Negotiating in Bad Economic Times

We are experiencing a period of economic turmoil greater than most of us have ever experienced. Situations that we never envisioned happening are now everyday news stories. Negotiating in Bad Economic Times is something new to many.

As we work through these difficult times, some of us are finding that parties with whom we had contracted are not able to live up to their contractual obligations. Whether such contracts be promissory notes, purchase agreements or any other type of contract, we are very disappointed to learn that one of the parties cannot perform. A frequent reaction is anger. We resent that the person whom we trusted when we entered into the contract is now not performing.

If you find yourself in this situation, anger may cause you to want to call your lawyer and sue the breaching party. However, from a business standpoint, it is critical that you, as the party subject to the breach, first analyze the situation with an eye towards the future by asking yourself several questions. Asking these fundamental questions as soon as you foresee potential trouble can go a long way toward saving yourself from significant hardships both economically and emotionally.

1. What went wrong? Did the other party breach the contract because it could not perform (*e.g.*, it had its financing pulled) or because it chose not to perform? Did the other party act responsibly? Did it acknowledge its problems and respond honestly and timely to your concerns?
2. Are you still dealing with the right people (*e.g.* the people best able to complete the deal)? If the breach resulted from the current economic turmoil, then maybe you are still dealing with the right people and maybe they are in the best situation to salvage the situation.
3. If you determine that you are dealing with the right people, are there ways to salvage the transaction? For example, can you restructure the transaction with a different payment or closing schedule that would allow the parties to proceed?
4. What legal options exist and what is your best alternative? From a business lawyer's point of view, pursuing litigation is at the bottom of the list of options to improve a situation.

An example may be helpful. Suppose you have contracted to sell an office

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building to a developer who has now failed to close. By asking and answering the above questions, you can begin to map out a strategy for proceeding. If you decide that you are still dealing with the right people, think creatively as to how you can make the transaction work. If this involves negotiations with the other party, consider who the best person is to negotiate on your behalf. If the person who originally negotiated the contract feels hurt or angered by the other side's breach, consider having someone else negotiate the restructuring. If your lawyer will be involved, make sure he understands your goal and is willing and able to work towards a resolution. That resolution should result in the parties entering into a restructured transaction that each party can reasonably perform. In the example above, if the buyer didn't close because its lender backed out of the transaction, you need to determine whether that buyer is still in the best position to find a different lender and close. Consider how to protect yourself in making that decision, such as by reviewing the buyer's financial situation. You want to make certain that buyer's financial condition hasn't deteriorated to a point that it cannot reasonably finance the transaction.

If you determine that you are not dealing with the right people (*e.g.*, no lender would possibly now lend to your buyer), decide how to best cut your losses. If the breaching party is judgment proof, acknowledge that early on and don't waste time and money trying to pursue that person, even if you think it might make you feel better. Sometimes walking away from a broken contract is the best thing to do if you can find a better party to contract with the next time. The worst solution is often not doing anything at all and just allowing things to fester.

Finally, if you decide that your best approach is litigation, make sure you load up on the Rolaids and are prepared for what could be a costly and time-consuming endeavor that might yield little in tangible results. Sometimes litigation is inevitable, but before going that route, carefully and rationally consider all alternatives before letting your anger or hurt get the best of you.

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