way of thinking. Along with achieving this vision, the mediator shall apply quite similar skills and tools in order to understand the dispute's triangle, as presented in Chapter Three of this thesis, by exploring the factual (objective) side, the social (outer) aspect, and the emotional (inner) dimension of the dispute. Once this exploration has been achieved - for instance, craving appreciation - the mediator shall be in a better position to identify the core concern of each party, and can then move to the next steps.

This diagnosis might need to be shared/discussed with the party who could experience it. This sharing, if the mediator believes that it has to be applied, has to be expressed in a form that saves the party's face, makes her feel taken care of, and keeps confidentiality intact; e.g., in a private session. The importance of this sharing/discussion is to test the accuracy of the diagnosis, and to assure the party that her worries have been understood, and her needs have been appreciated. On this sharing move, the mediator might resort to summarising and paraphrasing,¹¹¹⁰ as communication tools to send a precise message to the party that she has an opportunity to have her concerns allayed and - in our example here - that her aspiration for appreciation is natural, legitimate, and can be satisfied properly.

Engaging the other party in discussing her counterpart's concern can be more challenging, as this party might adopt a defensive attitude, because raising this concern and delivering it from the other room might imply an accusation that she is responsible

1109 See 3.5.3 Our proposed triangle on Chapter Three of this thesis.

1110 See Chapter Two where we listed a number of approaches regarding mediation phases.

for raising/causing the dispute. One more challenge is that the image of the mediator as a neutral negotiation assistant might be affected in the eyes of this party. Finally, delivering such a message about this concern must not, by any means, be done in a way that breaches confidentiality. However, all these challenges are not limited to this model/approach. However, deploying these tools and skills within our proposed model/framework shall add - we believe – a more systematic nature to this deployment, and shall make it consistent and in harmony with other tools and skills, as the main final target shall be “rationalizing” the process.

When it comes to the final two steps, preparing a list of alternatives that can address/satisfy each party’s concern/interest, and applying them, starting with the most appropriate one until the needed satisfaction is achieved, the mediator shall use all the agility, flexibility, and responsiveness she possibly has in order to succeed on this very first, and most important, stage/phase of the model. In the example¹¹¹¹ we used above this would involve *appreciation*, but the list of alternatives can be endless, as long as it includes an expression (verbal or non-verbal) that shows the concerned party that her opinion/thinking/need/want is heard, understood, valued, respected, and merited, even if the other party disagrees with it. With *affiliation*, the necessary moves shall target building affiliation by transferring the concerned party from a “strangers’ zone” to a “colleagues’ zone” by helping negotiating parties find existing links/common grounds (age, family, sports, food, hobbies) and by guiding them through reducing personal distance (using first names, holding meetings in person - when possible, arranging seating to be less confronting). Regarding the third core concern, *autonomy*, the concerned party needs to believe that her freedom to decide is acknowledged. The moves/actions which the mediator can suggest can include brainstorming jointly before planning, consulting before deciding, clarifying/justifying the decision-making processes, and all similar moves that shall help the concerned party feel that her autonomy is not impinged, and that there is no arbitrary decision “from above” to control/regulate her life and career without respecting her authority to choose and

1111 For the full examples list, see: Fisher and Shapiro (n 10) 19.

decide. When it comes to *status*, the concerned party needs to see that her high standing is acknowledged wherever deserved, bearing in mind that “every negotiator holds high status as a human being worthy of dignity and respect”¹¹¹². Acknowledging status and respecting dignity shall start by treating all parties with courtesy. However, the status acknowledgment possible here might require more specification than just known social status created by money or fame. The concerned party’s *particular status* can make a major difference here. By particular status, Fisher and Shapiro refer to being skilled in a specific area in which this party outranks others on it, for instance, athletic ability, computer skills, education, cooking experience...etc.¹¹¹³ Helping each party identify her, and her counterpart’s particular status, while acknowledging/respecting it, is what the mediator should do regarding this concern. Finally, with *role*, the mediator needs to ensure that each party is not suffering from missing a meaningful, fulfilling, and purposeful role. Such a role shall incorporate each party’s “skills, interests, values, and beliefs into the task at hand.”¹¹¹⁴ When an employee or life partner thinks she is not enjoying such a role, negative emotions are expected, as an unfulfilled role shall leave her feeling unengaged and trivialised, and it’s the mediator’s job to help this party avoid these feelings, not only directly by handling them, but also indirectly by assisting each party to enjoy her meaningful role.

Encouraging parties’ creativity is one of the skills mediators need while helping parties in getting their concerns addressed. The anticipated moves/recommendations/initiatives that parties can take in order to get their interests met are endless. Deciding what’s more suitable/successful within these moves depends on each party’s personality, identity, and mentality. That’s why exploring the parties triangle in Chapter Three of this thesis was indispensable. What role or status means for one party can be completely different from what it might mean to any other party. Accordingly, offering a seat on some board meetings, to show affiliation, can be satisfying for one person where a proper mention on the company website is the least

1112 *ibid* 99.

1113 For more examples: *ibid* 100.

1114 *ibid* 117.

convenient for another member to feel treated as a colleague. Similarly, with all the other core concerns given above.

Leaving these concerns unaddressed is likely to produce a wave of negative emotions. These negative emotions shall leave parties angry, anxious, envious, jealous, disgusted, ashamed, sad...etc. On the other hand, satisfying parties' core concerns tends to make them enthusiastic, happy, hopeful, affectionate, proud, calm...etc. This transformation from the first, negative line of emotions, to the second, positive one, might not be available all the time for all negotiation rationalisers. Negative emotions might manifest, erupt, and declare their existence before the mediator gets the chance and time to help parties get their concerns addressed, or even before identifying/recognising these concerns. Accordingly, mediators need to be equipped with sufficient tools and skills to handle negative emotions without trying to stifle them.

7.1.2 Negative emotions: The Emotional Handler

*For some of us, the problem is not that we are unable to express our feelings, but that we are unable not to.*¹¹¹⁵

Regardless of the outcome of the first factor in the previous element (dealing with parties' unaddressed concerns), mediators need to be ready all the time to handle parties' emotions and to deal with the influences of these emotions on the ongoing negotiations because we know, as a matter of fact, that "passion overwhelms reason time and again."¹¹¹⁶

¹¹¹⁵ Stone, Patton, and Heen (n 115) 89.

¹¹¹⁶ Goleman (n 769) 5.

In Chapter One of this thesis¹¹¹⁷, we mentioned emotions and their role in every negotiation. In Chapter Two, we referred to emotions briefly when we listed mediators' jobs. In Chapter Three, we covered emotions in more depth while exploring the dispute's triangle. In Chapter Four, we kept visiting emotions while viewing the two main systems and the role of emotions on each system. In Chapter Five, the significance of emotions was clear as the main feeder of fallacies. Here, we shall build on all these previous discussions to introduce the mediator's duty in handling parties' emotions as part of her job as a rationaliser.

Developing positive emotions and handling negative ones as requirements for rationalising negotiation shall urge mediators to try several approaches - independently or jointly - to achieve this goal. These approaches might include:¹¹¹⁸ emotional perception (recognising/identifying emotions), emotional analysis (understanding emotions), emotion regulation (managing emotions), and finally emotional facilitation of thoughts (investing emotions in enhancing reasoning abilities). Each approach raises debates about the usefulness of resorting to it in dealing with emotions, and - most importantly - in helping practitioners in the field of dispute resolution.

Recognising emotions, we believe, is a prerequisite for any approach towards handling emotions. It has even been suggested that "the knowledge of the emotions alone may improve negotiation."¹¹¹⁹ Such improvements can be achieved without even handling these emotions or managing them. Identifying emotions - fear for instance - shall help parties "make a decent hypothesis that their argument is working or that the person really is anxious to make a deal".¹¹²⁰ On the other hand, missing this recognition can open the floodgates for our emotions to influence the way we interpret and process information we receive in a way that might result in us "becoming illogical in our

1117 See negotiation elements on Chapter One.

1118 See: Reilly (n 16), where Reilly discussed these four approaches as branches of emotional intelligence by reflecting on J D Mayer and P Salovey, 'What is Emotional Intelligence?' in P Salovey and D J Sluyter (eds), *Emotional Development and Emotional Intelligence: Educational Implications* (Basic Books 1997) 3. However, we shall engage with Reilly's work by discussing and involving other scholarly works on this area in order to present our model in a clearer view.

1119 Freshman (n 1119) 377.

1120 *ibid.*

thinking.”¹¹²¹ Recognising emotions, then, can be useful in a direct way, by helping practitioners know if their exchanged arguments are working, which shall aid the progress of their communications, and it can be beneficial in an indirect way by paving the road to the other approaches of dealing with emotions as we shall see below. However, adopting the *recognising emotions* approach might be without a significant practical value if we don’t have a clear roadmap that can help mediators recognise emotions, and this map can still be useless if we didn’t arm them with sufficient training to use it¹¹²².

In his book *Emotions Revealed*, Paul Ekman identified a number of basic emotions we shall be able to identify, because people display them in distinct facial expressions. These emotions are anger, fear, surprise, happiness, sadness, disgust, and contempt.¹¹²³ He reached this list of basic emotions and associated expressions after decades of field research in diverse countries from Africa to Asia, from North America to Europe. Learning about these expressions and recognising them can be learned through just one hour training.¹¹²⁴ This training can equip trainees - including mediators - with tools that show them how to notice and record slight and quick changes in peoples’ faces, with examples of each group of facial expressions that manifest a specific basic emotion. They learn this through seeing videos and images that freeze moments which ultimately declare each emotion with feedback and discussion. These training sessions start with a pre-test and end with post-test to record the progress on the trainees’ abilities to identify and categorise the changes on peoples’ faces.¹¹²⁵ However, in spite of the simplicity of this approach, there is still debate among researchers, as Ekman’s suggested list does not answer every enquiry about the classification of emotions; what about mixtures like jealousy, a type of rage that also combines grief and fear? What about qualities like certainty and composure, courage and forgiveness, hope and trust, and forgiveness? Or perhaps some of the more well-known vices, such as

1121 G O’Sullivan, *The Mediator’s Toolkit: Formulating and Asking Questions for Successful Outcomes* (New Society Publishers 2018) 19.

1122 We shall discuss the training topic later on in this chapter.

1123 See Ekman (n 894).

1124 Freshman (n 1119) 375.

1125 *ibid.*

complacency, doubt, boredom, sloth? There are no conclusive solutions, and the scientific discussion on how to categorise emotions is ongoing.¹¹²⁶ However, for categorisation of the more significant emotions, we believe, classifying them into positive and negative emotions is desirable, and this role is included in the next approach.

Analysing emotions shall encompass several tasks, including understanding them, knowing their roots/causes, categorising/labelling them, perceiving the expected consequences of emotions, seeing the relationships among emotions, and learning how transitions occur among them.¹¹²⁷ Knowing emotions' roots and causes have been covered above while discussing the core concerns model introduced by Fisher and Shapiro. One of the central tasks in the *analysing emotions* approach is - we believe - categorising emotions, and we propose that positive and negative emotions are the two key categories mediators might need to be completely aware of. The significance of this categorisation comes from the need to distinguish between the expected moves mediators might need to take towards each of these two categories, as we shall see below while discussing the *generating emotions* approach. The difficulty in categorising emotions into these two, however, is one of the biggest barriers to the *analysing emotions* approach, as it can occasionally be disputed whether a certain emotion - for example, surprise - is positive or negative.¹¹²⁸ However, most other basic emotions listed by Ekman can be categorised as being either positive or negative. While labelling emotions, mediators might need to know that positive emotions are "not merely the absence of negative emotions ("not too bad") but distinct emotions ("feeling great") that independently affect negotiation."¹¹²⁹ This distinguished independent nature of negative emotions shall be clear to mediators while handling them.

1126 Goleman (n 769) 290.

1127 Reilly (n 16) 436-438.

1128 Freshman (n 1119) 373.

1129 *ibid.*

Once emotions have been categorised, mediators might need to start noticing how a specific emotion rises, how it escalates, and how it influences thinking and behaviour. For instance, regarding anger as it takes place during a conversation, it causes three unfavourable attributes; “first, it is uncomfortable. Second, it causes us to speak and act unskillfully. Third, it interferes with our ability to see things clearly. This is just as true in our personal lives as it is in our dispute resolution work.”¹¹³⁰ By keeping track of these changes, mediators shall be equipped with a relatively clear vision of what happens inside the mind and the heart of the negotiator, which shall help her plan next moves more realistically.

Regulating emotions and managing them is a very advanced skill which mediators may need to master in order to achieve success during their mediations as a aspect of their main role as rationalisers. Dealing with parties’ emotions shall include assisting them in expressing, acknowledging and reflecting on these emotions, treating them in a manner that does not harm the process. Expressing emotions moderately can be very challenging to some of us, especially during the time of disagreement. However, expression of emotions can’t - and shouldn’t - be suppressed or minimised. Yet, mediators might need here to help parties avoid emotional explosions. Emotions usually explode dramatically into confrontations “because people are blind to the pathways that lead to such strong emotions.”¹¹³¹ However, this endeavour “will not work unless we have practiced working with our own emotions consistently in our ordinary lives. Otherwise, in the heat of the moment during a negotiation or mediation, we are likely to forget every technique we have learned. Habitual patterns of behavior simply take hold.”¹¹³² Mediators’ job in helping parties express their emotions moderately should start, then, by getting trained in working with their own emotions, as “understanding our own emotional reactions is an essential prerequisite to working skillfully with emotionally charged individuals in disputes.”¹¹³³ However, after succeeding in understanding their own emotional mechanisms, mediators face strong debates and wide differences in the given approaches regarding the ways they should

1130 Calloway (n 14) 342.

1131 *ibid* 339.

