FROM THE IUSTORIA BLOG

Negotiating in the Shadow of the Law: Four Kinds of Negotiation and Where the Law Stands in Each

> *In a dispute the law is the alternative to a deal, in a contract the default rules, before an authority the only language, between partners an insurance policy. Know which game you are in.*

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Clients often ask me whether they should "negotiate or sue". The question is wrongly put. You negotiate almost always, even in the middle of a lawsuit, and almost always in the shadow of the law. The real difference lies elsewhere: the law plays a different part in each kind of negotiation. Sometimes it is the alternative against which you measure a deal. Sometimes it is the set of default rules that apply when you write nothing down. Before a public authority it is the only language you can speak, and between business partners or parents it is more an insurance policy than a weapon.

If you cannot tell which kind of negotiation you are sitting in, you can negotiate brilliantly and still be negotiating about the wrong thing. I have seen lawyers argue at the table as though they were in a courtroom and wreck a transaction, and negotiators who skipped the law altogether and closed a deal that fell apart at the first dispute.

Where the "shadow of the law" comes from

The phrase comes from a 1979 article on divorce by Robert Mnookin and Lewis Kornhauser. The authors noticed that the overwhelming majority of divorcing couples reach agreement on their children and property, and the court merely approves it. Yet the law shapes their negotiations all the same: both sides bargain with an eye to what the court would decide if they failed to agree. Statute and case law deal them their bargaining chips.

The idea reaches far beyond divorce, and in their conclusion the authors themselves point to other fields where people negotiate under the threat of a ruling. But the shadow of the law does not fall on every table in the same way. I distinguish four kinds of negotiation.

1. Disputes: the law as the alternative to a deal

In a dispute, the law is what happens if you do not agree. Negotiation theory calls it the BATNA, the best alternative to a negotiated agreement. The term was popularised by Roger Fisher and William Ury in their 1981 book Getting to Yes. In a dispute, your BATNA is the judgment. Not the judgment you would like, though, but the one you can realistically expect.

The most common mistake I see clients make is comparing the other side's offer with what the other side owes them. What they should compare it with is what the dispute will realistically bring them. That is a very different thing:

Item	Example
Amount claimed	CZK 1,000,000
Estimated chance of success	70%
Expected result before costs	CZK 700,000
Risk that you pay the other side's costs if you lose	deduct
Your own costs beyond what the court will award you	deduct
Two to three years of waiting and the risk that the debtor will have nothing to pay with	deduct

A million on paper can easily turn into five hundred thousand in reality. An offer of six hundred thousand, which the client dismissed at first as “insulting”, then looks rather different. How to do this calculation honestly, item by item, I set out in Litigation as an Investment.

So the law does not serve here as an argument about who is right. It serves as a price list for the alternative. And the price list changes as the proceedings unfold: after the first hearing, after an expert report, after the key witness has given evidence. Each such moment forces both sides to recalculate what the dispute will bring them, which is why most settlements cluster around these moments. Procedural tactics rest on the same footing: an action filed at the right moment is a more credible argument than the best-written letter, because it shows that you really do have an alternative to a deal and are willing to use it. Our guide to last-minute settlements, available in Czech, explains what the timing of a settlement means for the court fee and costs in Czech proceedings.

In a dispute you are not negotiating about who is right, but about the price of uncertainty. If you can calculate it more precisely than the other side, you have the advantage at the table even with the weaker case.

2. Contracts: the law as the default

With a contract there is no court on the horizon, and yet the shadow of the law still falls. The Czech Civil Code is largely non-mandatory: the parties may agree on rights and obligations that depart from the statute, unless the statute expressly prohibits it and the arrangement does not offend good morals, public order or the law governing the status of persons (Section 1(2) of the Civil Code). Whatever the parties do not regulate themselves, the statute regulates for them. Here, then, the law works as a set of default rules, the starting point from which the bargaining begins.

In practice this leads to a question I ask about every clause of a draft: *what applies if we strike this out of the contract?* The answer often shows that a provision the parties have been arguing over for an hour does not matter at all, because the statute would produce the same result. Elsewhere it shows the opposite: that an inconspicuous sentence overturns the allocation of risk, because it switches off a statutory rule the other side was counting on.

