Kluwer Mediation Blog

From Regulation To Resolution: Mediating Disputes In Regulated Sectors

Suzanne Rab (Serle Court) · Monday, May 8th, 2017

What is it about disputes in regulated sectors that make them suited to mediation?

Regulated sectors are ripe for disputes. Whether it's the energy, financial or telecoms sector, there are often incumbent players that own key infrastructure that is essential for delivering services to customers. At the same time new entrants may be vying for market penetration and trying to secure access to that infrastructure on fair terms. The sector regulator may be pushing to liberalise the market and open it up to competition. These markets are also consumer facing, which means that conflict can be emotionally charged even outside areas such as health and safety or environmental regulation. Ultimately, whether it is about utilities or financial services, we are concerned with those basic necessities or 'must haves' of life such as bank cards, fuel, mobile phones or getting from A to B and which make our lives revolve. When potentially antagonistic factions collide because a contract has been breached, consumers are being harmed or a party with market power is excluding others, conflict typically ensues.

The answers are not straightforward. Some of these industries have natural monopoly features and there are limits to how many players can operate in the same space. It is not efficient to dig up the roads and lay multiple gas or communication pipes, yet some market activities, particularly retail, are contestable and regulators are looking to open up markets for new entrants who can provide competition There are huge wins for getting it right – and often significant PR and financial fallout for getting it wrong.

This complex dynamic can often reverse the bargaining position between the larger regulated entity and the newer or smaller kid on the block i.e. the new entrant, for example, small telco, or the customer Mrs Brown who feels she has paid too much for her energy.

Communication may be perceived as a sign of weakness but sometimes companies will want to do business together going forward and have continuation of access and supply arrangements. Consumers may even value an apology more than pure financial redress. These are features of regulated industry disputes that make them ideally suited to mediation, where practical outcomes can be achieved outside mainstream litigation and in a less public forum.

What kind of scenario or dispute in regulated sectors would be amenable to mediation?

It's helpful here to set out three different categories of disputes that have a regulatory component:

(i) disputes between regulated companies and governments before legislation or regulation is adopted

The incumbent market player will have a strong interest in holding onto any exclusivity it has been given by any pre-existing licensing regime. But, where a government wants to liberalise a market it can often be a tussle between forces for change and the existing operator that expects to see its market position eroded. For example, in the telecoms sector mediation has been a useful technique which has allowed some small island nations to open up their telecoms sector gradually, working with incumbent players who have taken a healthy attitude to liberalisation. The involvement of a neutral skilled mediator can bring together government and market operators to set the framework liberalisation. This may involve compensation to the incumbent for loss of exclusivity, a grace period to allow price rebalancing and a sequencing of licensing rounds to introduce new competition over time. In my experience, those utilities that have engaged with forces of change and worked within a rebalanced regulatory framework have seen more significant returns in the long term. Mediation or reality testing can bring about a new way of looking at opportunities post-liberalisation because it puts a spotlight on growth opportunities within a predictable regulatory environment.

(ii) commercial disputes between parties operating in the regulated sector

These may just be routine commercial disputes over access to infrastructure or interconnection, take-or-pay gas supply contracts or sponsorship arrangements in the financial services sector. An interesting development is the overlay of mediation within a regulatory framework for dispute resolution. For example, in the telecommunications sector, the EU Framework Directive sets out a structure whereby a national regulator can adjudicate on inter-company disputes but before than can happen it has the option to require the parties to pursue ADR. There is an option to return to the regulator if that route is not successful. In the UK we see a recent innovation in the payments sector where the newly established Payment Systems Regulator has the power to require the operator of a regulated payment system or a payment services provider with direct access to the system, to grant access. It may also require change to the fees, charges, terms and conditions of an agreement relating to a regulated payment system. The regulatory guidance makes clear that parties to commercial disputes over access to payment systems must seek to resolve their dispute by commercial means before raising it with the regulator and here mediation has an obvious role.

(iii) consumer disputes

Mediation can be effective in resolving disputes between regulated companies and their consumer customers. These disputes tend to be numerous and often small value. The potential benefits of mediation will only be achieved if consumers have confidence in high quality mediation procedures. Following the consumer ADR Directive, member states need to have ADR schemes in place for consumer disputes that meet requirements of accessibility, expertise, independence, impartiality and transparency. I believe there is a real potential for mediation in achieving proportionate and successful outcomes for these disputes.

What is the relevance of sector insights for effective conduct of mediation in regulated sectors?