1132 *ibid*.

1133 *ibid*.

manage parties' emotions, or even whether they need to deal with parties' emotions at all¹¹³⁴. While some mediators believe that they should place a strong emphasis on assisting parties in expressing their emotions, others avoid doing so, in order to avoid therapy, and focus instead on assisting parties in coming to a resolution. Some mediators tend to be highly open to allowing parties to communicate directly. Some others prefer to run the process in such a way that practically all communication goes through them, even going so far as to never bring the negotiating parties into one room. However, Mayer noticed that "the more secure mediators are in their ability to manage emotions and communication, the fewer restrictions on direct interaction they impose."¹¹³⁵

Another principal skill which mediators might need to assist parties with is guiding them on acknowledging each other's emotions. Parties may not be aware that acknowledging is not a synonym for agreeing and "while you may not agree with the substance of what the other person is saying, you can still acknowledge the importance of their feelings."¹¹³⁶ This guidance is expected from the mediator as a part of her rationalisation job, in order to help parties avoid being dragged into confrontational hostile conversations that might hinder any progress in their communications. However, helping parties to acknowledge emotions, express them moderately, and reflect on them, without harming their ongoing conversation, shall require the mediator to follow several tactics and manoeuvres while dealing with the negotiating parties. These moves are usually mentioned in mediators' manuals and training programmes' modules.¹¹³⁷ For instance, the mediator can include parties' feelings in her summary or paraphrase, she might use parties' words if they express their feelings (such as being furious or frustrated); if not, she can follow their tone of voice and expression or she can imagine herself in their position. She can briefly experience the same emotions in her body (genuine empathy), her tone and countenance, as this shall naturally exhibit

1134 This debate is summarized on: Mayer (n 11) 207.

1135 *ibid.*

1136 Stone, Patton, and Heen (n 115) 182-183.

1137 We previewed a number of these manuals and programs on chapter two of this thesis.

more convincing evidence that she "understands it" rather than having to "put on" a sympathetic expression.¹¹³⁸

Generating emotions should be perceived as one of the most advanced mediation skills mediators need to acquire. It has been stated that negotiators "should try to develop positive emotions and better manage negative emotions because a more positive and less negative mix of emotions typically leads to better negotiation outcomes."¹¹³⁹ However, negotiators, as we have seen in Chapter One of this thesis, might not be able to do this themselves, due to several circumstances.¹¹⁴⁰ Thus, the mediator shall be ready to help them here in this regard as a core task for mediators as negotiation assistants and most importantly, on our proposal, as negotiation rationalisers. Mediators here might resort to apply what's known as Emotional Facilitation of Thoughts.¹¹⁴¹ In this approach, mediators focus on the way emotions influence the cognitive system and, consequently, influence thinking, decision-making, and problem-solving.

Using this tool shall provide mediators with "the ability to: (1) use emotions to redirect attention to important events; (2) generate emotions that facilitate judgment, memory and decision making; (3) use mood swings as a way to consider, and appreciate, multiple points of view; and (4) use different emotions to encourage creativity and different approaches to problem-solving".¹¹⁴² The main theme of this approach is directing parties' attention to positive elements and events, reminding them of connection and common features that tie them constructively to each other, and switching their focus from previous negative memories and to encouraging expected future gains. This constructive emotional facilitation has a transformative nature which

1138 Beer and Stief (n 13) 101.

1139 Freshman (n 1119) 373.

1140 See Chapter One, negotiation limitations.

1141 Reilly (n 16) 436-437.

1142 *ibid.*

is important in creating tendencies and inclinations towards positive behaviours and positions. Biases are made up of these tendencies.

7.1.3 Prevailing biases: The Debiasing Assistant

As we have seen in Chapter Four of this thesis, bias is an inclination, tendency, or preference, to favour a particular choice, person, thing, or belief according to this inclination, even when it might seem irrational to do so. These tendencies are major barriers to any fruitful negotiation. The clear link here between emotions and biases is that peoples' tendencies are usually heightened where emotions and feelings are deeply involved.¹¹⁴³ The presence of strong negative emotions in heated conversations activates and escalates biases and, the stronger the emotions, the more pronounced the biases. Comparatively, once the negotiator comprehends the other's point of view in a positive empathetic manner, this is likely to reduce her negative tendencies, differences will be reduced, and those that remain will be of a reasonable and understandable type.¹¹⁴⁴

When mediators fail to deal with negative emotions, biases created by these emotions might not be helpful in producing better conversation in the mediation room. These biases can be "one of the primary instigators of active disputes and often cause negotiations to reach an impasse and break down."¹¹⁴⁵ The challenge biases create is evident and prevalent to the extent that even if we tried to "escape the swamp of biases by pulling ourselves up by our own hair, we are unlikely to succeed".¹¹⁴⁶ Mediators cannot and should not ignore these biases or escape them. They need to deploy workable strategies to mitigate biases in order to avoid the harms they might cause to the process and to minimise their chances to produce fallacies. While there are many suggested norms and activities¹¹⁴⁷ which mediators might try to achieve this goal, we suggest here resorting to two main approaches; first one is The SEEDS Model

¹¹⁴³ *ibid* 445.

¹¹⁴⁴ *ibid*.

¹¹⁴⁵ Pyncheon and Kraynak (n 63) 151.

¹¹⁴⁶ D Lovallo and O Sibony, 'The Case for Behavioral Strategy' (2010) 1 *The McKinsey quarterly* 30, 33.

¹¹⁴⁷ *ibid*.

mitigation strategies we visited on Chapter Four of this thesis, and Debiasing as a reality-testing tactic.

In their SEEDS model¹¹⁴⁸, Lieberman and his colleagues grouped known common fallacies into five categories: similarity, expedience, experience, distance, and safety. From their initials came the label SEEDS. In each category, there is a long list of biases included, and for each category, they suggested numerous strategies which can be followed to mitigate the harmful influence of each bias. Here we present examples of the mitigation strategies they introduced, as we believe that mediators can adopt them during their mediation session as rationalisers and as part of the CEBF detailed model we propose in our thesis. Here we will revisit two bias examples from the SEEDS model to explore what mediators can do in order to mitigate these biases as part of their main factual role as rationalisers.

The first example is similarity biases,¹¹⁴⁹ which divide others into two teams, an ingroup and outgroup - favouring the first team members by feeling association and empathy with them, while dealing with the members of the second group in an unfavourable manner. These biases might be mitigated by helping negotiating parties find common ground and similar features they might share, in order to encourage the party who regards her counterpart as a member of an outgroup to recategorise her counterpart as a member, albeit temporary, of the in-group created by the mediation for the purpose of problem-solving. This recategorisation can be done with major assistance from the mediator at the very beginning of the mediation session. In the opening phase, the mediator can ask each party to introduce herself in a way that focuses on areas of agreement, such as food, school, sport, music...etc. The mediator can inspire them by referring to these topics while introducing herself in the opening statement. When parties commence their mediation session with discovering that their favourite food/music/sport is also their counterpart's favourite, there is a chance for moving this counterpart from the outgroup to the ingroup, even partially. Later, during

1148 Halvorson and Rock (n 714).

1149 *ibid.*

the exploration phase, the mediator should keep tackling more areas of agreement, not only on the merits of the dispute, but also on the general values, life goals and childhood common experiences that two disputants might share. Without breaking confidentiality, she can then use these common elements to help each party regard her counterpart in a different light. Such a new light can help each party receive and interpret mutual messages in a positive manner which doesn't jump to negative conclusions without sufficient justification. While this search for common ground is usually what professional mediators do in their daily practice, applying this search within our model shall make this task more meaningful for mediators, and help our rationaliser mediator to monitor this bias earlier, and tackle it in a planned manner as a part of a larger picture, as we shall explain after presenting the second example of our mediator's suggested role towards biases.

Experience biases¹¹⁵⁰ are another category; they pertain to a tendency for parties to believe their own observations, viewpoints, and positions to be true, comprehensive, and accurate. This occurs because a party's perspective of what actually occurs in the real world is coloured by her personality, past emotional experiences, and expectations. Therefore, a party who is adamantly sure of the truth and accuracy of her opinions will automatically think that everyone else must be mistaken, misinformed, or dishonest. A very common example of this sort of this bias is the Fundamental Attribution Error,¹¹⁵¹ which leads parties to believe that they make mistakes due to circumstances outside of their control, while others make mistakes because of their personality attributes. By helping negotiating parties re-examine this exaggerated notion about themselves and their counterparts in a more neutral, calm, and detached manner, such bias might be lessened. This re-examination shall be performed with valuable assistance from the mediator. This help can be given by allowing more time, offering a better, calmer atmosphere, and applying a wide range of reality-testing

1150 *ibid.*

1151 See: L Ross, 'From the Fundamental Attribution Error to the Truly Fundamental Attribution Error and Beyond: My Research Journey' (2018) 13 *Perspectives on Psychological Science* 750 <<https://doi.org/10.1177/1745691618769855>> accessed 6 May 2023.

moves which many mediation training programs and textbooks usually teach.¹¹⁵² Among several well-known reality-testing tactics, *Debiasing* is a tool that can be added to mediator's toolkit.

Debiasing is actually a common term on the field of judgment errors and decision-making studies.¹¹⁵³ There are two general pathways towards applying debiasing during the mediation session; first by trying to modify the parties' behaviour, and second, to modify the negotiation environment.¹¹⁵⁴ Modifying parties' behaviour might seem unachievable given the limited time and powers available to mediators, but there is still a chance to help parties in this regard, using two different sets of tools which can be used to modify parties' behaviours and their negotiation environment on the same time. The first set is a suggested list of questions which mediators can ask in order to achieve debiasing as a reality testing approach. In their recent study about construction mediation,¹¹⁵⁵ Li and Cheung drafted a long list of questions mediators can use during mediations in order to help parties regarding their decision-making strategies,¹¹⁵⁶ their attitude during mediation,¹¹⁵⁷ and regarding the mediation process itself.¹¹⁵⁸ They relied on several research papers¹¹⁵⁹ on designing these questions in order to mitigate biases in negotiation and to embrace debiasing in mediators' toolkits. The other

1152 See: V G Devinatz, 'What Makes a Good Mediator? Insights from a Mediation Training Program Participant' (2018) 30 Employee Responsibilities and Rights Journal 181 <<https://doi.org/10.1007/s10672-018-9315-y>> accessed 6 May 2023.

1153 See: Fischhoff (n 17), Arkes (n 17), and Soll, Milkman, and Payne (n 17).

1154 Soll, Milkman, and Payne, *ibid*, 11.

1155 K Li and S O Cheung, 'Embracing Debiasing in Mediator's Tactic of Reality Testing' (2020) 12 Journal of Legal Affairs and Dispute Resolution in Engineering and Construction Article 04519046. <[https://doi.org/10.1061/\(ASCE\)LA.1943-4170.0000359](https://doi.org/10.1061/(ASCE)LA.1943-4170.0000359)> accessed 6 May 2023.

1156 To achieve this goal, they suggested these questions: "Do you think you need more time to come up with an assessment?", "Have you reexamined your case upon receipt of an offer from your counterpart?", "Have you considered all the available information in deriving your current assessment?", "Are the current set of assumptions exhaustive?", "Have you considered information that runs against your assumptions of the case?", and "Are there any facts that support your counterpart?", *ibid*, table 2.

1157 This includes these questions: "Are there any mutually beneficial trade-offs between you and the counterpart?", "Do you think emotion has played a part in your decision?", "Will you do the same if you are your counterpart?", "Let me know your understanding of the grievances of your counterpart?", "What would be the impact on future collaboration with the counterpart if the dispute is not settled?", and "Do you think you are partly responsible if settlement is not achieved?", see *ibid*.

1158 This includes these questions: "What are the benefits of including new members for both of the parties at a new communication session?", "Will you consider inviting new members to join your team for the next round of negotiation?", "How about taking a fresh look at the case and your decision before the next round of negotiation?", "Let me know if your initial needs remain unchanged?", and "Are there other options that would also achieve your needs?", see *ibid*.

