

Kluwer Mediation Blog

Settlement Is Not Success*, Impasse Is Not Failure: It Is The Perseverance To Mediate That Counts

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Readers who are experts on the wartime British Prime Minister or have recently watched “The Darkest Hour” may find the above caption familiar. Yes, it has been inspired by Winston Churchill’s famous quote “Success is not final, failure is not fatal: it is the courage to continue that counts.” If you like the caption, feel free to use it as your mediation motto or share it with your colleagues and students in mediation training.

Being a lay person who knows very little about British politics, history and cinema, I enjoyed the film very much. However, as a mediation trainer, I (in view of the popularity of the film) need to prepare for answers from students who are more creative in questions than generating options during the role-playing exercises. “When do we negotiate and when do we stop negotiating?” “Is an initiative to talk an act of appeasement?” “What are the takeaways from the film?”

As a mediator, I always encourage the parties to negotiate. However, there must be a limit to that. Hard-selling the advantages of mediation may be perceived as imposing values on the parties. That explains why mediation is more powerful when it is a voluntary rather than a mandatory process. When the parties are ready, they are more willing to negotiate. It is up to the parties to determine whether and when they should negotiate. A party may not be willing to negotiate even when the BATNA (best alternative to a negotiated agreement) is not good at all. One is entitled to think that to be killed by the enemies is better than dragging out an ignoble existence. It may be an “irrational” decision from a third party’s point of view but a mediator must respect it pursuant to the principle of self-determination. Those who have watched the learned Ted Talk on “How to make hard choices” by Professor Ruth Chang should know very well that the decision to fight or the decision to talk is a hard choice and it cannot be measured by an objective yardstick. A mediator must be aware of that.

An interest-based negotiator will not consider initiating a negotiation as an act of showing weakness. However, a lot of the others think otherwise. Whenever my mediation is adjourned, I follow up the mediation by taking the initiative to request the parties to resume the negotiation so that they and their respective lawyers need not worry about the issue of losing face or appeasement. Besides, telling one party that the other party would like to negotiate further may run the risk of being perceived as the agent of the other party.

As a mediator living hundreds of miles away from the United Kingdom, I do not know much about Churchill although I will not think it is the name of a dog or has got anything to do with insurance

(see the observations of Foreign Secretary Boris Johnson in his recent book on Churchill). I said at the beginning of this blog that I had enjoyed the film thoroughly. To me, the takeaways from the film are: (1) grit is important during the darkest hour (which is likely to be the time around evening meal time when everyone is hungry and tired) of a mediation and it is the perseverance to mediate that counts; (2) shifting from the substantive dimension to the emotional dimension is a powerful skill that had been beautifully displayed by Churchill when his wife complained about his overspending; and (3) a good command of language is an effective tool to facilitate effective communication and thus knowledge on linguistics, of course including neuro-linguistics, is of great importance.

I must thank my younger son for recommending the film to me and my wife for requesting me to accompany her to watch it again. Following the advice of Ury, I always listen to them to connect and get to “Yes”. Thank you for reading this blog so that it is not a sound in the forest. I close it with another quote of Churchill: “Attitude is a little thing that makes a big difference.” I share Professor Nadja Alexander’s dream: “My dream is that even ordinary people will think about mediation first instead of going to court.” What a wonderful attitude!

** I think settlement is not the goal of mediation but instead it is only a by-product of mediation. The importance is the process of assisting the parties to negotiate and make informed decisions. As such, I do not see impasse as a failure. My dreamed utopia is that everyone (whether mediators or lay people) will take mediation as an attitude.*

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