

Kluwer Mediation Blog

Sticks, Carrots And Oysters

Bill Marsh (Editor) (Bill Marsh Mediator) · Saturday, December 7th, 2013

I am indebted to my friend and fellow mediator Mark Lomas QC for sending me the following email recently:

‘I have come across what I think may be one of the earliest recorded mediations in England, and conducted at the highest level. An Italian called Tito Livio dei Frulovisi wrote an account of the life of Henry V in 1437 (so only 15 years after the King’s death) called *Vita Henrici Quinti Regis Angliae*. An anonymous author translated it into English in 1513. It was re-discovered in the Bodleian library and a further edition was produced in Oxford in 1716. I have seen a 1906 re-edition and annotation of it by Charles Kingsford MA of St John’s College which contains the following passage:

“Two lords of Lancashire and Yorkshire quarrelled, and skirmished together till men were slain on both parties. Henry summoned them to Windsor, where they arrived as he was going to dinner. ‘By the faith that I owe to God and St George’, said the king, ‘if they have not agreed and accorded by the time I have eaten my oysters, they shall both be hanged ere I have supped’. So they agreed, and came in when the king had eaten his oysters.”

I very much doubt that King Henry V was interested in mediation. Absolute power is unlikely to steer one in that direction. However, it seems to me that the king was, perhaps unwittingly, on to something. He was providing the parties with an incentive to settle, whilst leaving them free to determine the nature of the settlement.

There are many modern day equivalents to the king’s threat of “hanging”. In a litigation context, the usual equivalent is a trial – although that is often not perceived (at least in advance) as a mutual suffering in quite the same way as both Lords being hanged! It does serve to make the point, however, that the *context* in which settlement discussions take place is a central aspect of the judgment calls which parties make.

Professor Bill Zartman refers to two criteria as defining “ripeness” for mediation:

1. A mutually-hurting stalemate; and
2. An impending crisis.

Our two fifteenth century Lords exemplify this. The mutually-hurting stalemate was clearly present – they had “skirmished together till men were slain on both parties”. All that was missing, until the King’s clever intervention, was an impending crisis. This he provided in pretty unequivocal terms – settle your differences or both be hanged.

The reality of decision-making in mediation is that there are range of factors which motivate parties. Some are sticks (essentially the risks and negative consequences of not reaching a consensus), some are carrots (the benefits of resolution). What is different about the story of King Henry V is that the key motivating factor (a stick, in this case) was imposed from *outside* – ie by the King.

Which is, of course, exactly what the courts have sought to do in some countries with the imposition of penalties for refusal to mediate. And that was developed recently by the English Court of Appeal in the decision of *PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288.

This concerned a case in which, shortly before trial, the Claimant had belatedly accepted the defendant's Part 36 offer of settlement (the offer having been made some time earlier). In normal circumstances, this would have left the Claimant exposed to some negative costs consequences. However, the Claimant had previously offered to mediate, and the Defendant had simply not responded to that suggestion (even when it was repeated). The trial judge therefore held that the Defendant had "unreasonably refused" to mediate, and hence was not entitled to the costs award which it would otherwise have expected to receive.

The Defendant appealed, arguing (amongst other things) that silence was not a refusal. The Court of Appeal disagreed with the Defendant, noting the parties were obliged to engage actively in the process of seeking an alternative means of resolution.

The only thing missing from this story is what happened to the oysters. In the 15th century version, it was the King who ate them. In its 21st century equivalent, I like to think it was their Lordships in the Court of Appeal. In any event, it was certainly not the parties. Frankly, it rarely is.

Have a very happy Christmas, and a peace-full New Year!

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