1159 See for example: T Mussweiler, F Strack, and T Pfeiffer, 'Overcoming the Inevitable Anchoring Effect: Considering the Opposite Compensates for Selective Accessibility' (2000) 26 Personality & Social Psychology Bulletin 1142 <<https://doi.org/10.1177/01461672002611010>> accessed 6 May 2023, L C Holaday, 'Stage Development Theory: A Natural Framework for Understanding the Mediation Process' (2002) 18 Negotiation Journal 191 <<https://doi.org/10.1111/j.1571-9979.2002.tb00740.x>> accessed 6 May 2023, and T W Yiu, S O Cheung, and C H Cheung, 'Toward a Typology of Construction Mediator Tactics' (2007) 42 Building and Environment, 2344 <<https://doi.org/10.1016/j.buildenv.2006.05.005>> accessed 6 May 2023.

approach towards debiasing is resorting to specific tactics that shall help parties overcome their own biases. The first tactic is dealing with biases driven by extreme optimism through applying “prospective hindsight”, which can be applied by encouraging the extremely optimistic party to “imagine time-traveling into the future and learning that your undertaking has failed.”¹¹⁶⁰ On this tactic parties shall be able to handle the overconfidence that might be caused by unrealistic estimation of the whole picture. Meanwhile, the second tactic is helping parties in *Generating Alternatives*. This can be done by ensuring that parties have a sufficient set of persuasive alternatives from which they can choose, as this shall help them combat restricted thinking and assist them in approaching the problem in a different way.

However, this generating process can’t be achieved without investing sufficient time on the exploration phase with each party in order to grasp a comprehensive understanding of the dispute and disputant triangles, as we explained in Chapter Three of this thesis. The third tactic is more critical and might not be compatible with many mediation styles’ perspective of neutrality and mediators’ roles. On this tactic, mediators are expected to provide new information about the merits of the dispute in order to shake parties’ fixed positions and to mitigate their biases. In some cases, allowing negotiating parties to explore additional information or ratings can help them make more rational decisions. For instance, there is a field study¹¹⁶¹ which found that Starbucks restaurants clients tend to reduce their average calories purchase on their transactions after posting sufficient calorie information for beverages and foods. Availability of new information for decision-makers in this example helped them change their consumption habits and their own attachment to specific taste preferences for healthier and more rational choices. Mediators here can practice a similar role towards parties by helping them become freed from their own prevailing biases and controlling tendencies.

1160 Li and Cheung (n 1155) 9.

1161 See: B Bollinger, P Leslie, and A Sorensen, ‘Calorie Posting in Chain Restaurants’ (2011) 3 American Economic Journal: Economic Policy 91 <<https://doi.org/10.1257/pol.3.1.91>> accessed 6 May 2023.

To conclude, the above three roles towards concerns, emotions, and biases shall help parties and mediators enjoy a mediation context that fosters rationality and allows for more systematic thinking. In this environment, system 1 - or what we call substitute logic - should be less evident, while system 2, or logic, shall be activated and performing. In this context, the mediator shall be able to use the lessons she learned from managing parties' concerns and from handling parties' emotions. Furthermore, working within the CEBF framework makes the mediators' role more integrated, unifies her efforts, and adds a more purposeful nature to it. Moreover, this model can label each role with a clear title that shall distinguish it from other possibly known overlapping roles, and help the mediator to be fully aware of her duties and approach by using this title as a reminder. As for unaddressed concerns, the mediator can be a *Concerns Manager*, and regarding negative emotions, she can be an *Emotional Handler*,¹¹⁶² while with prevailing biases she can be a *Biases Mitigator* or *Debiasing Assistant*.

However, adopting all these well-structured titled roles cannot guarantee that fallacies will not take place in the mediation room. Fallacies shall always be expected, and mediators have to be constantly ready to deal with them. We believe that when parties commit fallacies during mediation, mediators have to respond in order to fulfil their main role as rationalisers. The above three roles regarding concerns, emotions, and biases were preventive, but once the fallacy manifests its presence, mediators need to step in. Now, we are willing to explore mediators' roles towards fallacies once they occur, as the final part of our proposed CEBF Model, then we shall progress to the

1162 Compare "Toxic Handler", which refers to: a person in an organisation who supports colleagues by allowing them to express their negative emotions to them in a safe and supportive environment. Typically, toxic handlers have to deal with emotions such as sadness, frustration, and the anger of their colleagues, allowing them to 'let off steam in order to help them cope with their emotional state. Typically, those who take on this role have a more senior role, but being a toxic handler is normally an addition to their main role and can often arise informally because of their personal qualities—such as being easy to talk to, trustworthy, calm, and non-judgemental, see: <https://www.oxfordreference.com/display/10.1093/acref/9780191843273.001.0001/acref-9780191843273-e-300;jsessionid=A8693A283C7F0E4F758EC09878379BBE>, accessed 6 May 2023, and P Farmanesh, Toxin Handlers and Burnout Among Human Resource Managers: Does Emotion-Focused Coping Make a Difference?' (2021) 74 *Revista de Cercetare Şi Intervenţie Socială*, 91 <<https://doi.org/10.33788/RCIS.74.6>> accessed 6 May 2023.

final section of this chapter and thesis by examining our model and investigating the expected challenges it might face.

7.1.4. Expressed fallacies

Once a fallacy is conveyed, the mediation process and mediation values can be susceptible to possible harm. The mediator's expected moves in order to handle this anticipated threat might vary depending on her mediation style and the mediation context, which might urge her to prefer one move over another from the given list of possible actions, but what are these possible actions?

In Chapter Five we explored the five main types of fallacy, with examples for each type. We relied on Damer's book¹¹⁶³ on reviewing fallacy types, and shall revisit his approach again here, as he introduced a wide range of strategies which he proposed can help in "attacking" each fallacy type. We need to resort to these strategies in order to examine their adequacy for the mediation practice, and to check whether using them will distinguish mediator's role from other known roles or styles which we discussed earlier in Chapters Two and Six of this thesis.

For the first type of fallacy, fallacies that violate the structural criterion - circular arguments, for instance - the given strategy is to explain to the party who committed the fallacy that she did not complete her argument, and that she just repeated her premises in different terms. This party might simply need to be reminded that she just used premises and a conclusion that are almost the same. When she says, for example, "I'm entitled to a later curfew, so they should let me return home at 11 p.m.," the mediator shall ask her to provide "more" reasons for believing in her entitlement to a later curfew. The mediator here didn't clarify to her that she did not provide "any" evidence at all, she preferred not to confront this party, in order to give her the

¹¹⁶³ Damer (n 789).

opportunity to save face and to avoid any unnecessary embarrassment. Instead, the mediator might be inclined to put her in the picture by informing her that she needs to provide “a” reason for her position, because she did not give any, since returning home at 11 pm is just another way of saying ‘later curfew’, and the counterpart might be expecting a reason other than just repeating the same statements with different wording. This move is more confrontational, yet while it might not provoke the fallacy committer’s defence motivation,¹¹⁶⁴ it is not informative enough to guide her through the recommended faultless arguing track. To achieve this guidance, the mediator can resort to a more explanatory tactic, by trying to give an absurd or obvious counterexample of the fallacious argument. For example, she might use this counterexample “reading is fun because it brings me lots of enjoyment,”¹¹⁶⁵ which shall make it clear to this party that she hasn’t established any claim by her argument. However, this can be a questionable intervention, and a controversial move in terms of the mediator’s neutrality and the supposed friendly/non-adjudicative nature of mediation. Graduating from encouraging the party to provide “more” evidence, to directly confronting her with the absurdity of her argument by introducing an obvious counterexample, can reflect the various degrees of mediation styles here.

However, in all grades of intervention, the mediator has to remember that there is no need to embarrass the fallacy committer, who might be genuinely persuaded that she is just saying what she thinks is true. All we need is to avoid the possible fallacy harms without provoking the committer’s hostility or making her exposed to an unnecessary loss of face. The message which mediators need to convey to the negotiating parties in order to handle this fallacy is that “in an argument, one’s personal beliefs or convictions concerning the truth of a claim cannot be used as evidence for the truth of that claim.”¹¹⁶⁶ Such a reminder can be a useful early prevention tool that can be set by the mediator while educating parties and setting the process rules, as we shall see later in this chapter.

1164 We visited defense motivations and their effects on negotiator’s behavior on Chapter One of this thesis.

1165 Damer (n 789) 65.

1166 *ibid* 65.

Regarding the second type of fallacy, fallacies that violate relevance criteria, we can explore how to deal with the genetic fallacy as a main example of this type. In this fallacy, as we explained in Chapter Five, the party who commits it is “judging the truth of an assertion on the basis of its source rather than by the evidence or argument available for it.”¹¹⁶⁷ The difficulty in mitigating/attacking this fallacy is the strong emotional memories, impressions, and viewpoint the arguer keeps, appreciates, and, involuntarily recalls from the original context. The mediator can help this party become detached from this irrelevant context by asking her a couple of questions about the aspects of that previous context, in order to help her notice that there are changes to be considered between then and now. She can also ask this party to recall her own previous status, as it can be easy for the party to identify the changes she experienced in her attitude and frame of reference since then. Finally, she can try the previously mentioned move, giving an obviously absurd counterexample in order to convince her of the inappropriateness of recalling their origins. This counterexample could be: “You say that John is a great chef, but I remember how as a kid, he used to make pies out of mud. I’m not about to eat any food he prepares. There’s no telling what might be in it.”¹¹⁶⁸ In this example, it should be clear that there is no sane person who would believe that the muddy pies of John’s childhood could have any relevance to his current cooking skill. These three given moves aim to create a clear separation between past considerations and current context. However, preferring one move over another relies, again, on the mediator’s style and the mediation context.

For the third type of fallacy, fallacies that violate the acceptability criteria, we shall investigate the possible moves through applying them to one of the most known fallacies that violate acceptability criteria; the wishful thinking fallacy. In order to attack this fallacy, the mediator can offer strong evidence that supports a claim which is clearly contrary to the wished claim, after which, the fallacy committer can be asked

1167 Kaplan (n 841) 13.

1168 Damer (n 789) 94, 95.

to evaluate this counter evidence. Here, the mediator is trying to get the arguer engaged in a discussion involving critical thinking in order to direct her attention towards the importance of providing evidence for our claims, other than just relying on personal wishes. Another way to mitigate the wishful thinking fallacy is to assume a conclusion that directly contradicts the fallacy committer's conclusion, depending, solely, on a wish that contradicts the arguer's wish. This seems less provocative than the usual absurd counterexample strategy, as it can be perceived as an endeavour to review and tackle the available choices, alternatives, and possibilities that can replace the claimed wished outcome. This can be regarded as brain storming and collaborative thinking, other than challenging the arguer or proving her wrong. Here, the fallacy committer shall notice that there are two contradicting conclusions, and none of them has any acceptable evidence other than personal hopes and optimistic wishes; at this point, and because the two contradicting claims can't be both true at the same time, both parties can try "a cooperative evaluation of independent evidence—evidence that has nothing at all to do with wishes."¹¹⁶⁹

The fourth type, fallacies that violate sufficiency criteria, or the slippery slope fallacy - as a very common example of this type - can be handled in various ways. One of the possible moves here is to ask the arguer who uses it to give an independent simple explanation for every event about which she tries to make a claim.¹¹⁷⁰ Such an explanation might be sufficient in supporting a number of the steps in the slope, but not the whole series. At some point the arguer shall realise that the later unacceptable conclusion can't naturally be justified. Another tactic the mediator can apply here is using an absurd counterexample, that contains a series of obviously disconnected events, which lead to an end that no one can accept it as an inevitable necessary conclusion of the given initial event in this series. For example, to "suggest that if you use a credit card to buy things, you will soon buy more than you can afford, you won't be able to pay your bills, the bank will repossess your car because you are behind in your payments, you'll lose your job because you'll have no way to get to work, and

¹¹⁶⁹ *ibid* 148.

¹¹⁷⁰ *ibid* 186.

you'll be so unhappy you will kill yourself - all because you used a credit card.”¹¹⁷¹ By giving such a counterexample, the fallacy committer shall see clearly that there is no reason to believe that just by using a credit card, the card user will necessarily consequently commit suicide, and her mind will see the link between this absurd counterexample and her fallacious argument, thereby, provoking her mind to use the analogy to discover, with her own mind, the error in her claim. The absurd counterexample here shall seem less challenging or embarrassing than using it with other fallacies, because the obvious absurdity of the slippery slope fallacy itself makes it natural to encounter it's logic by a similarly structured argument. The arguer here needs a strong warning to urge her to stop this track of arguing, which might insult her counterpart's intelligence, or cause unwanted tension or hostility in the mediation room.

Finally, the rebuttal criterion violating fallacies shall compel mediators to try all possible moves in order to contain them and to avoid their possible harms to the mediation process and mediation values. In the previous chapter, we reviewed two main examples of this type which are very common in everyday conversation, including discussions that occur inside the mediation room. For the first example, the ad hominem fallacy, an intervention from the mediator is needed at the soonest possible opportunity, as with this fallacy there is a very common temptation to counterattack the committer in the same offensive manner. However, letting the other party follow such temptation shall deepen the disagreement and escalate the conflict. One of the most constructive strategies to be used to contain the abusive ad hominem fallacy is to point out to the party who committed it that her attitude might not be helpful and could be considered abusive, then the mediator can ask her to provide a response that tackles the other party's argument instead of attacking that party.¹¹⁷² This separation between a party and her argument is very similar to the rule given by Fisher and Ury on their book “getting to yes”, where they asked negotiators to “seperate the people from the problem.”¹¹⁷³ This advice is not always easy to follow,

1171 *ibid.*

1172 *ibid* 200.

