Kluwer Mediation Blog

Has The Fat Lady Really Sung?

Bill Marsh (Editor) (Bill Marsh Mediator) · Monday, October 3rd, 2011

Last week, former British Prime Minister Tony Blair said in a television interview that he had just made his 71st trip to the Middle East in the three or four years that he has been envoy for the group of four – EU, UN, Russia and the US. He is of course acting as a mediator, trying to put together a deal that the region so badly needs. By the time I write this, the number may be 72.

Whatever you think of him – and this piece is not a critique of him – you have to say that 71 trips represent commitment. I wrote last month about the importance of commitment by mediators. But a second question arises? How long is a mediation? Or put another way, when is it over? Do we just go on and on until we are fired? And what expectations do we create amongst the parties?

In my work as a commercial mediator, most mediations are scheduled for, and often last, 1 or 2 days. Why is that? Well, largely because that is the "model" for commercial mediation which has emerged here in the UK, and indeed in many countries. It has become "standard". It is what everyone in that "world" now expects. And indeed as a model is has some distinct advantages – busy and expensive people do not have to get together for much longer periods, a tighter focus on resolution is induced by the time frame, and most of the time – according to the typical global statistics – deals get done.

And if not? Well, it depends how you see your function as a mediator. Over the last few years, I have attended three trials of cases which I mediated without a settlement being achieved at the time. On each occasion, I went of my own volition, not at the request or invitation of the parties. I was not paid to attend. I had no formal role there. And yet on each occasion, the cases were settled within a matter of days. In the first, I had no role in ongoing discussions, but my mere presence prompted the parties and advisers to start asking questions about settlement. I was a pretext, an excuse for discussions.

In the other two, I simply enquired of the lawyers at the end of that day's hearing (both were lengthy trials) how things were going. Both expressed a desire to talk to me, but not to be seen doing so! Within a few days, I was engaged in further impromptu mediation work, and settlements resulted. Neither wished to raise the question of mediation with the other, but both were keen to use me as the pretext.

So here are a few thoughts on staying involved – not exhaustive, just the first few off the blocks:

1. Don't measure by time. Mediation is a *process*, not an *amount of time*. You can run out of your pre-agreed and frankly somewhat arbitrarily-allotted amount of time, but have come nowhere near

to completing the mediation process itself.

2. The process, as we all know, is full of ups and downs, of moments when resolution appears impossible and those when progress is made. It has its own ebb and flow, its own life-cycle. We need to be careful in judging when it is really “over”.

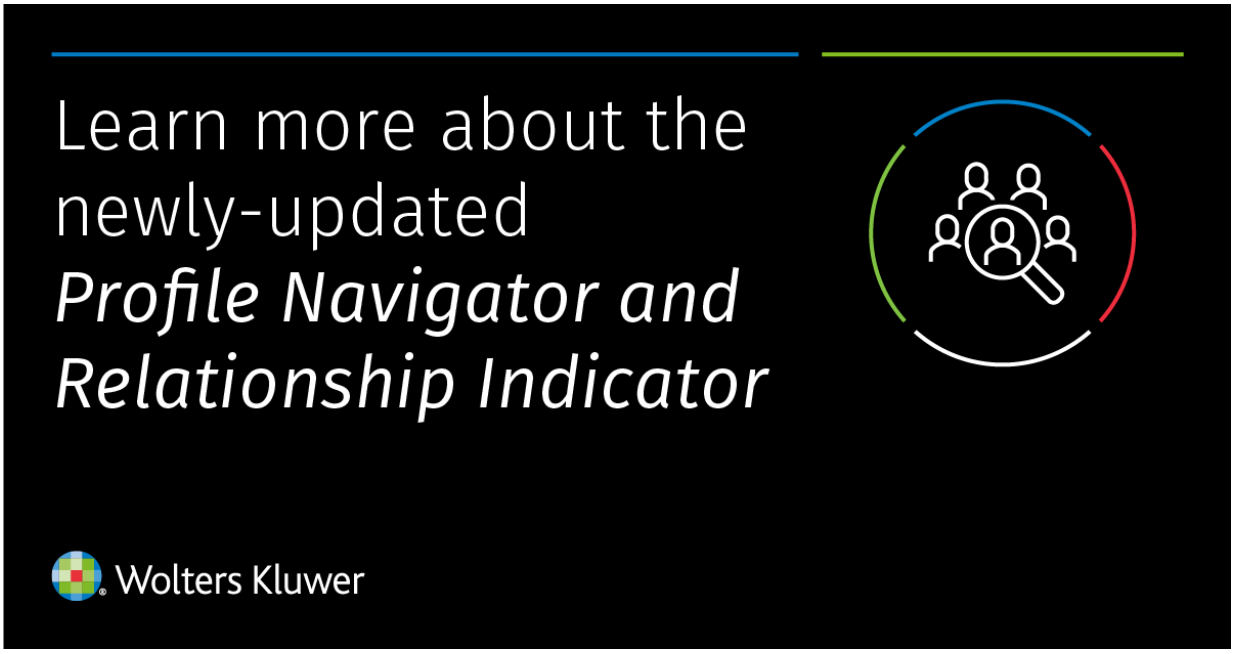
3. The parties’ expectations are key to their behaviour. If we talk about the mediation being “over”, parties will believe that to be the case. Our choice of language inevitably colours their attitudes. If we talk about the point in the process which has been reached, we enable them to see that more requires to be done.

4. This has to be done with care. It is not a question of stringing out mediations which have long-since run their course. And indeed there is much value in presenting parties with the end of the road scenario – final tough decisions are often taken as a result. Equally, however, we are the ones who have been hired to help take things forward, and it is often up to us to represent the only glimmer of optimism available.

5. Breaks of days, weeks or even months need not a problem – just a reflection of the parties’ needs. For example, to collect further information, to reflect further, to come to terms with and prepare others for reduced expectations, and so on. The challenge for mediators is *managing* such periods. There is an inevitable tendency for parties to re-trench in hardened positions when away from exposure to the mediator and the other parties, not least because the litigation/arbitration process, or civil war, usually remains ongoing. To help retain an appropriate focus during this time, parties need to know what purpose such a break might serve. For example, is the break simply to allow everyone to cool off? Or boards to be briefed? Is it to allow further information to be fed in? And so on. Having a clear focus at least allows a meaningful parallel track to accompany the resumed fight. Even if you don’t speak to the parties for some time, the mere knowledge that there is some kind of parallel track in place has its own impact on the parties.

6. We often expect parties to travel a long way in mediations, in terms of reducing expectations, coming to terms with different perspectives on the case, making previously-unheard of concessions, and so on. The longer the journey, the longer it takes. Sometimes we need to adapt to ensure that they have enough time to make this journey.

So next time the proverbial is hitting the fan in a mediation, the small hours of the night are upon you, and parties are telling you it’s all over, listen carefully for the fat lady. Whatever the surrounding noise, I find she very rarely sings.



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