SEPTEMBER 1 2020

# WHEN TO NEGOTIATE, WHEN TO MEDIATE, WHEN TO LITIGATE (AND HOW)

## Different Approaches in Times of Emergency


**Authors**

GIAN PAOLO COPPOLA

MARCO IMPERIALE


LCA

# INTRODUCTION

The social and economic crisis that will follow the spread of the COVID-19 will force everyone to review a large number of contracts. This unprecedented event will affect every industry as well as every kind of business and all people. There will be delays, suspensions, and a number of events that will impact the performance of contracts and will trigger potential and actual disputes. With a view to the hard or soft legal battles, we thought it might be a good idea to make a preliminary analysis regarding various possible routes that businesses and individuals might take to resolve a dispute.

Before starting, we ask you to consider the following paragraphs as quick tips rather than in-depth juridical analysis. Indeed, each one of the topics would require articles, if not books, to be introduced properly, and this is not at all our intention. Our idea is to provide simple, but effective, insights which can be considered useful by our clients and easy to implement.

Please consider us available for any further clarification regarding the methods and procedures indicated hereunder and, more in general, regarding the discussion of your contracts and legal issues. We believe in the role of a lawyer as a business and legal advisor, and this is the perfect moment to involve a trusted professional, who can provide you with competent advice, and a fully rounded juridical picture to solve a complex situation.

In all circumstances, we recommend that the first step is a comprehensive legal review of the contracts and the specific circumstances of the case. More specifically, the contractual clauses that will need to be examined and studied will most likely be those concerning force majeure, hardship, MAC (material adverse change), termination clauses, *ipso facto* clauses triggering termination of the contract for insolvency of one party. The review will serve to identify strengths, weaknesses and the inevitable uncertainties of the dispute, and will lead the client and lawyers to choose the best route to solve the disagreement: negotiate, mediate or litigate.

# WHEN TO NEGOTIATE (AND HOW)

As Chris Voss, former FBI chief hostage negotiator, used to say, “everybody negotiates several times a day”. It can happen when we discuss our rent and bills, or when we ask for a raise. But it can also be the conversation with a supplier after a stock of goods has not arrived, or that with a broadcaster after an event which we decided to sponsor has been cancelled.

Basically, a negotiation is every step that precedes the agreement, and sometimes, especially when things are not going properly, the period after (in this latter case, we also speak about re-negotiation). From another, more juridical, perspective, it can be a preliminary step towards i) an agreement ii) mediation (a procedure that involves a neutral professional to help parties reach an agreement) iii) litigation or arbitration (procedures that, towards judges or arbitrators, assign to one or more parties specific rights or duties). For the sake of clarification in the following paragraphs, we will mention the concept of party/counterparty, assuming it is just a single person or entity. Still, most of the times negotiation, mediation, and litigation involve multiple parties and players.

## So, What Does Negotiate Mean?

Well, first of all, it means having a full perspective about our position (what we want) and the position of the other party (what they want). Moreover, it is having an idea (as detailed as possible) of our interests and the ones of the counterparty (the reasons why we/they are asking for something). Both these elements, even though apparently immediate and easy to reach, can require hours of analysis to be appropriately considered. That said, negotiation is way more than this. It is being able to acknowledge the presence and the position of all the stakeholders at the table, it is detaching the party we are dealing with from the issues we are discussing (i.e., are we acting in a certain way because of the behavior of the counterparty or because of what they are asking for?), and it is having an adequate knowledge of the consequences of each one of our actions.

As one can imagine, negotiation is a science which involves not only juridical skills, but also profound emotional and social capabilities. An experienced professional, who is capable of managing complex and sophisticated transactions, can reach extraordinary results. The following are ten strategies that we suggest:

1. **Take into account the reactions of the other party.** Negotiating means maintaining for the whole time active minds and ears. Analyzing the reaction of the other party to our proposals can be significantly effective. This does not concern only negotiations at the meeting rooms, but also email conversations, phone and video calls, etc. Sometimes what is not said can be even more important of what is said;
2. **Try to avoid "take it or leave it" proposals**. A negotiation can be a long and painstaking process. Even though it is highly tempting to make "*last calls*", the risk of losing reputation is significantly high. And reputation is pretty hard to build, and at the same time pretty easy to lose;