1173 Fisher, Ury and Patton (n 22) 13.

and sometimes it becomes challenging. The main challenge here is that at the time of the dispute it might be hard to deal with the problem without parties “misunderstanding each other, getting angry or upset, and taking things personally.”¹¹⁷⁴ Taking things personally is the core of the ad hominem fallacy, and one of the main elements of being a rationaliser mediator is to help parties get rid of this. The recommended track to get this done is to carry out the above roles efficiently by tackling concerns, emotions, and biases through acting as Concerns Manager, Emotional Handler, and Biases Mitigator as appropriate.

For the straw man fallacy, the other common example of this type, the mediator needs to be very cautious while handling this, because the recommended strategies to handle this fallacy might endanger her neutrality. The most common move here¹¹⁷⁵ is to remind the party who commits it of the original argument of her opponent, and ask her to discuss this argument other than an unreal one. This move might threaten the mediator’s neutrality, as the mediator could seem to be another party’s representative who speaks for her.¹¹⁷⁶ The precaution which the mediator might need to follow here is to avoid making this reminder directly. She needs to either ask the arguer who used the fallacious straw man argument to repeat what the other party has said, or to ask that other party to represent her argument. To add more vigilance, she might also subtly imply that the argument included in the fallacy hasn’t been said, by doubting her own memory, using statements such as “I might have missed that, when the other party stated this argument?” or “I might have misunderstood what the other party stated, I thought she said a different thing, would you please shed more light on this?” Such questions shall keep her neutrality less threatened.

¹¹⁷⁴ *ibid.*

¹¹⁷⁵ Lewinski and Oswald (n 868).

¹¹⁷⁶ However, while some scholars argue that mediators can advocate for one party while evaluating the merits of the case in the private sessions, they admit that such moves threat mediators neutrality’. See this discussion in: D De-Girolamo, *The Fugitive Identity of Commercial Mediation: Negotiations, Shift Changes and Allusionary Action* (Routledge 2012) 66-68.

In all of the above fallacies, the arguing party who commits the fallacy is experiencing what some logicians call “strategic manoeuvring”.¹¹⁷⁷ This term refers to a concept that is very close to the displacement game we proposed in Chapter Four of this thesis, where we showed how logic (systematic thinking rules) and substitute logic (deviations from logical rules) always interchange positions. However, the strategic manoeuvring is more attached to fallacies than any other deviations from logic (such as heuristics and biases). Furthermore, it focuses more on an enclosed list of critical discussion rules which can be compared to the “optimal decision rules” we explored in Chapter Four,¹¹⁷⁸ and can be compared to the “five criteria of good arguments” we presented in Chapter Five.¹¹⁷⁹ However, we shall visit, later in this chapter, this enclosed list of critical discussion rules, or what is called “code of conduct for reasonable discussants,”¹¹⁸⁰ as we believe that it shall help mediators in their roles towards handling fallacies.

Strategic manoeuvring can be perceived as a “continuous balancing between two competing, yet reconcilable goals in argumentation.”¹¹⁸¹ The first goal discussants/negotiators have is “maintaining certain standards of reasonableness and expecting others to comply with the same critical standards;”¹¹⁸² these standards are also referred to as “dialectical obligations.”¹¹⁸³ This first goal can be linked to the accuracy motivation we viewed in Chapter One of this thesis,¹¹⁸⁴ and can also be linked to the impression motive,¹¹⁸⁵ as discussants here try “to maintain the image of people who play the resolution game by the rules”¹¹⁸⁶ and be “very keen on keeping up the pretence of reasonableness, portraying themselves as living up to all critical standards.”¹¹⁸⁷ The other goal negotiators/discussants have is getting their “own

1177 See: Eemeren and Houtlosser (n 791), and Lewinski and Oswald (n 868).

1178 See Chapter Four: 4.2.1.2 Heuristics mechanism.

1179 See Chapter Five: 5.5 Fallacies typology.

1180 Eemeren and Grootendorst (n 20) 190.

1181 Lewinski and Oswald (n 868) 6.

1182 F H Van Eemeren and P Houtlosser, ‘Strategic Manoeuvring in Argumentative Discourse’ (1999) 1 *Discourse Studies* 479 <<https://doi.org/10.1177/1461445699001004005>> accessed 4 June 2023, 481.

1183 *ibid.*

1184 See Chapter One: 1.6. Negotiation motives.

1185 *ibid.*

1186 Eemeren and Houtlosser (n 1182) 481.

1187 See: F H Van Eemeren and P Houtlosser. ‘Rhetoric in a Dialectical Framework: Fallacies as Derailments of Strategic Manoeuvring’ in: Van Eemeren F H (ed), *Reasonableness and Effectiveness in Argumentative Discourse* (Springer 2015) 607.

positions accepted.”¹¹⁸⁸ This goal is also referred to as a “rhetorical objective,”¹¹⁸⁹ and can be linked to defence motives, as we explored in Chapter One. The continuous balancing between these two goals is called Strategic Manoeuvring.

Rationaliser mediators here are expected to help parties achieve this balance - we believe - without harming the mediation process and mediation values. At the same time, they are required to give this assistance without allowing it to harm the mediation process and mediation values. This explains why we need to shed more light on the moves suggested above which mediators can take while handling fallacies, in order to have a clearer view of their roles, which shall compose the final part of the CEBF Model, combining a series of minor/supporting roles that can show, in a detailed fashion, how the Rationaliser Mediator shall work, starting from being a *Concerns Manager*, *Emotional Handler*, *Biases Mitigator*, and, finally, the following proposed roles towards fallacies.

The above - and upcoming - roles shall compose the answer to the main thesis question: To what extent should mediators be responsible for freeing mediation process from logical fallacies’ possible harms? The above roles are – mainly - agreed upon ones among mediation scholars, have been discussed previously in other mediation studies and we simply revisited them, restructured them, renamed them, and added them to our CEBF framework. However, the upcoming roles are - to some extent - new to mediation scholarship and reflect various grades of responsibility we believe mediators have towards protecting the mediation process and mediation parties from the expected harms that fallacies might cause to them. As we shall see, each upcoming minor role refers to a grade of this responsibility.

1188 Eemeren and Houtlosser (n 1182) 481.

1189 *ibid.*

7.2 New roles for mediators towards fallacies

In this section we are proposing a series of roles that are solely built to deal with fallacies. Each role reflects a grade of responsibility towards keeping mediation free from the harms which fallacies might cause. Deciding the suitable role shall depend on several elements, as we shall see below.

7.2.1 Fallacy Detector

Until negotiation norms radically shift, however, we can assume that some mediation participants and their clients will stretch the truth—at times beyond recognition. But the question remains: What should the mediator's response be? The mediation codes don't present a uniform answer, which leaves to each individual mediator wide latitude in separating the acceptable white lie from the intolerable fraud.¹¹⁹⁰

The Fallacy Detector/Finder is a mediator who simply keeps a record of any fallacy that takes place in mediation, and does not intervene unless this fallacy leads the negotiation astray or puts one of the parties at risk of accepting an offer or giving a concession that she would not accept or give if her opponent's argument was clear and fallacy-free. Simply put, the Fallacy Detector recognises fallacies, memorises them accurately, and gets prepared to either switch to a more interventionist approach and protect the vulnerable party from getting misled, or to end the mediation session if she finds that she can neither change her style, nor protect the mediation process and mediation values.

¹¹⁹⁰ Waldman (n 228) 201.

Practicing this role requires following specific steps in order to achieve the main mission of this role. Firstly, she needs to pay a great attention to all arguments that parties use during the mediation session. Second, it is essential to analyse these arguments and examine their flawlessness. Thirdly, she needs to recognise any fallacious argument and keep an accurate record of these fallacies within their context in order to be able to move to the next step, which is evaluating the possible influence of this fallacy on the targeted party's decision. Finally, the Fallacy Detector mediator could decide to raise a flag and switch to another minor role by becoming a Fallacy Defuser, or she might decide to remain loyal to her role as fallacy finder and proceed with the process, unless she realises that proceeding without intervention might lead to serious harms to substantial fairness of the mediation outcome, or an actual threat to the necessary informed consent of the targeted party, who would possibly refuse to accept this outcome if she has learned about the fallacious side of her counterpart's argument. Once the fallacy finder becomes sure that these harms are expected, and doesn't want to switch to another more interventionist role, she might then end the mediation session and withdraw. The steps then needed are:

- 1- Watching "the ongoing conversation",
- 2- Analysing "the arguments both parties might use",
- 3- Recognising "the potential flaws on parties' arguments",
- 4- Evaluating "the possible influences of these flawed arguments on parties' positions",
- 5- And either switching "to another role" or terminating "the mediation process".

This mediator believes in minimising her intervention, and doesn't tend to step in unless there is a real threat that might endanger mediation values. She proposes that each party is capable of deciding independently, and each of them is able to distinguish good arguments from bad ones, which means that even when a fallacy is being committed, there will be a chance that they should be able to deal with it. However, because she is a rationaliser mediator, she believes in the importance of keeping the mediation process and negotiating parties protected from the possible harms of fallacious arguments. This dual role creates the dilemma reflected in the fifth step above; to proceed with the process and losing the non-interventionist nature by

switching to a more directive endeavour, or to respect her original commitment to not intervene at any cost, even if this cost is terminating the process and leaving the mediation room.¹¹⁹¹

For instance, when one of the negotiating parties uses the straw man fallacy to influence her counterpart and push her to accept an offer that might not be the best resolution for her, the fallacy detector mediator needs to make a record of this fallacy and observe carefully their next moves, especially those offers that include concessions, in order to identify any possible correlation between that fallacy and these concessions. However, the challenge here is that the fallacy finder mediator might not be able to confirm that the fallacious argument had a significant effect on the targeted party's offers or concessions. The party who receives the fallacy might be influenced by various factors other than just that fallacy. To handle this, the mediator can discuss with this party the reasons behind her concession, as a part of her main job to assure the presence of the necessary informed consent. This discussion might retrieve the section of the conversation that included the fallacious argument, then the mediator might spend time on investigating the possible link between this argument and the receiving party. Such a discussion doesn't include any direct move from the mediator towards exposing the structure, type, error, or the influence of the argument. Such exposure means that the fallacy finder mediator has switched to a more interventionist role by becoming a Fallacy Defuser/Dismantler.

7.2.2 Fallacy Defuser

While the fallacy defuser¹¹⁹² follows the same initial four steps followed by the fallacy detector, when it comes to the fifth step, she knows what she has to do; she dismantles the fallacious argument in order to make it clear to both parties that this argument is

1191 On her book "Mediation Ethics", Waldman resorted to this terminating move "ending mediation session and leaving the mediation room" in many occasions where she believes that mediation values are evidently threatened. See: Waldman (n 228) 2.

1192 Can also be labelled as Fallacy Dismantler, and Fallacy Deconstructor.

now defused, and without any possible persuasive power; in other words, she disarms the fallacy. Accordingly, the steps of this role are:

- 1- Watching “the ongoing conversation”,
- 2- Analysing “the arguments both parties might use”,
- 3- Recognising “the potential flaws on parties’ arguments”,
- 4- Evaluating “the possible influences of these flawed arguments on parties’ positions”,
- 5- Defusing “the fallacious element of the argument”.

Defusing a fallacious argument is a more interventionist move than simply reviving the conversation and discussing it. The mediator here does not limit herself to discovering the fallacy and waiting for the possible consequences, but rather, once she realises - from the context of the conversation - that the committed fallacy might affect the targeted party’s position, she steps in and comments on the fallacious argument in a manner that shall help the fallacy committer realise that her argument shall not pass. However, this realisation must be achieved in a way that doesn’t frame this argument as a deceptive move or an unethical tactic. The defuser targets the argument, not the arguer, by deconstructing the fallacy itself just after realising its possible harmful influence on the receiving party’s decision. To achieve this, she resorts to the fallacy mitigation strategies we previewed in this chapter as a systematic tool in dismantling the fallacy and defusing it.

Paraphrasing the fallacious argument in a way that shows its flaws is one of the most successful common strategies a mediator can use. However, this paraphrasing shall not be carried out in a way that introduces the party who committed the fallacy as an unethical or deceiving negotiator. Saving the party’s face shall be maintained by the mediator in this scenario. Accordingly, using an absurd counterexample by the mediator - as we presented earlier as a fallacy mitigation move - in order to dismantle/defuse the fallacy, can be a very dangerous move. Thus, the mediator might

need here to limit her intervention to simply taking the argument apart by stating its premise(s) and conclusion(s) in separate simple sentences in a way that allows any layperson to see the flaw in the argument. However, the fallacy dismantler still needs to be cautious while taking the fallacious argument apart, as this move might threaten her neutrality if she represented the premises/conclusions in a way that either improves or deteriorates the quality of “precision or eloquence” of the sentences. However, this danger is present in all situations where mediators try to paraphrase parties’ sentences or offers while facilitating the ongoing communication between the parties.