This is where an informational advantage arises that rarely gets talked about. The party that knows the default rules knows whom the contract's silence favours, and by how much. It can therefore give way where giving way costs nothing and trade that for something it cares about. The party that does not know the default rules pays for concessions it would have had for free and fails to see the ones that will cost it money. The most expensive clauses I have seen over the years were not the contested ones. They were the ones nobody paid any attention to; five of them are described in Five Contract Clauses Nobody Reads.

There is a flip side: mandatory rules are not up for negotiation. A term the statute prohibits is as a rule invalid, however enthusiastically the parties agree on it. Time spent negotiating something a court will not uphold anyway is time wasted, and worse, it gives a false sense of security.

3. Authorities and the police: the outcome is not for sale, the route is

Clients are most often wrong about dealings with public authorities. The tax office, the building authority, the police and the public prosecutor are not a counterparty you can meet halfway. The official has no interest in your money. His interest is in the file: his decision has to withstand review by a superior body and by a court. What tax has arisen under the law is not up for negotiation.

What is negotiable is the route to the outcome. On the taxpayer's application, the tax office may allow the tax to be deferred or paid in instalments if the statutory conditions are met (Section 156 of the Czech Tax Procedure Code). An authority can extend a deadline or take into account a document you supply before it decides. Czech criminal procedure provides for a plea agreement (*dohoda o vině a trestu*) between the public prosecutor and the accused (Section 175a of the Czech Code of Criminal Procedure), but even that takes place within limits set by statute.

Before an authority, then, the rule is the reverse of the one at a business table: the strongest negotiating position belongs to whoever offers the official a solution his file can bear. A submission that states precisely which provision allows the authority to decide in your favour, and which documents prove it, does the official's work for him. Threats, appeals to decency and complaints to his superior achieve the exact opposite: the official digs in, because now it is no longer only about the matter itself but also about making sure his own handling of it holds up.

> THE HEART OF IT
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> With an authority, you negotiate with a provision and a document. Your counterpart is not the official but his file.

4. Business partners and parents: the law as insurance

The fourth kind is the hardest. These are negotiations between people who will have to get along even after the agreement: business partners who go on running the company, parents bringing up children together, neighbours, a family dividing an inheritance. Game theory calls this a repeated game. The other side remembers every

move you make today until the next round.

Here the law is not meant to be a weapon. Bring a statutory provision into a negotiation with your business partner as your opening argument and you may win the battle and lose the company. That is why the law here deals mainly with two things.

The first is the boundary: what the parties cannot settle between themselves, or what does not hold without a court. This is clearest with minor children. Parents can agree on care and maintenance themselves, and the court decides only if they cannot agree. But the court will not divorce spouses with a minor child until it has ruled on the arrangements for the child (Section 755(3) of the Civil Code), and in doing so it may approve the parents' agreement (Section 906(2) and Section 919(4)). A decision on the care of and contact with a child can be enforced only on the basis of a court decision or a court-approved agreement (Sections 501 and 502 of the Czech Act on Special Court Proceedings). Parents who have agreed "between themselves" therefore have a valid agreement, but on the day one of them breaks it, they hold nothing in their hands that could be enforced directly.

The second is insurance for the day the relationship stops working. An agreement that cannot be enforced is only a wish. A court-approved settlement has the effects of a final judgment (Section 99(3) of the Czech Code of Civil Procedure) and lets you go straight to enforcement, without a new lawsuit. Without a lawsuit, there are two ways to an enforceable agreement: a settlement approved by the court in conciliation proceedings before any action is filed (*smírčí řízení*, Sections 67 to 69 of the Code of Civil Procedure), for instance after a successful mediation, or a notarial deed with consent to enforceability (*notářský zápis se svolením k vykonatelnosti*). Since 2013, a deed drawn up by a court bailiff (*exekutorský zápis*) no longer confers enforceability. So I draft an agreement in such a way that nobody ever has to enforce it, and at the same time so that it can be enforced should the need arise. How to part ways with a business partner without destroying the company is the subject of Business Partnership: How to Part Ways, and, in more detail, of our guide to partners parting company, available in Czech.