3. **Try to articulate the reasons why you are asking for a certain sum or for specific behavior before making the proposal**. Grounding our proposals with legal and fact-based elements is crucial to obtain good results. It makes clear that we have done our homework, and it is also a way to show respect to the other party. Moreover, if the first thing that we mention is "what we want" and not "the reasons why we want" something, the risk that the other party will switch off the brain and focus on counterproposals without listening to us anymore is significantly high;
4. **Try to have a constructive, more than a destructive approach**. As Roger Fisher and William Ury have successfully shown in one of the most important books in negotiation science, *Getting to Yes*, having a positive and proactive mindset can guarantee, both in the short- and long-term, better results;
5. **Even when lawyers are involved, use carefully the good cop/bad cop strategy**[1]. It is very effective in an interrogatory scenario, but there is the risk of ruining the relationship with the other party, and the positive effects in commercial transactions are not always guaranteed;
6. **Be aware of the anchoring effect**. For various social and neurological reasons, once we formulate a number or a proposal, it is pretty hard to conclude the agreement very far from it (and when it happens, it can be risky for our reputation). For this reason, the first number or proposal can be more important than the other ones, and we have to reflect properly before articulating it;
7. **Before negotiating, always take into account your alternatives, and especially your BATNA and WATNA**. With the terms "BATNA" and "WATNA", we intend the best alternative to a negotiated agreement and the worst possible one. It is crucial to have these elements clear in mind, as well as any possible *plan-b or -c* – not necessarily the best and the worse -, before making any kind of proposals;
8. **Try to make open questions more than closed ones**. Negotiation is also a process when information is shared, and sometimes, playing well, we can obtain insights that are useful both for our business and our strategy. Even just referring to the 5W (who, where, why, what, when), and to the "three magic words" (how might we?) can sometimes be extremely helpful;
9. **Take some time to reflect**. This can also mean spending a couple of hours writing positions and interests. Putting down a list of our priorities. Waiting before sending an email. The time that we spend reflecting is not lost. It is earned.
10. **Try to work on ranges more than on specific numbers** (this is why negotiation professionals speak about ZOPAs - zones of possible agreement). That said, once we mention a range to the

1 With this strategy, we intend using two different players, who represent different characters, one good and emphatic with the counterparty, and the other strict and harsh.

other party, it is likely that we will reach an agreement in the lower part. So, ranges are good for us but risky to be shared.

We are aware of the fact that most of our clients believe that they can manage negotiations by themselves. Sometimes, it is true. A lawyer, however, can provide you with a juridical picture before the negotiation starts *(what will happen if we go to Court? what percentages do we have to win? what are the legal grounds of the counterparties? how about the costs?).* Secondly, an experienced professional can provide sincere feedback when a third-party check is needed. Thirdly, the involvement of a legal professional, if the card is played well, can make a negotiation strategy more effective.

## WHEN TO MEDIATE (AND HOW)

Sometimes the parties are not able to reach an agreement by themselves (even involving lawyers). For this reason, they can decide to start a mediation, which is – speaking in simple terms - a procedure that involves a professional to unlock an *impasse* situation. Starting a mediation can also be a strategic move in order to make a last call before litigation in the hopes of a better outcome[2] or to be more aware of our interests, position and needs. Last but not least, and especially if parties are asking the mediator for a more "evaluative" approach, the mediator can guide parties to make proposals which are more likely to be accepted. Mediation, however, is not only a method to obtain an agreement. It is also a way to have a better perspective of the situation. Despite the fact that everything that is said or done in mediation is strictly confidential, spending some time with the other party and the mediator can be really helpful.

Trying to articulate in a different way the differences among the various methods, mediation is a procedure that looks forward, both in terms of clauses and relationships with the other party, while litigation and arbitration are procedures that look backwards (parties ask a judge or an arbitrator to decide on something that had already happened). Moreover, mediation tends to be an informal procedure, while litigation and arbitration are more rule-based.

2 According to a research from Stanford University, involving a neutral helps parties reaching better results, especially because they react in different ways when the source of the proposal is a neutral and not a party (for further information, Ross, Lee "Reactive Devaluation in Negotiation and Conflict Resolution").