Therefore, while the fallacy detector doesn’t aim to expose the flaws in the argument to the party who committed the fallacy, the fallacy defuser does, but tries her best to not allow this exposure to place that party in a situation that might make her feel uncomfortable. The real aim is to help both parties use better argumentation in a way that doesn’t leave room for misunderstanding or misrepresentation. Thus, dismantling a fallacy shall be done by using cautious approaches that help this particular party to understand why this argument should not take place in the mediation room. In order to achieve this, the mediator’s deconstruction move shall manifest itself as an inquiry or a quest for understanding, other than any format of unwanted investigation or unaccepted accusation. The mediator here does not want to allow the fallacious argument to take place in the mediation room, and at the same time does not want to cause any threat to the rapport she needs to build with both parties. Accordingly, the private sessions, or caucuses, are a suitable option for the mediator here. By this tool, she can maintain the balance she wants, and can make her intervention smoother and less troubling.

While this quest for understanding is very common in everyday conversations, when the fallacy dismantler uses it, she can focus more on the fallacious argument in a systematic, cautious way, by basically asking the arguer specifically to restate, recapitulate, or clarify her argument. By doing this, mediator does not give a direct comment on the fallacious argument, but instead implies that the given argument can

be more helpful to the ongoing conversation if the arguer paraphrases it. This paraphrasing is a deconstruction process by which the arguer shall be able to see closely the flaw in her argument and notice that this flaw might not be acceptable to the other party. If the arguer has been unable or unwilling to offer this recapitulation, the mediator can do it herself by using closed end questions, starting with the arguer's argument in a new improved wording, and ending with a simple question; for instance, is that what you mean?

For both types of mediators, the fallacy detector and the fallacy defuser, the main challenge is the evaluation step. When she initiates this phase, she needs to investigate the scale of the possible influence of the fallacious argument on the targeted party's position. Such investigation requires a wide range of tools that shall assist the fallacy detector and fallacy dismantler mediators to proceed with their investigation, without either letting any party lose face or letting her own neutrality be endangered. This perplexing challenge does not exist when it comes to the third minor rationalising role, the Fallacy Demolisher.

7.2.3 Fallacy Demolisher

The fallacy demolisher is a fallacy dismantler who doesn't need to identify any possible influence of any party's fallacious argument on her counterpart's position; she intervenes immediately once the fallacy is detected, without waiting for any investigation. This mediator adopts the role of the Assistant Referee (the linesman) in association football. She uses the flag every single time one of the parties tries to exploit a fallacy. Her role is to capture any fallacy committed without waiting for the result, quite similar to the assistant referee who raises her checked flag regardless of what might occur afterwards. This is exactly what the fallacy demolisher does; she has to intervene irrespective of the result of the fallacy, and without consideration of the response of the other party. This approach might save time as it doesn't require the

mediator to invest any time to examine the possible harms of the fallacy, as once she recognises a fallacy, she has to step in and deal with it.

Accordingly, the steps of this role are:

- 1 - Watching “the ongoing conversation”,
- 2 - Analysing “the arguments both parties might use”,
- 3 - Recognising “the potential flaws on parties’ arguments”,
- 4 - Demolishing “the fallacy entirely by all acceptable means”.

Apparently, this approach/role saves time and effort as it skips the most challenging phase, the evaluation, but assumes that the mediator believes in her absolute responsibility of protecting parties from all possible harms that fallacies might trigger. While the previous two roles do also believe in the importance of this protection, they conceive their responsibility towards achieving it differently.

The fallacy detector assumes that each party is capable of deciding for herself without evident intervention from the neutral party. Furthermore, she believes that if she decided to intervene and initiate a direct discussion about the flawed argument she just recognised, then she shall wear a new hat and adopt a different role in order to engage in such discussion. Otherwise, if she wishes to keep devoted to her noninterventionist approach, she can put an end to the process and withdraw, if she finds out that the committed fallacy is about to endanger mediation values.

While the fallacy defuser believes in her responsibility in protecting parties from possible fallacy harms, and she is ready to intervene and offer assistance towards this, she doesn’t initiate this assistance unless relatively sure that allowing parties to proceed with the fallacy’s presence would harm mediation values. Moreover, the intervention she shall offer might be less confronting than the one offered by the fallacy demolisher, as she does not give any direct comment on the committed fallacy, but just implies that the given argument can be more productive if the arguer stated it in a different way. Contrarily, the fallacy demolisher doesn’t restrict herself to this non

confronting obligation; she might resort to severe interventions, such as using absurd counterexamples or even naming/labelling the fallacy and asking the arguer to withdraw it. This confronting nature of the fallacy demolisher's intervention might guarantee a better protection from the fallacy harms; however, it might affect the rapport mediators need to build with both parties, as this confrontation might lead to a loss of face, or at the very least, an uncomfortable situation.

Therefore, the differences between the three roles are:

- 1- The number of steps needed to fulfil the role,
- 2- The time of offering assistance,
- 3- The way of assisting the parties,
- 4- The possible side-effects of the given assistance.

These differences among our proposed three minor roles can be linked to the differences between the different mediation styles we presented in Chapter Two of this thesis, where we explored the Riskin grid and other related classifications. However, these three roles are all under one main role, rationalising mediation, and they all testify the importance of protecting mediation from the possible harms of fallacy. Finally - they shall all be preceded by a unified conditioning role that shall take place in the opening/introductory phases/stages, The Decision Coach Role.

7.2.4 Decision Coach

One of mediation's great strengths - its informality - is also a potential weakness. The absence of any structure of procedural or substantive rules, in a process conducted without direct public scrutiny, presents the real

*danger of harm from inept or unethical practitioners.*¹¹⁹³

The decision coach, originally, is a health care provider who is professionally trained to aid and provide patients with all necessary support that aims to develop their abilities in: thinking about the available options they might have, using and understanding all necessary evidence-based health care data, and being prepared to discuss and implement the chosen decision.¹¹⁹⁴ However, we propose that our rationaliser mediator might need to add some changes to this medical concept while trying to bring it to the mediation room.

Decision-coaching parties in mediation as a part of rationalising the process is, we suggest, a generic role that has to be associated with the above three FDs; the “Fallacy Detector, Fallacy Defuser, and Fallacy Demolisher.” Furthermore, it can be added - and should be added - to several mediation styles that we reviewed in Chapter Two of this thesis. The mediator here is a thinking-coach or a decision-assistant rather than a decision-coach. The difference here is that our mediator doesn’t aid parties’ in choosing between already available options as a medical decision coach does for patients, but rather helps negotiating parties develop their ability to make choices and articulate sound arguments while discussing these choices.

Developing parties’ abilities to make choices doesn’t mean changing their way of thinking or restructuring their thinking methodologies. Such an endeavour can’t be achieved, due to the limited time that mediation offers and the nature of mediation itself, which is mainly concerned with assisting parties in their ongoing mutual persuasion process, other than anything else. However, mediators can still equip

1193 R A B Bush, Study of Ethical Dilemmas and Policy Implications’ (1994) 1994 Journal of Dispute Resolution 1
<<https://scholarship.law.missouri.edu/jdr/vol1994/iss1/4>> accessed 1 July 2023, 4.

1194 Jull and others (n 19).

parties with the proper guidance that shall help them produce better arguments and commit less mistakes in thinking. Equipping parties with such guidance can be a part of the mediation process by embedding it in one of the mediation phases; namely, the opening/introductory phases/stages.

In the previous chapter we previewed the mediator's to do list, and we have stated that the mediator in the beginning of the mediation shall "Negotiate the purpose, structure, and guidelines of mediation with the parties." And in Chapter Two of this thesis, we previewed mediation phases and the objective of each phase. In the opening/introductory phases/stages we have learnt that mediators need to teach parties about the process and the rules they might need to respect. These rules could include legal obligation, confidentiality for instance, or a recommended list of conduct and manners, avoiding interruptions for instance. In this phase, we believe that the FDs mediators might need to supply the parties with list of guidelines that shall help them engage in a fallacy free negotiation. This list can be referred to as "A Code of Conduct for Reasonable Discussants",¹¹⁹⁵ which was presented by Eemeren and Grootendorst.

In their systematic theory of argumentation, Eemeren and Grootendorst presented a well-defined guiding principle that shall form a framework for a recommended reasonable discussion.¹¹⁹⁶ They formulated a full detailed list of thinking rules that shall help negotiators discuss their differences of opinion. This detailed list is explained over a whole long chapter with technical wording and professional articulation. Later, on the same book, they admitted that these rules are "too technical for immediate use by ordinary discussants."¹¹⁹⁷ Accordingly, they proposed an accessible "code of conduct for reasonable discussants." This code addresses discussants who want to find a resolution for their differences of opinion in a reasonable manner. This unique code consists of ten rules, or what they referred to as

1195 See: Eemeren and Grootendorst (n 20) 187.

1196 *ibid* 189.

1197 *ibid* 190.

“ten commandments” which are basically a list of essential requirements for discussions reasonable behaviour. These commandments “only list prohibitions of moves in an argumentative discourse or text that hinder or obstruct the resolution of a difference of opinion.”¹¹⁹⁸ These rules/commandments are presented as follows¹¹⁹⁹:

Code of Conduct for Reasonable Discussants		
“The ten Commandments”		
The Rule Number	The Rule Title	The Rule Text
1-	The freedom rule.	Discussants may not prevent each other from advancing standpoints or from calling standpoints into question.
2-	The obligation-to-defend rule.	Discussants who advance a standpoint may not refuse to defend this standpoint when requested to do so.
3-	The standpoint rule.	Attacks on standpoints may not bear on a standpoint that has not actually been put forward by the other party.
4-	The relevance rule.	Standpoints may not be defended by non-argumentation or argumentation that is not relevant to the standpoint.
5-	The unexpressed-premise rule.	Discussants may not falsely attribute unexpressed premises to the other party, nor disown responsibility for their own unexpressed premises.
6-	The starting-point rule.	Discussants may not falsely present something as an accepted starting-

¹¹⁹⁸ *ibid.*
¹¹⁹⁹ *ibid* 190-195.

		point or falsely deny that something is an accepted starting point.
7-	The validity rule.	Reasoning that in an argumentation is presented as formally conclusive may not be invalid in a logical sense.
8-	The argument scheme rule.	Standpoints may not be regarded as conclusively defended by argumentation that is not presented as based on formally conclusive reasoning if the defence does not take place by means of appropriate argument schemes that are applied correctly.
9-	The concluding rule.	Inconclusive defences of standpoints may not lead to maintaining these standpoints, and conclusive defences of standpoints may not lead to maintaining expressions of doubt concerning these standpoints.
10-	The language use rule.	Discussants may not use any formulations that are insufficiently clear or confusingly ambiguous, and they may not deliberately misinterpret the other party's formulations.

This code can be a useful tool for mediators in terms of supplying negotiating parties with standards and guidelines they might agree upon in order to help them speak a relatively unified language. Such rules were tailored by Eemeren and Grootendorst after examining a wide range of fallacies that usually occupy ordinary

conversations.¹²⁰⁰ They tackled in their proposed code of conduct the possible roots of thinking errors and fallacious argument in order to equip ordinary discussants with a ready-to-use framework.

The rationaliser mediator, we propose, shall resort to this list as part of her minor role as Decision Coach. Using this list is an invitation from the mediator to the negotiating parties in which she *recommends* them to accept these rules as conversation guidance. Thus, there is no compulsion here, not only because of the voluntary nature of mediation and the autonomy of the parties, but also because these rules can't be followed by the parties without getting them entirely persuaded of the benefits of applying these rules to their discussion. In order to achieve this persuasion, the rationaliser mediator needs to explain these rules to the parties as part of her role as a decision coach. This explanation requires a long preparation, as we believe that mediators might not be able to introduce this code for negotiating parties, along with adopting one or more of the three FDs presented above, unless the road to such an introduction is properly paved for them, and for other service providers, through introducing a number of adjustments to the broader context on which mediation takes place. However, before moving to discussing these needed adjustments, we might need to draw attention to a notion regarding the timing of resorting to the above rationalisation's minor roles - specifically the FDs - during the mediation session, as they might be applied on a phased basis, rather than just deploying them interchangeably with each other.

The phased basis in applying mediator's approaches/roles is not an unfamiliar concept in mediation theory and practice. It has been suggested that mediators can begin their mediation session with a facilitative style, and in later stages, when the offers and concessions start, she can offer evaluations as mediators don't need to - and possibly

1200 *ibid* 158-186.

cannot - embrace a single style throughout the whole mediation session.¹²⁰¹ A quite similar suggestion can be produced here regarding the rationaliser mediator's minor roles towards fallacies. If the opening/introductory phase/stage is clearly the suitable stage in which the decision coach's role can be fulfilled, the other three FDs can be applied in the other upcoming phases on a phased basis. In the exploration phase, where mediators try to learn about the parties and the dispute, the fallacy detector role can be active, as there is no direct immediate intervention expected towards fallacious statements/arguments in this phase, especially when mediators manage it through private sessions. Later on, when the negotiation phase starts, and mutual arguments are expected to support the ongoing exchange of demands and offers, mediators might start resorting to the fallacy defuser role, as its interventionist nature shall help them to better assist parties keep their negotiation protected from possible harms caused by fallacies. Finally, when the agreement approaches, and real concessions are evident as responses to the exchanged arguments, the mediator might prefer here to become a fallacy demolisher, as fallacious arguments at this stage might cause an immediate effect on parties' positions and standpoints, which might consist of a real threat to their supposedly intact informed consent.

