

Kluwer Mediation Blog

Reflecting on Two Long Mediation Days.....

John Sturrock (Core Solutions Group) and Anna Howard (Centre for Commercial Law Studies, Queen Mary University of London) · Monday, June 20th, 2016

“Caminante, no hay camino, se hace camino al andar”

“Traveller, there is no path, the path must be forged as you walk.”

Antonio Machado, as quoted and translated in *Daring Greatly*, Brene Brown

Those were two very long and eventful days. Though the prospect of reaching an agreement appeared remote – at best – at many stages of the mediation, at 1.30 am as we entered the third day of the mediation, the parties finalised their agreement. Now we find ourselves reflecting on the learning from this challenging and rewarding experience.

Certain themes emerge as we look back. These apply to various stages in the mediation so, rather than a chronological approach, we have selected a few events from the mediation to explore each of these themes.

Anchoring

The use of a few carefully crafted and yet impromptu comments at the beginning of a mediation can be helpful as a reference point for the day: “I’ll invite you to challenge the many assumptions you’ll make during the day but I will ask you to make one assumption: that each of you is trying your best in the circumstances in which you find yourself.” It is remarkable how well this can work to challenge perceptions.

Another technique which seemed to work particularly well in this mediation was the use of visual aids in the opening stages to illustrate the situation the parties found themselves in.

There were two this time. First, there was a roughly drawn slice of cheese. Arrows gave this image relevance for the mediation. Arrows depicted the different angles from which the slice could be viewed: from above, from the left, from the right. The point: everyone is looking at the same slice of cheese but what they see is very different – and equally valid. The broader point: there are several sides to most stories... it just depends on where you are standing... What we had not anticipated was the frequency with which the parties would return to this drawing. It appeared to anchor them. Throughout the mediation, and in important principal-to-principal conversations, we heard “Ah yes the cheese – you see it from this angle and I see it from that one.” This visual image frequently helped the parties to acknowledge another’s views and share their own in a respectful

and non-adversarial manner.

And then there were the less exotic two overlapping circles – the Venn diagram. Again arrows conveyed the relevance of this sketch for the mediation: two red arrows showed the circles drawing away from each other so that the intersection reduced. Two green arrows showed the circles moving towards each other with the intersection growing. The intersection was the space in which the parties would find potential resolutions which worked for all of them. Again, what we had not anticipated was how frequently the parties would return to these circles: “Ah yes, the red arrows – if we take that approach, we’re moving away from the space in which we can work towards a resolution.” They offered a conciliatory way of saying “This isn’t helping us to get to where we need to be.”

Authority

There were a number of points here.

First, who has the authority? Here, we are not referring to who has the authority to sign the settlement agreement. Rather, who – when the parties are back in their rooms – is the one to whom the others defer? Who is leading the discussions in those rooms? We may, due to perceptions about role, status, position, age and presence, make assumptions about who is the “authority” in each room. This can, however and as we discovered, lead to error. What we needed to do was to challenge any such assumptions and take risks in checking our initial conclusion. Indeed, the person or people with apparent authority may change as the day progresses or circumstances change. That certainly happened here. Identifying the person (or people) with authority in each room is not always as easy, or as quick, as we might hope.

Second, the mediator is not the authority This mediation was a particularly complicated commercial matter involving tiered and technical legal arguments. Some time was spent exploring the legal arguments and inevitably this was an important part of the mediation process for those involved. Each party seemed keen for its argument somehow to win favour with the mediator and each party had to be reminded frequently of the non-judgmental role of the mediator. At times, this enthusiasm for recognition of their legal points slipped into advocates placing words in the mediator’s mouth: “As you say, they don’t have good legal points.” And at such times a firm reply from the mediator of “That’s your characterisation, not mine” was needed. This kind of exchange can arise when the mediator has challenged a particular proposition. The explanation that “I am here to rattle your cages, and I’ll do so with the others” seems to work well to remind the parties of what the mediator is there to do.

Third, but the mediator does have authority ... There are times when, as mediator, you sense that you are probably correct on a matter of process but, against your better judgment, you allow yourself to be persuaded otherwise. In this mediation, this arose on a point about exchange of information. We felt that crucial information should be conveyed to a stakeholder group in a particular way. We accepted a suggestion, forcefully put, that another way would be better. As it happened, that approach didn’t go well. The message conveyed was not the message which had been understood by others. Not only that, but the effect was to make the recipient stakeholder group feel disenfranchised in the process. This, rather than the substance, caused them to rebel. As a result, all the progress which had been made in this lengthy mediation could have come to nothing.

What was the turning point? What helped the mediation to continue when it looked as though it may be at an abrupt end? First and foremost, it was the willingness of the stakeholder group to put aside their personal sense of grievance and continue to work for a solution. Secondly, another party was encouraged to and was willing to make a gracious concession. And perhaps also – most of all? – an apology from the mediator for permitting the situation to arise. Taking responsibility in this way is a really useful approach as it diverts anger away from the parties and draws it towards the impartial third party to absorb. Even if the mediator's assumption of responsibility is disproportionate, it can work well. Humility is an asset. And we mediators do misstep from time to time. How quickly we then regain our footing is down to us.

Attention to detail

It can seem to be all about the detail. As we noted above, this was a complex commercial matter, raising intricate legal and technical points which were explained carefully by skillful lawyers. While the actual commercial resolution had little direct relationship to the voluminous detail – both legal and technical – of the dispute, the mediator having mastery of the detail still appeared to be essential in earning the parties' trust and respect. Acknowledging and understanding a small point of detail (and being able to find it in the papers) can make a big difference. If that is what it takes to be credible and carry authority, the many hours of reading must be done. On the other hand, we must never lose sight of the big picture and that the detail only matters in the context of the overall whole.

Agility

Looking back on those two long days of mediation, it's easy now to see a clear path and to forget how uncertain that path seemed when we were walking along it with the parties. A recognition that there is no preconceived way, but rather one which the parties need to forge themselves with the guidance of a mediator, reminds us of one of the essential qualities we can bring and encourage in the mediation process: flexibility – even spontaneity – which is just as important in the very late hours of a mediation as in the early stages.

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