The management of mediation is very similar in Italy and abroad. However, there are significant differences. For example, in Italy, the participation to mediation sessions can be mandatory in specific fields (such as banking contracts, defamation, or neighborhood issues)[3]. Even the direct enforcement of the title, which is characteristic of the Italian territory, is not always a rule worldwide (even though the agreement that is eventually reached, if not respected, can lead to a contractual breach). Finally, and at least in our experience, mediation in Italy tends to be managed with several meetings, while abroad there is more tendency to have fewer, longer sessions. In any case, there is the involvement of registered professionals (not necessarily lawyers), who have strong emphatic skills and are trained to help parties in solving their issues. Because of that, the parties are required to actively participate in order to reach the best possible outcome.

## So, What Are the Main Pros and Cons of Mediation?

### Pros

- It is possible to reach an agreement in a quicker way. Sometimes even a meeting can be enough;
- According to Italian law, when lawyers are involved and parties reach an agreement, the title is directly enforceable;
- Usually, parties are able to maintain a good relationship with the other party (and sometimes also to continue business together);
- There is space for creative outcomes. The mediation world is full of anecdotes of unusual proposals formulated on the spot by the parties. And there is the possibility of going out of the meeting room with an unexpected, but satisfying, solution;
- The costs related to legal fees, both taking into account billable hours and flat fees deals, will be significantly lower than with litigation or arbitration; and
- Mediation is confidential, both regarding what is said in the meeting and what will be said after (excluding specific agreements of the parties on the matter).

3 The concept of mandatory participation is interpreted in very different ways among the Italian Courts. Most of the time, the requirement concerns the participation to an introductory meeting, and not to the session. However, there are exceptions, and it is possible that judges will ask parties to start a mediation before proceeding with the judgement. Regarding the areas which, in Italian law, are subject to mandatory mediation: property rights, hereditary successions, family agreements, leasing and loans, rental of businesses, medical and health liability, insurance, banking and financial contracts.

## Cons

- The parties will likely settle for a sum that is lower than expected. It is unlikely that a party likely to win will reach the same amount of money that it could be awarded in Court;
- From an emotional perspective, the possibility of "giving up something", or "compromising" can be difficult to accept;
- When principles are involved, it is very difficult to reach an agreement;
- The mediation has costs that have to be paid by both parties. This differs from litigation in Italian law, where the losing party has to bear all the expenses;
- Litigating can have a strategic value. Suing a party has many economic, reputational and personal consequences;
- In case of mediation, litigation is likely to be postponed of weeks/months. Mediation meetings require time to be scheduled, and sometimes the agenda of lawyers and parties can be pretty full.
- Reaching an agreement is a possibility, not a certainty.

Regarding the how, the suggestion is approaching mediation with a very open and creative mindset. In our experience, it is usual for a party to start the procedure with a pessimistic mood, believing that it is "time lost" and that reaching an agreement with the other party is simply impossible. However, data from the most important mediation centers worldwide (including the Milan Arbitration Chamber) show us that, especially in civil and commercial transactions, the possibility of an agreement is significantly high. Percentages may shift from country to country and from industry to industry, but we can say that more than half of mediations conclude positively[4].

Another suggestion is doing proper homework, both in terms of expert verifications, juridical analysis etc. The better and clearer we have in mind our position and the ones of the counterparty, the more we will be able to articulate our thoughts in the mediation setting.

Finally, we suggest participating in person. Mediation can be managed online (even more during these times). Sometimes lawyers can be delegated. However, it is still a party process, and the benefits of having every player sitting at the same table is without question.

4 For further information regarding percentages of agreement on the Italian territory, and more in general regarding the adoption of alternative dispute resolution procedures, we suggest looking at the 2018 report on ADR in Italy, available at https://www.camera-arbitrale.it/upload/documenti/centro%20studi%20pubblicazioni/10-decimo-rapporto-giustizia-alternativa.pdf

Regarding the involvement of the lawyers, and taking into account that in Italy their participation is most of the times mandatory, we suggest working on a strategy with them, defining which elements have to be shared, the behavior, and how to approach the meetings.