However, this application of mediators' roles in a phased basis towards fallacy is just a proposed way of applying them. Mediators in practice don't usually follow this theoretical idealistic order or classification.¹²⁰² Mediators in practice are susceptible to several factors that shape their styles and approaches, and they need to be responsive to these factors, including the nature of the dispute, its complexity, parties' relationship, the time available and many other factors. Yet, regardless of the way our rationaliser mediators will apply their minor roles towards fallacies, either interchangeably or on a phased basis, they will need to wait for a number of essential

1201 See: D Q Anderson, 'Facilitative Versus Evaluative Mediation: Is There Necessarily a Dichotomy?' (The Alternative Dispute Resolution Conference, Singapore, 4–5 October 2012) <<https://ssrn.com/abstract=2889142>> accessed 1 July 2023, 74, and for more about the timing and appropriateness of applying different mediation styles, see: S N Exon, 'The Effects that Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation' (2008) 42 *University of San Francisco Law Review*, 577 <<https://repository.usfca.edu/usflawreview/vol42/iss3/1/>> accessed 1 July 2023, and E Waldman, 'The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence' (1998) 82 *Marquette University Law School* 155 <<http://scholarship.law.marquette.edu/mulr/vol82/iss1/4>> accessed 1 July 2023.

1202 See: Exon, *ibid.*, and Waldman, *ibid.*

adjustments to the broader context in which mediation takes place, as we shall see below.

7.3 The required steps towards applying the CEBF Model

*At the core of nearly all great negotiators, mediators, lawyers, and leaders is a person who has learned to connect with other people, that is, to build relationships of trust, cooperation, and collaboration.*¹²⁰³

As we discussed in Chapter One of this thesis, many negotiation and mediation studies focused on the relational/communication side of the process, and offered a wide range of studies and training materials that targeted promoting and developing this side. However, when it comes to the argumentative nature/side of negotiation/mediation, it becomes very evident that mediators shall face a clear lack of supporting studies, trainings, and proposed tools and strategies. Here we are going to explore this challenge that might hinder the application of the rationaliser approach, along with what we envisage as useful steps to handle these challenges.

7.3.1 Law schools' curriculum

In Chapter Four of this thesis¹²⁰⁴, we reviewed the shift that influenced the law schools' curriculums regarding teaching logic for law students. The fact that "Law schools no longer teach logic"¹²⁰⁵ can explain why we shouldn't expect current lawyer mediators to have a sufficient knowledge about fallacies. However, the changes we would suggest to the curriculum are not radical or holistic. There is no need here to engage in debate about the nature of law that occasionally erupts between the supporters of the "legal formalism" who believe that judges decide cases or must decide cases using logical reasoning, either solely or mainly, and the scholars of "legal realists" who

¹²⁰³ Reilly (n 16) 434.

¹²⁰⁴ See above on this thesis: 4.1.4.3 Logic and law schools.

¹²⁰⁵ Aldisert, Clowney, and Peterson (n 659) 100.

suggest that judges have, or should have, broader discretion in deciding cases.¹²⁰⁶ Yet, we do agree with Michael Moore that any criticism formalists face does not stem from the reliance of legal formalism on logic, “Judges should be logical; their decisions should follow logically from their premises. This much is surely correct about formalism, however much the Legal Realists may have mocked it.”¹²⁰⁷ We don’t need to engage deeply in this debate, because mediating is not judging, and mediators’ backgrounds and roles are obviously different. Nevertheless, we do echo Moore here by emphasising that the help logic can offer for mediators is also significant.

The nature of knowledge of logic which I suggest law students to acquire is not theoretical neither sophisticated. Law students are better with practical and ready-to-use logic rules. There is no need in law schools for long debates about the history of logic, the relation between logic and language or the variated landscape of logic theories and schools. The topics a law student might need to know from logic scholarship shall essentially include these features:

- 1- The necessary sets of skills and competencies, people in general, and law practitioners in particular, shall need in order to think critically and interact with others positively, including collecting, organizing, classifying and analysing data, listening patiently, carefully, and actively to others... etc.¹²⁰⁸
- 2- The requirements/elements a layperson needs in order to build a flawless/persuasive argument. This might include approaches such as the “optimal decision rules”,¹²⁰⁹ the “five criteria of good argument”,¹²¹⁰, and the “code of conduct for reasonable discussants”¹²¹¹.
- 3- The factors that might interrupt the process of building a good argument. This shall cover the relation between emotions and reasoning, and the ways feelings contribute in shaping/blurring our decisions.

1206 For more about this debate see: B Leiter, ‘Legal Formalism and Legal Realism: What is the Issue?’ (2010) 16 *Legal Theory* 111 <<https://doi.org/10.1017/S1352325210000121>> accessed 1 July 2023, and B Z Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton University Press 2010).

1207 M S Moore, ‘The Semantics of Judging’ (1981) 54 *Southern California Law Review* 151, 292.

1208 Reilly (n 16) 457.

1209 See Chapter Four: 4.2.1.2 Heuristics mechanism.

1210 See Chapter Five: 5.5 Fallacies typology.

1211 See on this chapter: 7.2.4 Decision Coach.

- 4- The various deviations of logical reasoning and sound thinking. These deviations shall include definitions, examples, and classifications of heuristics, biases, and fallacies to the extent that make them recognisable to students.
- 5- The possible mitigation strategies law practitioners can deploy in dealing with these deviations in order to equip them with efficient sufficient tools that shall help them avoid their possible harms to their everyday conversation.

This non-exhaustive recommended list indicates the anticipated practical nature of the changes/addendums we suggest to the curriculum. These topics can be either presented as an autonomous module or as a part of an already existing module (i.e., legal theory.)

7.3.2 Mediation training¹²¹²

*It seems that mediators tend to mediate in a manner that reflects their previous profession, whether as lawyers, engineers, social workers, psychologists or academics.*¹²¹³

Teaching logic to law students is not sufficient in preparing future mediators to be successful rationalisers, because of two reasons. Firstly, mediators are not solely lawyers, they come from various backgrounds, regardless of the debate about the nature of mediation and whether it is a legal profession or not, which we do not want to, nor have to engage with, as it is a matter of fact that there are a number of mediators all over the world who are non-lawyers. The thing that we are concerned about here is making sure that practicing mediators, lawyers and non-lawyers, have a proper knowledge of logic, in order to help them perform as proper rationalisers.

The second reason behind our interest in getting mediators trained about our suggested roles and approaches before practicing as rationalisers is the flexible characteristic of

¹²¹² See: Devinatz (n 1152), and see: D N Frenkel and J H Stark, 'Improving Lawyers' Judgment: Is Mediation Training De-Biasing?' (2015) Faculty Scholarship at Penn Carey Law 1680 <https://scholarship.law.upenn.edu/faculty_scholarship/1680> accessed 1 July 2023, 17.

¹²¹³ Alexander (n 173) 18,

mediation as a process and profession. This feature shall urge us to call for a series of changes on the current known mediation training programs. Our suggested list of changes/additions to mediation training programs is – again - neither radical nor extensive, but rather complementary and supplemental. This list shall include these features:

- 1- Shedding more light on the significant role the concept of “persuasion” plays in understanding and conceiving negotiation and mediation.
- 2- Revisiting negotiators’ modes/attitudes using the proposed disputant’s triangle “personality/identity/mentality” presented in Chapter Three of this thesis¹²¹⁴.
- 3- Expanding the designated “study of emotions’ role in mediation sessions/hours to allow a deeper discussion about the influence of emotions on reasoning.
- 4- Reformatting the section that discusses the opening phase/statement to allow room for adding and applying the suggested “code of conduct for reasonable discussants”.
- 5- Adding specific sessions dedicated to previewing the most common sets of biases and fallacies, with their classifications, definitions, and life examples.
- 6- Tailoring a sufficient number of activities/simulations/role-plays that comprise biases and fallacies, with accompanying sets of mitigation tools and strategies.

This list shall extend the duration of the training course/programme, but it is crucial in terms of supplying mediators with necessary knowledge and skills that shall arm them in protecting mediations from the possible harms that fallacies might cause and help parties become well informed and confident about decisions in their disputes. However, negotiating parties might need preparation before being ready to accept this help. This preparation can be done by enhancing the way mediation is being marketed.

7.3.3 Mediation marketing

The way in which parties conceive mediation might need to be changed in order to help them benefit from the fallacy handling suggested roles in particular, and from the

¹²¹⁴ See above: 3.5.4 Our Proposed Triangle.

main rationaliser model in general. This change in the public's image of mediation shall promote the use of our suggested new roles.

Current mediation marketing content focuses on the main characteristics of mediation as an efficient alternative that saves time and money, offers flexibility and voluntariness, and guarantees neutrality and confidentiality.¹²¹⁵ However, we believe that mediation should be introduced to people in a more reassuring/appealing light.

We propose that parties need to see mediation as a safe, deception free space. Mediation rooms should be labelled as places where no one can take advantage of the parties who engage with them. This safety is the new benefit rationaliser mediators can offer to parties.

Publicising the safe/harm-free notion to the parties can be achieved in several ways, including the websites of mediation centres, illustrated simplified leaflets, and short introductions about the benefits of rationalisation approaches, delivered by case managers and conveners.

Once the mediators are educated/trained about their expected roles as rationalisers, and once the concept and process of rationalisation are clearly explained and appealingly introduced to the expected negotiating parties, the implementation of these roles shall be feasible. However, there are a number of expected obstacles that might hinder the proper execution of the rationalisers' job in general, and the FDs roles in particular, as we shall see below.

7.4 Expected challenges in applying the CEBF model

The early stages of the rationaliser approach/style, including Concerns Manager, Emotional Handler, and Biases Mitigator can be achieved without significant challenges, as previous studies and practices have tackled the difficulties that usually

1215 See: A Hartmann-Piradeau, *Mediators in the Leading Role: Understanding and Actively Managing Mediation* (Springer 2022), and L A Allport, 'Mediation: Alternative? Or a First Choice for Resolving Disputes' (2021) 2 *Amicus Curiae* 151 <<https://doi.org/10.14296/ac.v2i2.5251>> accessed 4 July 2023.

accompany them and developed several well-structured frameworks that shall help mediators deal with concerns, emotions, and even biases skilfully, as we have seen previously in this chapter. However, when it comes to the newly suggested roles we presented here towards fallacies with “the decision coach and the three FDs”, many hurdles might arise.

7.4.1 Time limitations

*General human impatience will make many negotiators and mediators reluctant to expend the extra time.*¹²¹⁶

Implementing these suggested minor roles in rationalisation shall take time in every single role, and every single step. Extending the opening phase in order to introduce and explain the “code of conduct for reasonable discussants” and persuading parties to acknowledge it as acceptable guidance shall take time. However, monitoring and analysing parties’ arguments and recording each detected fallacy shall take time, as well applying the wide range of different strategies that rationaliser mediators might use to deal with fallacies.

However, we should expect that teaching parties thoroughly about the ten rules code of conduct, and persuading parties to adopt them shall decrease the possible chances of committing fallacies during the next phases of the process, which shall reduce the probabilities of misunderstanding and mistrust that fallacies may cause. Getting parties/discussants to be reasonable and follow the same rules of arguing shall make them use quite similar language, and be able to understand each other faster and deeper. Accordingly, the possibilities of facing stalemates and impasses shall be

¹²¹⁶ Stempel (n 1018) 505.

minimised and, subsequently, save time. However, all these expectations should - we suggest - be thoroughly examined in future, well-prepared research projects that investigate the possible influences of applying our proposed roles, as we shall see in the next, final, section below.

However, the challenge presented by time limitations might bring an ethical dimension to the mediations in which parties pay mediators/mediation centres on an hourly fee basis. In these situations, rationaliser mediators “could look to clients like padding the bill or acting inefficiently.”¹²¹⁷ Therefore, we believe that mediators in this instance should either change their payment methods, or explain to the parties the time saving results of applying these new roles and approaches by reducing the chances of misunderstanding and the opportunities for deadlocks and mediation failures.

7.4.2 Parties’ autonomy

*Unlike litigation and arbitration,
mediation has no rule book.*¹²¹⁸

Rationalisers using the CEBF model might seem to threaten parties’ self-determination and informed consent in two situations, through introducing the “code of conduct for reasonable discussants”, and applying direct interventions in the “Fallacy Demolisher” style.

The language used in the code might raise concerns about the freedom left for parties to build their arguments and express themselves independently. The ten rules introduced above place limitations on the parties’ liberty to discuss their dispute by

¹²¹⁷ *ibid.*

¹²¹⁸ P Newman, *Alternative Dispute Resolution* (CLT Professional Publishing 1999) 39.

their own terms and rules. However, this thesis suggests that mediators who present this code do not, by any means, oblige parties to apply them, as this code is a guidance that doesn't become binding unless both parties accept it. That is why mediators who perform a role as Decision Coaches need to explain the code to parties, and persuade them of its usefulness. Once this persuasion is achieved, the threat to parties' autonomy shall be neutralised.

