

Kluwer Mediation Blog

Three Feet from Agreement (Optimism in Mediation III)

Martin Svatoš (FORARB/Charles University) · Sunday, October 20th, 2019

At a certain point, when another offer was denied, one of the managers showed a real disappointment with the hard negotiation approach presented by the other party: *“You know what?! I lost my patience. I will not sit here any further... I will ask my lawyer to finish the formalities and let's see each other in court!”*

Seeing the non-verbal reply of the other party, I knew I had to do something otherwise the mediation would be over: *“Before you do so, and you are of course free to leave at any time you wish... I would like to tell you a story...about discovering the ancient Assyrian city of Nineveh...”*

Temptation to Give up



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As there is never enough optimism in mediation, I have decided to write this mediation mind-setting saga. You can either read the previous two parts prior (in the [first part](#), I addressed the general comments in relation to optimism and its indispensability in every mediation room, and in the [second post](#), I have tackled some hints and tricks that might improve mediators' mind-set in this regard) or just go through this last part addressing the issue of persistence - a crucial characteristic absolutely indispensable for every dispute resolution practitioner.

In my experience, all the really good mediators are persistent and I believe that even the mediation praxis itself is predisposing in this regard: Surely everyone who has ever started a mediation career will confirm that there was a time when he or she

considered quitting the path. After having successfully finished the mediation training, after having received the necessary accreditation, they put their name on offices' doors and waited... and waited... and waited...

Deadlock in Construction Case



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No surprise, there is usually no avalanche of cases. It is indeed tending to give up at this stage. To make the situation even worse, your inner voice is tempting you: *“Let’s do something different, this was a blind shot”*. Each mediator was in this situation, not everyone resisted. As a result, the field is freed from impatient personalities in this way. Only those who overcame the temptation became the mediators because of their peculiar quality - persistence. And this will help them with helping the parties. As they are keen to give up when there is no light at the end of a tunnel. There are different ways how to do this.

Recently, I was involved in a construction mediation. Two companies (the main construction company and its sub-contractor providing the underground services) claimed a breach of the contract by the respective counterparty. The construction project ended up in a significant delay and the heavy disagreement between those two companies really upset their client - an investor. Its manager set a deadline for next week. If the two parties were not to provide him with a new and agreed upon rescheduling, he will initiate arbitration against both.

We went through all the facts. We discussed different options and negotiated for hours. The mediation started in the early morning and after a lunch break, we went on till the evening.

Discovering Nineveh

At a certain point, when another offer was denied, one of the managers showed a real disappointment with the hard negotiation approach presented by the other party: *"You know what?! I lost my patience. I will not sit here any further... I will ask my lawyer to finish the formalities and let's see each other in court!"*

Seeing the non-verbal reply of the other party, I knew I had to do something otherwise the mediation would be over:

"Before you do so, and you are of course free to leave at any time you wish... I would like to tell you a story...about discovering the ancient Assyrian city of Nineveh..."

Both the managers and lawyers looked at me surprised.

"Well, Nineveh, at the time, was a real miracle of construction and as we are currently involved in a construction dispute, I guess this might be of some interest to you."

While keeping their surprised look, both managers nodded and asked me to continue.

So I did so: *"Nineveh at its heights was the largest city of the known world. It counted fifteen great gates that penetrated its sky-scraping walls. There was a sophisticated system of canals that brought water from the distant hills. At its peak, more than 150,000 inhabitants lived in the area, about twice as many as in Babylon at the same time. The contemporary used to say that there were more towers in Nineveh than stars in the night sky. Yet as the destiny of ancient metropolises usually was, after a lost battle the enemy destroyed the city and tore down its walls. The sand of the desert slowly ate a street by street and wall by wall and one day, nobody knew, where the ruins of Nineveh were. The destruction was so perfect that our ancestors did not even believe it actually ever existed. They thought it was just another mythical place such as Atlantida and Garden of Hesperides."*



Rifle, Horse, and Enthusiasm



Vue du monticule et du village de Khorsabad by Eugène Flandin

"Now I got their attention, they both relaxed in the chairs and watched me with attention. So I continued..."

