



Litigate in hot blood, negotiate in cold blood

We aren't often advised to let passion get the better of us in business. But if we aren't passionate about an idea, we rarely commit to its execution.

This is as true for litigation as it is for anything - perhaps more so. Because there aren't many good reasons to accept the risk, stress and expense of placing your dispute in the hands of strangers (your lawyers) so that it can be tested to destruction in court and adjudicated by yet another stranger (the judge).

As the client, you completely lose control of your dispute in litigation or arbitration. The timetable is set by the rules and is in any case variable at the whim of an opponent. One who is happy to bear the costs of imposing delay.

Even worse, you accept the possibility that, if the decision goes against you, you will have yet more costs to pay - your opponent's. Truly a barrel full of salt to be rubbed vigorously into a painful wound.

Nonetheless, one can be too passionate. We learnt in yesterday's Times that a golf club incurred nearly £500,000 in costs trying to expel a member who had allegedly abused its rules. It doesn't seem exactly rational to bring - or indeed to defend - such a case. I suspect passion played a very big part in the decisions that led to the trial and eventual denouement of the club's wish to uphold its strongly held belief.

It's true that to resolve even a sensible commercial dispute, you need a huge amount of energy, both mental and physical. This is a great deal easier to generate and sustain if you are passionate about your cause.

After all, if you were indifferent to it, you could easily find better ways to invest your time and money. And I am sure your accountant and your family would applaud your decision to avoid risky and expensive conflict.

Completely different calculations apply to negotiation and settlement.

Securing a good deal requires a clear mind that can measure the costs, risks and benefits of fight versus flight.

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This is often the drab certainty of immediate cash, versus the excitement and satisfaction of crushing your enemies, seeing them driven before you and listening to the lamentation of their loved ones, to paraphrase Conan the Barbarian.

One has to accept that one is rarely Conan in life - and never in court.

Being well advised about risk is essential. As is looking for settlement mechanisms that are not within the power of a judge to award, so that you can find a way to exit the dispute with your pride intact and your net worth undiminished.

Some battles need to be fought to the end, but most do not.

The trick is to be able to tell the difference.

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