The confronting moves used by fallacy demolishers might comprise a real challenge to parties' autonomy and informed consent, as these moves do not allow any fallacious argument to take place in the mediation session without attacking it and erasing any of its possible influence on the targeted parties. Such moves might happen even before the protected party knows about the possible danger the fallacy might have caused as the mediator here shall attack the fallacy even before the targeted party receives it which might hinder her right to decide and choose the suitable response to her counterpart's fallacy. Yet, this dilemma is not new to the mediation practice,¹²¹⁹ and a proper understanding of the hierarchy of mediation values shall help mediators to decide and choose the correct intervention that doesn't sacrifice a high rank value to a lower one. Allowing fallacies might lead to a real threat to informed consent and substantial fairness, while confronting them might lead to a possible risk to parties' autonomy and informed consent, and this dilemma, again, seems to be eternal, and shall be handled case by case, according to the unique circumstances of each mediation.¹²²⁰ This case-by-case handling shall rely on many factors including mediator's style, parties' relationship, and time availability. However, in most given scenarios when the mediator prioritizes one value, for instance, substantial fairness, in order to protect parties' autonomy, several valid criticisms shall arise as there is no agreement on the correct hierarchy of these values and what can be superior to one mediator might be less important for another as we have seen in Chapter Two of this thesis.

1219 Haley (n 272), and Waldman (n 228).

1220 Waldman, *ibid.*

7.4.3 Mediator's neutrality

*Mediation is held out to be a neutral and unbiased process, in which the mediator is not partial to either side. But questions arise regarding what is necessary to maintain both the appearance and fact of impartiality.*¹²²¹

Fallacy Detector mediators might feel unchallenged in terms of their neutrality, as they minimise their interventions as much as they can, and avoid any expression of their evaluation of the parties' argument. However, the other two FDs, the Fallacy Dismantler and the Fallacy Dimolisher, might face real challenges regarding keeping their neutrality intact.

The mediator's intervention can be controversial in terms of respecting neutrality. The labels and descriptions given to directive mediators such as ““muscle mediators” or “Rambo mediators””¹²²² can illustrate the concerns some scholars might have towards directive mediators.¹²²³ The same worries can arise concerning Fallacy Dismantlers and Fallacy Demolishers. The label itself indicates a shade of expressing an opinion or impression towards party's position, standpoint, or argument.

We agree with Susan Exon that:

Often a mediator's style affects her ability to maintain impartiality, no matter how the style is coined. Whether termed evaluative, directive, trickster, magician, prime negotiator, settlor, protector, norm-advocating, or Michigan

¹²²¹ Bush (n 1193) 12.

¹²²² Lande (n 36) 850.

¹²²³ Exon (n 1201), Haley (n 272), and Waldman (n 228).

Mediation, these types of mediators easily can exceed their neutral and impartial responsibility. In each case, these types of mediators may influence parties to adopt a position that the mediator thinks is rational or best for everyone involved in the mediation. At the very least, when a mediator evaluates the dispute, her opinion usually favors one party over the other, which arguably jeopardizes her impartiality.¹²²⁴

When the fallacy demolisher, for instance, attacks a fallacy, she does what she believes is rational, fair, and in favour of every party involved in the mediation, in terms of ensuring an undisputed final just settlement, and protecting both parties from renewing the conflict again, when the unjust nature of the settlement - caused by the undemolished fallacy- is being revealed.

As stated above as a suitable position towards the endangered parties' autonomy, we resort again to a proper understanding of the concept of hierarchy of mediation values in helping our mediators to decide and choose the correct intervention that doesn't sacrifice a high rank value to a lower one, while bearing in mind that what can be considered a fundamental top ranked value for one mediator may not be the same for another. In all cases, parties shall be informed about the possible sacrifice which mediators might perform by explaining their style in the opening phase, in a simple straightforward manner, along with explaining the ten rules code of contact¹²²⁵ in order to make parties fully informed about the process and the ethics that shall govern it.

7.4.4 Non-lawyer mediator's anticipated resistance

Shedding light on the significance of logical integrity for the mediation success and producing new mediation roles that reflect and interpret this significance might provoke non-lawyer mediators to resist the embrace of those new approaches that adopt this viewpoint. The rationale behind this expected resistance is the long history of the perceived association between logic and law, in both theory and practice. This

¹²²⁴ Exon, *ibid* 604-605.

¹²²⁵ See above: 7.2.4 Decision Coach.

well-established association shall send a message to non-lawyer mediators that rationalisation approaches in general, and the FDs roles in particular, are not friendly models for them, and supporting the view that labels mediation as a branch of legal profession that shall be exclusive to lawyers. This message - we believe - is entirely incorrect, and is probably in opposition to the real message we might intend to send by proposing the rationaliser approach and its minor roles.

We do believe that stressing the importance of parties' logical integrity and fallacy free mediation can actually help non lawyer mediators with the fact that "the practice of mediation is insufficiently professionalized and disciplined"¹²²⁶ and experiences an evident "absence of any clear and demanding standards of practice for mediators."¹²²⁷ We propose that adding clear logical rules and list of conducts to the process - that can be learnt and applied without requiring any previous legal knowledge - shall help non lawyer rationaliser mediators apply the same conduct rules that lawyer rationaliser mediators apply. Adding these rules to the process shall bring all practitioners under the same umbrella and reduce the differences in the performance of mediators who come from various professional and educational backgrounds. These proposed roles translate known shared concepts, such as common sense and sound thinking, into unified lists and practices which laypersons can abide by and any mediator, regardless of her background, can introduce, explain, and apply.

7.4.5 Astute negotiators anticipated resistance

*Because mediation is not considered a "tribunal," mediation advocates are free to engage in bluffing, puffing and "little white lies."*¹²²⁸

¹²²⁶ Bush (n 253) 1.

¹²²⁷ *ibid.*

¹²²⁸ Haley (n 272) 85.

Negotiating parties who are accustomed to using deceptive moves and ethically questionable tactics might not be happy with adopting new roles that shall facilitate the recognition of fallacious arguments and misleading premises. When a party relies on these practices in obtaining what can be called “unmerited gains”, they might not be willing to sacrifice these benefits to respect a list of rules that they aren’t legally obliged to follow. This unwillingness might result in hindering the mission of Decision Coach mediators in persuading those “clever” participants to accept the “code of conduct for reasonable discussants.”

Mediators here might use two justifications in order to encourage those parties embracing that code and accepting the rationalisation approach. Firstly, the safety sphere this code aims to offer shall be appealing for most discussants, as even well-prepared, eloquent, arguers can be misled, misguided, and taken advantage of, especially when their counterparts’ abilities and skills are unknown to them. Secondly - as we explained in Chapter Five while exploring the possible harms fallacies might cause to the mediation process, mediation values, and negotiating parties - even if those astute negotiators refused to abide by the logical rules and even if they succeed in achieving unmerited gains as a result of their ethically controversial moves, they still have no guarantee that their counterparts will not renew the dispute and refuse to honour the settlement. Those counterparts might try to do so when they realise that the final settlement could have been better if the negotiation was filtered from some fallacious arguments they received during the process. In order to avoid such a possible undesired result, astute negotiators may be willing to welcome the FD’s roles and discussion rules without significant resistance, as long as the mediator takes time to explain them clearly and carefully.

7.5 Further insights, future research, and suggested forthcoming changes

Throughout the entire seven chapters of this thesis we have tried to investigate the possible answers for one main question regarding the mediator’s role towards fallacies that occur within mediations. During this investigation journey, we reached a number of conclusions:

1. Revisiting negotiation definitions in the light of the supposed significance of logical thinking in the process and the central role of “persuasion” as a key concept in perceiving negotiation.
2. Redefining mediation in the light of the above proposed characterisation of negotiation by suggesting a more constructive role that mediation can play in disputes.
3. Re-examining the concept of “disputes” and their dimensions, along with picturing the disputants’ attitudes towards these dimensions, by focusing on the role of logical thinking on these attitudes.
4. Revising the current concepts about logic; its role, relation to law, and the most significant challenges it faces, including heuristics, biases, and fallacies.
5. Reviewing the scholarship on fallacies and bringing attention to the harms these fallacies might cause to mediation values when they take place in the mediation room.
6. Presenting new roles mediators can adopt in order to fulfil their expected duties towards helping parties avoid possible harms fallacies might cause to both process and parties.

However, obviously, these conclusions and answers await further theoretical elaboration and empirical validation from a wide range of aspects and perspectives. These validation studies shall engage with and target: mediators, parties, lawyers, mediation trainers, regulators, and entrepreneurs.

7.5.1 Mediators’ perspective

Mediators shall be asked about the frequency of situations in which they face parties using fallacies during mediation, the way each mediator detects them, the influences/harms these fallacies might have caused, and the form of intervention they apply to deal with them. Such questionnaire/interview shall be preceded by a proper explanation of the fallacy definition, classification, and examples. Then interviewed mediators could be asked about their expectations from applying the above proposed roles. Finally, a number of these questions might be asked again after a pilot project in

which the same mediators use these approaches in real mediation sessions for a limited period. The answers mediators will give shall examine the validity of the above suggested roles, and pave the way for advanced adjustments and practical changes in the way these roles might be practiced. However, these answers might be coloured by what Jacob and Aakhus believe to be most mediators' preferred model, which is bargaining rather than critical discussion, as we mentioned above in the previous chapter.¹²²⁹ Yet, it is premature to talk about such results before the proposed roles have been actually tried and applied by a proper number of practitioners for a sufficient period of time.

7.5.2 Parties assessment

Exploring parties' reviews regarding these new roles shall be a subject for a number of empirical studies. This exploration should include asking them about their experience with the code of conduct and the FDs mediators' interventions. The questions need to cover parties' feelings about their autonomy, the mediator's neutrality and substantive fairness, to name just a few. The design and wording of these questions, of course, wouldn't be restricted by this exact same language we use in textbooks and mediation theory. These question forms should be accompanied by examples that explain the meaning, structure, and possible harms of fallacies with clear simple examples. However, it is important to ensure that these forms do not turn into biased manifestos that influence parties' in favour of the researcher's desired conclusion.

7.5.3 Lawyers feedback

With lawyers, the number of possible studies and questions might increase. The debate here is expected to take another level, as these new roles shall place some restrictions on their performance and activities during mediation sessions. Even if lawyers - at

¹²²⁹ See above: 6.3.2.2 Rationalization and Mentalization.

least the legal formalist lawyers - are familiar with the process of building reasonable arguments, and even if they are acting ethically without any deliberate attempts to commit fallacies, they are still susceptible to committing them, as we know from the studies previewed in Chapter Five that fallacies can be either planned tactics or unintentional thinking mistakes. Lawyers in both scenarios might feel either their ethical image or logical abilities are challenged and questioned, which could result in a negative response from them. However, all these possible responses depend on the mediator's choice of the above three FDs, and the way she applies them. Yet, these possible studies and questions shall not be necessarily held after trying the new proposed roles. Researchers can draft questions that include several scenarios/examples from what we have presented on this thesis and they can then explore the lawyers' views, evaluation, and expected reactions to these given situations.

7.5.4 Mediation trainers

Mediation training programmes mainly rely on a mixture of examples from real mediation contexts, and theories from relevant disciplines as psychology and sociology.¹²³⁰ However, we do believe that early training materials on this topic could start with hypothetical situations that include fallacies with several intervention moves, along with analysing these situations and moves in the light of these disciplines and previous similar mediation practices and theories. Afterwards, when the FDs gain a suitable foothold, and after a proper number of mediators become comfortable and experienced in recognising fallacies and handling them, training materials shall find a wide range of real examples that can be studied, classified, and used in both practical training and theoretical research.

¹²³⁰ See for example CEDR Training Program modules at: <https://www.cedr.com/event/mediator-skills-training/>, and Pepperdine Mediation Training Course modules at: <https://law.pepperdine.edu/straus/training-and-conferences/mediating-litigated-case/malibu.htm> accessed 11 Aug 2023.

7.5.5 Mediation regulators

In Chapter Two of this thesis, we referred to a number of codes of ethics/conduct including Alabama, Florida, and Arkansas, which included precise articles that ask mediators to withdraw in cases of seeing parties' concessions and agreements seemingly rest on misleading statements or fraud.¹²³¹ This looks quite similar to what the Fallacy Detector will do when she realises that the fallacy committed in the mediation session shall lead to an unjust outcome, and she is unable to handle it without switching to another confrontational role. We shall suggest here that regulators of codes of conduct might consider adding the use of fallacies, as this shall draw mediators' attention towards the harm that fallacies might cause, support the use of our suggested FDs in particular, and the whole CEBF model in general.

7.5.6 Mediation entrepreneurs

Service providers - including private and NGO mediation centres - might gain use of these new proposed roles, as they can claim to offer safe "misleading free" zone for negotiators who are looking for an alternative dispute resolution that has some standards and codes that shall make the process sufficiently professionalised and disciplined. On the other hand, these entrepreneurs can help researchers gain insight about the preferences of parties, as they can offer a rich data base that can help measure the influence of applying these proposed roles on settlement rates and on client satisfaction with the process that embraced these new roles.

¹²³¹ See: Alabama. Code of Ethics for Mediators, Standard 3(b) (2010), And: Ark. Alternative Dispute Resolution Commission, Requirements for the Conduct of Mediation and Mediators, Standard B (2004); Fla. Rules for Certified and Court-Appointed Mediators, Rule 10.420(b) (4) (2006).