At a glance: the four kinds in one table

Kind of negotiation	Role of the law	What is really being negotiated	Typical mistake
Dispute	The alternative to a deal (the judgment)	The price of uncertainty	Comparing the offer with the claim instead of with the realistic outcome of the case
Contract	Default rules and guardrails	Departures from the statute	Arguing over what the statute would settle the same way, and overlooking what switches it off
Authority, police	The only language of the negotiation	Procedure, deadlines and documents	Negotiating over an outcome the law prescribes
Business partners, parents	Insurance and boundary	Getting along in the future	Using a statutory provision as the opening argument; closing a deal that cannot be enforced

How to bring law and negotiation together

Practice has given me five rules that hold across all four kinds.

Analysis first, tactics second. Until you know how the matter would end without a deal, you do not know what a deal is worth. Legal analysis is not a prelude to the negotiation; it is its foundation. Without it you are negotiating blind.

Know which kind you are in, and watch for the moment it changes. The kinds overlap and shade into one another. A transaction can degenerate into a dispute, and dealings with the tax office into criminal proceedings. When the kind changes, so does the role of the law, and with it your tactics as a whole.

A procedural step is information, not punishment. An action, an interim measure (*předběžné opatření*) or a criminal complaint sends the other side a message about what you are prepared to do. Choose them by the message you want to send, not by how you happen to feel. Why tempo is dictated by whoever has time working for them I described in a separate article.

Draft the agreement so that it survives a courtroom. Clear performance, deadlines, an enforceable form and a provision on costs. If court proceedings end in a settlement, nobody is entitled to costs according to the outcome of the case unless you agree otherwise in the settlement. One missing sentence can thus cost tens of thousands of crowns.

Assume that every word may end up in the court file. Czech civil procedure offers no general protection for what is said in settlement negotiations. The mediator is bound by confidentiality; the other side is not. What you said at the table may turn up in the next submission. Which sentences should therefore never be spoken at the negotiating table I have summed up in It Is Being Recorded.

> **About to negotiate and not sure what your alternative to a deal is really worth?** We will work out how the matter would end without a deal and prepare a negotiating strategy built on that. We handle disputes and their settlement as part of our dispute resolution practice. Get in touch.

Conclusion

A good lawyer at the negotiating table does not talk about statutes all the time. But he has brought them with him and knows where they lie in the negotiation: in a dispute, in the price of the alternative; in a contract, in the default rules; before an authority, in every sentence of the submission; and between business partners, in the form of an agreement that with luck will never need enforcing. That is why negotiation and law cannot be pulled apart. Legal analysis determines what is being negotiated and against what alternative, and the negotiation decides how much of what the law has to offer the client actually gets.

Sources

- Mnookin, R. H., Kornhauser, L.: Bargaining in the Shadow of the Law: The Case of Divorce. The Yale Law Journal, 1979, vol. 88, no. 5, pp. 950–997.
- Fisher, R., Ury, W.: Getting to Yes. Negotiating Agreement Without Giving In. Boston: Houghton Mifflin, 1981.
- Act No. 89/2012 Coll., the Civil Code, Section 1(2).
- Act No. 89/2012 Coll., the Civil Code, Section 755(3), Section 906(2) and Section 919(4) (as amended by Act No. 268/2025 Coll.).
- Act No. 99/1963 Coll., the Code of Civil Procedure, Sections 67 to 69, Section 99 and Section 146(1)(a).
- Act No. 292/2013 Coll., on Special Court Proceedings, Sections 501 and 502.
- Act No. 202/2012 Coll., on Mediation, Section 9.
- Act No. 396/2012 Coll. (abolishing the enforceability of bailiffs' deeds from 1 January 2013).
- Act No. 358/1992 Coll., the Notarial Code, Sections 71a and 71b.
- Act No. 280/2009 Coll., the Tax Procedure Code, Section 156.
- Act No. 141/1961 Coll., the Code of Criminal Procedure, Section 175a.

This article is for information only and does not constitute legal advice. It reflects the law as at 4 November 2026; the right course in any specific matter always depends on its circumstances.

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