# WHEN TO LITIGATE/WHEN TO START AN ARBITRATION PROCEDURE (AND HOW)

In several, limited cases, litigation is unavoidable. These are the hardest ones. Maybe it is a counterparty who decides not to participate in mediation sessions or formulates proposals that are not reachable, maybe their behavior is simply inconceivable for unknown reasons. In these cases, it is necessary to go before the judge or opt for arbitration. We believe that, like in the previous cases, it is hard to consider *prima facie* good or wrong approaches. It is better to find the appropriate ones. Sometimes it is good to involve a mediator, sometimes it is good to litigate.
Once again, we opted for a brief analysis of the various pros and cons. Moreover, and for a matter of synthetic approach, we took into the same account both litigation and arbitration. However, there are significant differences between the two[5].

## Pros

- If things go well, the party will recover the entire amount requested plus interest, legal fees and other costs (according to the Italian law). In countries like US, however, the parties will have to pay for the respective legal fees despite the outcome (at least in the majority of cases);
- Litigation is public. Press releases after a suit can have strategic commercial value;
- From an emotional perspective, "winning" after a long battle is a priceless emotion for the party;
- The party will not be forced to meet the other party in person.

5 The differences are many, and they include the nature of the institution (public or private), the choice to among specific professionals (in arbitration), the different range of autonomy for the parties, the time and even the costs, which are generally higher in the arbitration field.

## Cons

- The proceedings can be extremely long (even years, and this excluding appeals). And if in the meantime, the other party declares bankruptcy or has significantly issues with cashflow, the situation can be even worse;
- The amount of legal fees will be significantly higher than in the cases of negotiation and mediation. The costs are not only related to the legal fees, but also to the one of the institutions, experts and consultants;
- Especially in civil law countries, it is almost impossible being "sure" about winning. It is not unlikely that lawyers will provide percentages regarding the possibility of a positive outcome, however, a percentage is not a certainty, and it can be very subjective.

Regarding the how, we believe that litigation, despite the necessary intervention of the lawyer6, is not a lawyers' game. The party has a significant, crucial role. For this reason, and quoting Jerry Maguire, the famous agent interpreted by Tom Cruise in the Hollywood movie, "*help us to help you*". The following can be some suggestions to do that:

- Show us all the data. In our experience, the better and bigger the picture, the more we can support you. Maybe a document that you consider irrelevant is crucial. Maybe a signature on the contract that you believe is binding is not. Maybe the meeting you forgot to tell us is a key-point for our future strategy;
- Don't be afraid of telling us actions that you consider mistakes. We are not judges (both in the moral and juridical sense). We are here to support you and decide a strategy with you. Quoting a Latin proverb, we are an extension of you (longa manus).
- Please be coherent with the strategy we decide together. There is nothing worse than deciding an approach in a meeting with a client and seeing her just a day after doing exactly the opposite. This is not only dangerous considering the relationship with the other party, but also from a litigation perspective. Furthermore, the consequences of our actions can be even worse than our actions themselves.
- Trust us. If we tell something is for the good.

6 Sometimes in Italy, and especially for judgments related to lower sums, there can be exceptions. However, the presence of lawyers in all the steps of the procedure is a pillar of our juridical system.

# OUR ROLE

It is a common cliché that lawyers support clients just in case of litigation (or arbitration), while negotiations (and – sometimes – mediations) can be managed in an autonomous way. Paradoxically, sometimes the opposite is true. Because of their legal knowledge and their experience, lawyers can help the client choose the best alternative, shaping the approach with the other party, and more than anything, providing a legal analysis of the situation.

The relationship we have with our clients pushes us to fulfill their best possible good (or at least to avoid their most significant loss). We can be a strategic support for a negotiation strategy, a good interlocutor in a mediation session, or the legal support you need in the litigation and arbitration scenario.

But the most important thing to say is that we are here. We are here to support you in difficult times like as we were to support you in the best ones. Feel free to reach us to discuss a strategy, a relationship with a counterparty, or a repayment plan.

Every crisis brings with itself a huge amount of opportunity. We believe that four eyes are more likely to reach them than two would be.

# WHEN TO NEGOTIATE, WHEN TO MEDIATE, WHEN TO LITIGATE (AND HOW)

## The authors:

**Gian Paolo Coppola**
lawyer
gianpaolo.coppola@lcalex.it

**Marco Imperiale**
lawyer and innovation officer
marco.imperiale@lcalex.it