Conclusion and Recommendations

Throughout the whole research journey, this thesis tried to tackle one pertinent, yet straightforward, question which led to a series of subordinate questions, investigations, and interrogations. The primary question was: what should mediators do when one or more of the parties commits, either intentionally or unintentionally, a thinking error during her endeavours to persuade the other party of her position, demand, or offer? Thereupon, questions kept emerging from the first chapter of this thesis to the last.

The first chapter aimed to investigate negotiation as a main component of almost every mediation definition. Examining the current negotiation studies revealed that persuasion can be a key word for understanding and analysing negotiation. Envisaging negotiation from a persuasion lens leads to a better examination of its meaning, elements, approaches, and limitations. However, the most significant added value from persuasion here was differentiating between the two routes a negotiator might follow in order to persuade her counterpart of her viewpoint, the central route that follows logic and reason, and the peripheral route that follows intuition and resorts to heuristics, biases, and fallacies.

The second chapter previewed mediation scholarship by exploring most of its aspects, including given definitions, styles, phases, and challenges. This exploration gave extra attention to the current known typology/classification of mediation styles/approaches. This chapter proposed a recategorisation map that used various criteria to which mediation styles can be classified. By recategorising mediation styles, we aimed to reach a better understanding of each approach, in order to examine its capability and readiness to offer the help we believe negotiating parties might expect from mediators, as mentioned in Chapter One. However, identifying the type and extent of this help needed a closer investigation of the context in which mediation takes place, namely, disputes.

The third chapter portrayed disputes as the main event that summons disputants to set and negotiate. Both disputes and disputants have been seen from different angles and both of them have been perceived as dependent on each other. To mediators, each side/aspect of both disputes and disputants has a room for intervention; however, the

analysis of all sides/aspects showed that mediators have more reliable tools that should allow a better chance of success when they try intervening in the aspects related to logic and reason. Placing the various aspects/dimensions of disputes and disputants demonstrated that they have objective criteria and systematic approaches which mediators can use in their endeavours to help parties discuss their differences successfully, while other aspects, namely emotions and identity, might be more challenging. Consequently, the thesis proceeded with logic to explore the possible aid with which it can arm mediators with in their job.

The fourth chapter proceeded with reviewing the two reasoning pathways, or what can be called logic and substitute logic. The first pathway can be linked to the central route of persuasion presented previously in Chapter One, while the second is a systematic analysis of the peripheral route. Exploring the original pathway, logic, showed that it has a well-established scholarship that cared mainly about stating the needed rules and steps for producing good arguments, persuasive statements, and flawless discourse. Following logic shall help followers discuss their differences objectively, with a language they can share, and with measures they can trust. On the other hand, substitute logic represents the main deviations from logic which distort reasoning, and lead discussants/negotiators to make agreements that don't honestly represent their intentions or meet their aspirations. These deviations include heuristics, biases, and fallacies. Chapter Four reviews, briefly, both heuristics and biases, but leaves fallacies and their influence on mediation to the upcoming chapter.

The fifth chapter was devoted to fallacies as a main explicit defiance of logic rules and evident articulated arguments that can be tracked, identified, analysed, and, hopefully, mitigated. This chapter thoroughly discussed fallacies, giving definitions, typology, and most importantly, the possible harms they might cause to mediation, mediators, and parties. These harms are not limited to those situations where one or more of the parties commits the fallacy intentionally, as fallacies can occur even if the committer herself was not aware of the flaw in her argument. Such findings reveal that both parties might need to avoid them, not only the one who receives it. Failure to prevent fallacies in the mediation room can lead to unpleasant consequences including:

impairing parties' autonomy, threatening good faith requirements, questioning the fairness of the mediation outcome, discrediting mediation's reputation as a safe zone in which parties feel they won't be taken advantage of, and doubting the assumed trust in mediators as genuinely neutral assistants who are expected to keep mediation values intact and respected. However, these expected roles from mediators towards fallacies have been discussed thoroughly in the last two chapters.

The sixth chapter revisits the existing mediators' roles and job descriptions in order to examine their capabilities and readiness to deal with anticipated harms from logical fallacies which we highlighted in the previous chapter. Reviewing the current mediators' tasks that can be included in their "to do lists" revealed that these lists vary from one mediation style to another, which reflects the way each mediator perceives her role, and the extent to which parties expect them to help. However, this descriptive approach has been accompanied by a prescriptive one, by suggesting a unifying role that can be applied and used by most existing mediation approaches. Rationalisation is the role we presented in this thesis, in order to arm mediators with a central approach that can be applied, along with various existing mediation styles. In this role, mediators are expected to help negotiating parties enhance the quality of their arguments, and making their persuasion endeavours less occupied with thinking errors, including heuristics, biases, and most importantly, logical fallacies. When resorting to this new suggested role, mediators shall be able to redesign the atmosphere of the mediation to make it "logic friendly", by switching the participants' attitude and thinking from using their emotional mind to depending more on their rational mind, from the peripheral route of persuasion to the central one, from system one (fast thinking) to system two (slow thinking), or from what we characterised in Chapter Four as substitute logic to original logic. However, rationalisation, as a general new approach, shall require a series of supporting minor roles, auxiliary usable tools, and reliable mitigation strategies in order to allow mediators to deal with different types of logical fallacies and avoid their possible harms.

The seventh chapter suggested a series of minor roles mediators can follow that track fallacies' journeys from their very beginning as unaddressed concerns, to their last phase as expressed fallacies. This journey forms what we call the CEBF Model in which mediators might need to deal with parties' concerns, emotions, biases, and fallacies. Unaddressed concerns, if not managed successfully, shall lead to negative emotions, and failure to handle these emotions effectively would allow them to produce biases that need to be mitigated, otherwise these biases shall prevail and urge the biased party to resort to one or more of the listed logical fallacies, which make mediation susceptible to one or more of the harms associated with using fallacies in mediation. In each stage of this model, this thesis suggests a strategy. Moreover, mediators can use these strategies to stop this journey in earlier phases; however, even if the mediator didn't manage to intervene earlier to assist parties in getting their concerns addressed, negative emotions handled, and prevailing biases mitigated, this thesis concluded with suggesting that mediators can, and shall, step in and help parties regarding the final step, the logical fallacies. The manner and extent of intervention might vary according to the mediator's style, the situation in which the fallacy takes place, and the grade of danger that might threaten mediation values, mediation outcomes, and the mediation/mediator reputation due to this fallacy. However, applying these roles and strategies shall require some changes to a number of notions related to mediation, and shall open a gate for future research that reflects the limitations of this study.

Accordingly, we believe that the following recommendations can be presented as main conclusions and implications of this thesis:

- 1- Understanding and promoting negotiation scholarship and practice can be enhanced by perceiving negotiation through the lenses of persuasion. Such perceptions can draw researchers and practitioners' attention to the significance of mastering logic rules in articulating good arguments. By doing so, mediators shall have a better awareness of the two routes persuasion might follow, recognise each of them, and use the strategies and tools that suit the route which the parties followed, whether the central route or the peripheral one.

- 2- Regardless of the route parties decide to follow, once they initiate a negotiation, they engage in a persuasion game that, like any other game, has - or should have - rules. In this game, each party is trying to convince the other(s) of her viewpoint/position. However, in guaranteeing that the game's rules are respected, parties may need a game master.
- 3- Mediation can be perceived as a process in which mediators would be rationalisers of the persuasion game, by mastering this game through rationalising the ongoing discussion, and helping parties follow some guidelines that can add reasonableness to both the negotiation process and negotiation outcomes.
- 4- Mediation training programs, and law schools' curriculums, should be revised to add a number of logic topics, including, for example, the requirements of good arguments, the list of possible violations of good reasoning, the types of logical fallacies (with sufficient examples), practical strategies to deal with thinking errors.
- 5- Current marketing materials for mediation that aim at spreading awareness of using mediation as an alternative dispute resolution should focus on this added value/privilege which mediation can guarantee; namely, the opportunity to discuss differences in a safe zone in which parties shall be less susceptible to possible logical fallacies' capacity to cause harms and misleading argument effects.
- 6- The scope and definition of good faith requirement should be expanded to include parties' readiness and willingness to engage in negotiation without deliberately resorting to logical fallacies, and - with quite similar importance - showing readiness and willingness to cooperate with mediators when they try to help them free their arguments from unintended thinking errors and reasoning flaws.
- 7- Parties' self-determination scholarship should be updated to consider "accepting or presenting an offer or demand influenced by a logical fallacy", as a violation of this core value, because it harms the essential feature that distinguishes mediation from most other traditional dispute resolutions. This

would significantly strengthen the marketing materials used in attracting parties to attempt mediation.

- 8- Neutrality as a unique, yet controversial, mediation value, should be reconceptualised to exclude “handling fallacies” from the suggested lists of infringements that researchers and practitioners warn from while dealing with neutrality and its sensitive nature. Thus, mediators’ moves and strategies in handling logical fallacies shall be explicitly perceived as a nuanced application of the principle of neutrality.
- 9- Mediation practitioners, for example, governmental centers, private entities, NGOs, individuals, should prepare their own list of thinking rules that shall help negotiators discuss their differences of opinion. These lists should be tailored in a precise and concise language that avoids any feature that makes it complex or intricate. This list can be inspired by the one we presented in Chapter Seven.
- 10- Convening phases shall condition parties before engaging in mediation sessions by making them aware of mediators’ duties in saving parties’ wills from being thwarted by specious arguments, by offering guides to their reasoning, and by offering different grades of intervention that shall keep these wills intact and free from intended and unintended fallacious arguments.

However, there are a number of main limitations that can be mentioned here, as they highlight a need for further investigation, and can initiate a call for future research¹²³²:

- 1- The extent and form of harms which fallacies can cause to mediation need to be identified thoroughly, through qualitative research, in which a sufficient number of mediators from various backgrounds can be interviewed and asked in a detailed manner about their experiences, in which they might have faced fallacies and watched their influence in parties’ decisions, and in mediation outcomes. The research question here is: to what extent can logical fallacies distort mediation practice?

¹²³² See above: 7.5 Further insights, future research, and suggested forthcoming changes.

- 2- Testing the implementations of the suggested fallacy handling roles presented in this thesis in helping mediators protecting parties from the expected harms logical fallacies might cause, without jeopardising their neutrality, and without risking mediation's reputation as a place in which parties shouldn't be afraid of losing face or feeling uncomfortable by being confronted by their reasoning faults or thinking errors. The research question here is: how can mediators minimise the side-effects of attempting to make negotiators' arguments more logical?
- 3- Investigating the impact of adding more logic topics to law school curriculums and mediation training programs in promoting the legal practice in general, and mediation practice in particular, especially in terms of enhancing practitioners' self-esteem, developing their logical abilities and enriching their reasoning capacities. The research question here is: what is the impact of logic education on mediation practitioners?
- 4- Examining the influence of marketing mediation as a fallacy free zone in attracting both parties who have tried mediation previously and newcomers who haven't been to mediation before. This examination can be achieved by surveys that target these two groups of parties with well-prepared questionnaires, supplemented by illustrative materials that include simple explanations of fallacies, their definition, types, and examples. The research question here is: to what extent can rationalising mediation practice achieve client satisfaction?
- 5- Scrutinising the possible connection between adding more rationality to mediation sessions and achieving substantial justice. Such an examination shall try to answer one final question: can putting the mission of applying reasonableness and the rules of good arguments in the hands of the mediator, counterweight the absence of the compulsory application of formal justice provided by judges in the traditional role of the judiciary, who take care of the decision-making process and apply the legal rules?

These limitations are expected due to the nature of the research methodology this thesis followed. The deductive research in the first four chapters investigated a number of

axioms, theories, and hypotheses in order to examine their validity, sufficiency, and suitability in answering the main research question. Then, the final three chapters, building on the proposed new definitions and classifications given by the first chapters, tried to present a framework that shall help mediators achieve the mission this thesis supposes that they are responsible for: helping parties avoid the possible harms logical fallacies can cause to mediation, and bring more reasonableness to the process and its outcomes. Throughout this methodology, we tried to dismantle and reconstruct the main concepts including the essential four topics: negotiation, mediation, conflict, and logic. On this approach we tried to revisit all these topics in order to investigate the possible spaces for intervention mediators can apply on their journey to answer the main research question: To what extent they should be responsible for freeing mediation process from logical fallacies' possible harms? However, answering the research question could not be final or irrebuttable.

The proposed mediators' roles in this thesis shall need a series of empirical studies as stated above to examine their validity, usability, and capability of enhancing the efficiency and quality of mediation processes. The target groups on these studies shall include practitioners, users, lawyers, service providers, trainers, and legislative experts. However, the suggested further research shall additionally integrate other disciplines that this thesis resorted to and engaged with. This integration shall include neuroscience, psychology, and decision-making studies. Investigating in more depth the role of emotions, the influence of biases, and the varied landscape of logical fallacies might require a number of co-authorship endeavours that shall join forces, signifies shared intellectual contribution, and strengthen the needed interdisciplinary nature of such studies. We hope that these future collaborative studies can enrich both mediation scholarship and mediation practice.

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