There are sector-specific features of disputes in regulated sectors which mean that industry knowledge and credibility are often key to engaging meaningfully with the parties. These disputes can be highly technical raising complex pricing issues and they often require a deep understanding

of how the market works. There can be a lot of industry jargon and a mediator who is not conversant in the parties' own way of communicating will be less effective as an interlocutor between them. There is an overlay of sector regulation and those mediators who are unfamiliar with the regulatory rule-book will be compromised in their ability to get the parties to see the bigger picture. Sometimes these disputes are launched against parallel proceedings in front of a sector regulator or competition authority, so the best alternative to a negotiated settlement may not necessarily be litigation. A long-term perspective needs to be taken. Investments in these sectors are measured not in years but in decades. Parties have an eye on the immediate dispute but also on the life cycle risks, cost and reward where settling today's problem may store up issues for the future. The players are not anonymous adversaries. The growth of pan-European and multi-jurisdictional energy and telecoms companies may mean that the new entrant in dispute A may be the incumbent in dispute B. Thus, offering a concession in one market and in a standalone dispute may raise wider strategic issues where the same disputants face each other in another market where their market positions are reversed.

It is these complexities which often lead parties to mediation in regulated sectors to ask for a mediator who is knowledgeable about the sector, understands the relevant regulation, and has the requisite financial and often economics skills to cut through detailed financial modelling and identify the commercial issues. Beyond these profile characteristics the mediator must command the respect and credibility of industry. That might be someone who has formerly worked at the coal face in a regulated entity; it might be an ex-regulator or an adviser or perhaps even someone who combines all of these.

Parties going into these disputes do need to be realistic that they might not be settled in a standard mediation day. I am aware of one mediation in the telecoms sector involving industry and a European government which spanned several years. Tenacity and constancy on the part of the mediator is often key to creating a path to settlement which may be a long one. At the other end of the spectrum I have experience of disputes in regulated industries ranging from shareholder JV disputes, to agreements over access to dark fibre and hosting arrangements in the telecoms sector which have been set down for mediation in a day and achieved settlement within the day.

There is ample scope for conflict in a regulated setting and these disputes can be costly in economic, reputational and emotional terms. For resolution of these cases, the culture of the generalist mediator is giving way to a new breed of mediator who is subject-matter literate and sector savvy.

Suzanne Rab was interviewed by Anna Howard in London.

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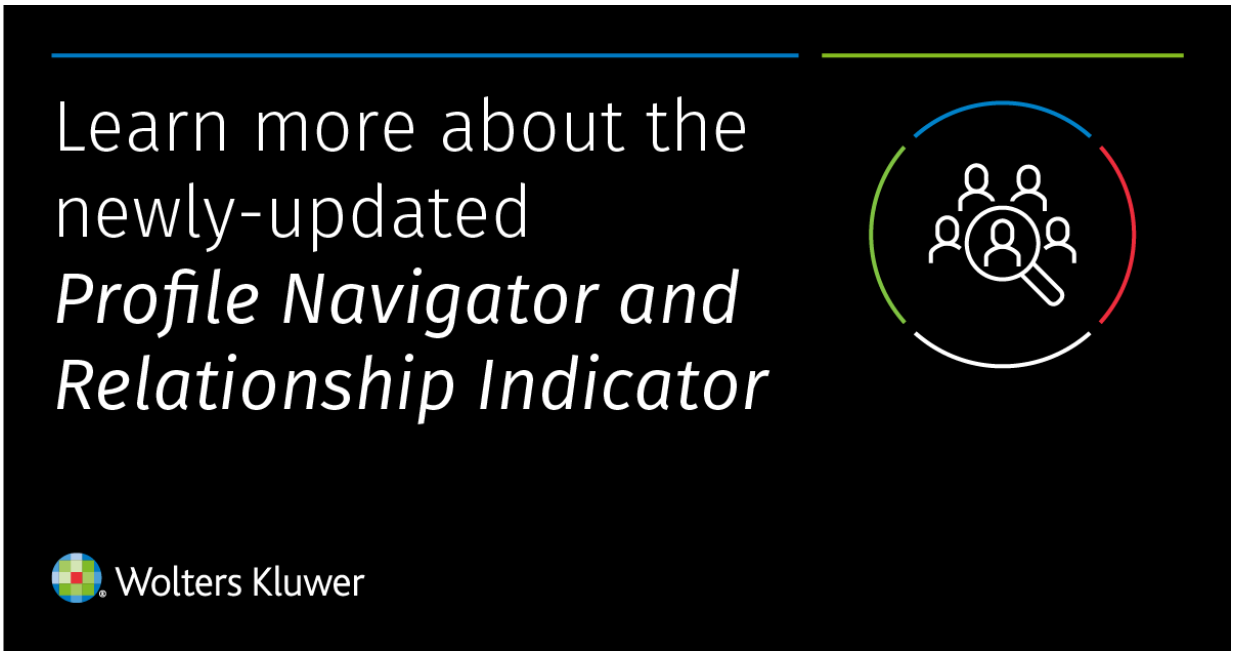

This entry was posted on Monday, May 8th, 2017 at 1:10 pm and is filed under Commercial Mediation, Developing the Field, Dispute Resolution, Future of mediation, Mediation Practice, Regulation
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