Kluwer Mediation Blog

Settling Well

Michael McIlwrath (MDisputes) · Thursday, April 13th, 2017

Savvy litigators often tell their clients that “a bad settlement always beats a good litigation”. That may be partly because there is embarrassingly scant guidance in the literature, or even in the world’s law schools, on how lawyers can help their clients settle well rather than badly.

I recently had the honor of writing the forward to Michael Leathes’ new book, Negotiation: Things Corporate Counsel Need to Know But Were Not Taught. For those who do not know him, Michael could be considered the godfather of commercial mediation in Europe. A long-time in-house corporate counsel with several leading companies, he’s one of the co-founders of the International Mediation Institute, and the reason many younger (but now senior) corporate dispute lawyers have developed a special affinity with mediation.

In my private correspondence with Michael when he was writing his book, I argued that he should not limit the focus to corporate, in-house counsel, because dispute lawyers generally would benefit from his views. But Michael believes that in-house lawyers are the ones who ultimately call the shots and drive changes, and that is where he kept his focus.

While I was unable to convince Michael to change his mind, I still wish to plead the case that dispute lawyers of all types need to invest time into understanding more about negotiation. I offer as evidence this passage from his book on how opening offers contributed to a good settlement result of a large arbitration. The lesson is particularly relevant because so many counsel (external and internal) are reluctant to make a first move when trying to settle, wrongly assuming they should always let the other side go first.

In the early 1980s, I was a member of a small corporate negotiation team that met with representatives of the revolutionary Iranian Government. The meeting took place in Austria, and at the insistence of the Iranians the location was their Consulate in Vienna. I recall the magnificent tall ceiling, silk wallpaper and a huge portrait of Grand Ayatollah Khomeini surveying the French-polished antique table with a steely gaze. The aim of the negotiation was to resolve a claim that my company had filed with the Iran-US Claims Tribunal in The Hague, established in 1981 in the wake of the Hostage Crisis in 1980 and the seizure of Iranian assets, to recover the value of our expropriated Iranian operating company.

As the meeting was taking place on territory of the Revolutionary Government of Iran, we were cordially invited to present our arguments first. We began with an anchor, a copy of an audit report of our subsidiary’s operations that had been routinely prepared during the final months of our ownership by one of the large international accounting firms. The audit had assessed the net

worth of the subsidiary at X million, and on top of that we claimed loss of the net present value of future income from the subsidiary's operations. The Iranian negotiators politely listened to our explanation, but did not open the audit report, which lay untouched before them on the table. When we had finished, the lead Iranian negotiator, with some ceremony, discarded his unopened copy of our audit, and passed to us a document in Persian that he said was an audit by the Ministry of Finance of the Revolutionary Government. He simply remarked that this audit, carried out more recently, indicated that our former subsidiary that the Government had since "inherited" had a negative net worth of Y, and that we should be the ones providing compensation by leaving the Iranian Republic with a costly liability.

The negotiation on that day did not progress. Some time later, the case settled close to our audit-backed claim [instead of continuing to litigate] our claim in The Hague. Anchors that lack the force of credibility, or are less robust than those presented by the other party, generally weaken your position.

For that reason, many negotiation specialists point to a natural human reluctance to "shoot first". For example, in their book, The First Move: A Negotiators Companion (2010), professors Alain Lempereur and Aurélien Colson, suggest that most people prefer not to be the first to drop an anchor. They give two risk-related reasons for this. First, the danger of being overly optimistic and therefore appearing unreasonable to the other party. Secondly, the opposite, by being overly pessimistic and having their proposal snapped up by the other party, leaving potential value on the table. By encouraging the other party to be first to drop an anchor, so the argument goes, there is at least a prospect that you may be pleasantly surprised and able to react accordingly.

If all parties feel this way about anchoring, and no one is willing to anchor first, a standoff ensues.

Although this instinctive hesitation to drop the first anchor is explainable, it is risk-averse, and you need the confidence to overcome it. My rule is that negotiators should try to anchor as soon as they have gathered sufficient information to enable them to state a claim that is as far above their [worst case] as it is possible to get while retaining genuine credibility for their anchored claim. This emphasizes the importance of pre-negotiation preparation in order to greatly reduce the first-to-anchor risks, and secure the leverage and persuasive benefit of getting the other party to negotiate from your anchor, not theirs.

Where the other party beats you to it, and drops an anchor that is nowhere near your own perception of reasonableness, think fast how to respond. You could challenge them to justify their anchor, but that can cause them to retrench and become unwilling to move away from it, which can lead to deadlock. Another response is immediately to table your best possible anchor and explain your justification for it, stimulating a discussion on your rationale rather than theirs. Alternatively, change the subject and move the discussion away from the unreasonable anchor.

Guidance like this is invaluable for all lawyers who advise the decision-makers. At the end of the day, company managers and corporate clients are all the same people. Seeing opportunities to settle before they do, and helping them get there successfully, can generate longer, more lasting relationships than relatively good results delivered after hard-fought, expensive, time-consuming arbitrations and court proceedings. (And that's assuming you get a good result!).

To further support my case, I would like to share a story Michael himself told me many years ago, about what he once did after being irritated by an article about a dispute he had read while flying

from London to Asia. The article quoted a prominent outside counsel of a national company boasting about how the costs of the case would make the other side, a key partner of his client, miserable. When Michael landed, he called the reception desk of the national company and asked to speak with the general counsel. When he was put through, he introduced himself as a fellow corporate counsel with no relationship with either of the parties and said he was shocked by what he had read.

The general counsel did not hang up. Instead, he agreed to have lunch, where they discussed the case and the strategy. Shortly after this, Michael was able to help convene the parties to identify a mediator and settle their dispute. He and the general counsel struck a relationship that led to their future cooperation in setting up mediation facilities in the country, and collaboration on other projects with a public interest.

And on that, I rest my case, Mr. Leathes.

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