In 1842, the French consul general at Mosul, Paul-Émile Botta, began to search the vast mounds in the area the locals believed being the original Nineveh's location. He

was supported by the French government and had everything the then archeologists needed. Despite some important discoveries, he failed to locate the ancient city. After years of hardship and difficult work, the financial support of the French government grew dry and exhausted and demotivated consul gave up at the moment when his excavations arrived at the foot of a giant sand hill named Kuyunjik.

Meanwhile, there was a young Englishman Austen Henry Layard. After having wandered for many years in Europe and Persia, he turned to Constantinople, where he made the acquaintance of the British Ambassador. After much persuasion, he received the approval and the financial support of 60 pounds. This ridiculous amount enabled him to barely purchase a horse and a rifle. Yet he was not dissuaded. He set off for Mesopotamia to explore the former French excavations. Unlike the French expedition, Layard did dispose neither of modern archaeological material nor of an army of workers.

Yet he possessed two important characteristics: Keenness and persistence. He dug literally next to the place where Botta's workers gave up - at the foot of Kuyunjik mound. To much his surprise, he discovered that the hill was not of natural grounds! It was the remaining of one of the Nineveh's biggest palaces with 71 rooms and colossal bas-reliefs. He also unearthed the palace and famous library of King Ashurbanipal with 22,000 cuneiform clay tablets. This led to one of the biggest ever archeological discoveries in mankind's history. Should the unfortunate Paul-Émile Botta have been more persistent, it would have been his discovery... Yet, he gave up at the wrong moment..."

Three Feet Away

Back in my mediation room, the parties remained still for a moment. Then one of the managers said: "You know what, let's have a break for dinner for, let's say, an hour. At 7 PM, we might meet here again and try another dig..."

They settled after another two hours of negotiation.

Napoleon Hill in his famous evergreen book Think And Grow Rich narrates a similar story about Colorado gold prospector R. U. Darby who gave up on his mine when he was just three feet away from discovering a multi-million dollar gold vein. According to the story, Darby found some gold dust on his mine claim but given his limited geology knowledge continued digging in the wrong direction. With many frustrations, he decided to quit after months of hard work. He sold his mining equipment and claim to a local boy for just a few hundred dollars which were only a fraction of its actual value. The buyer was as well unaware of the secrets of gold mining, yet he hired a mining engineer to advise him. Thanks to



Free feet away

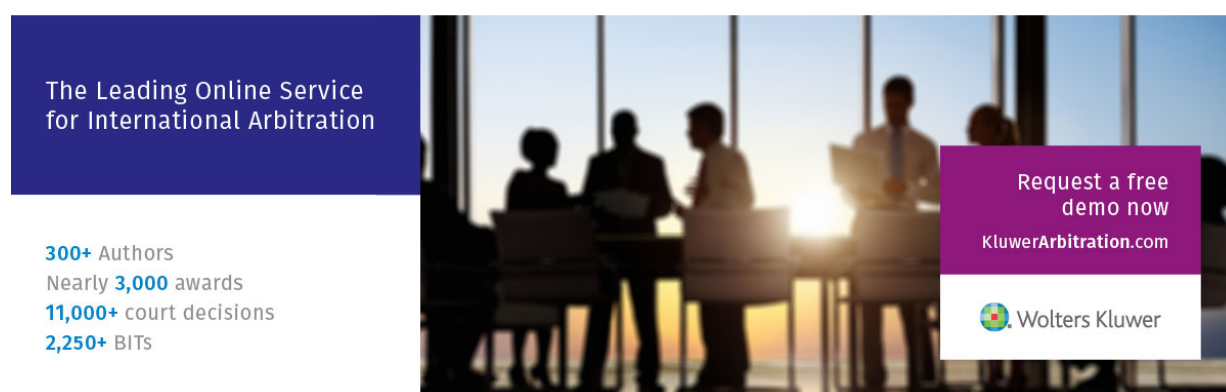
this step he quickly discovered that Darby had failed to recognise the gold veins just three feet away from the place where he had stopped digging.

So remember, persistence is a way a successful mediator should be taking. Even if the parties are tired and ready to quit, you should try to persuade them to dig on. There might be a golden agreement hidden somewhere in your direction. May be just three feet away...

So next time when the parties will be fading you might consider tell them one of the stories mentioned above. Or, just share with them the following great quote by Winston S. Churchill. It might have just the same effect:

“Success consists of going from failure to failure without loss of enthusiasm.”


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