Kluwer Mediation Blog

Launch of the Commercial Mediation Group: Promoting the Interest of Users

Katie Bradford (Linklaters LLP) · Tuesday, April 17th, 2012

We were pleased to see the recent launch of the Commercial Mediation Group covered by the Editor's blogpost last month.

So why set up the Group, what are we doing and where is this headed?

As for the thinking behind the initiative, the Editor hit the nail on the head. For many years the 'mediation space' has been very effectively served by an active network of mediators pooling experiences and ideas as to best practice. Given the broad range of commercial law firms navigating clients through the mediation process and the even broader base of commercial clients they advise in different industries, the "users" of mediation were a less organised bunch. Whenever we floated the idea of setting up a representative forum for the commercial users of mediation, we were met with enthusiasm and thoughts as to what issues might be addressed.

The Group's 'mission statement' tells the rest of the story. The Group is "… an affiliation of legal professionals, including solicitors in private practice and in-house counsel, who act as advisers in relation to the resolution of commercial disputes through mediation ("Commercial Mediation") …". Its objective is to "… promote the interests of the users of Commercial Mediation, including companies, financial institutions and public bodies, in all aspects of the current and future development of the law, standards and practice of mediation with a view to, amongst other things:

- improving service standards between Commercial Mediation users, mediators and service provides;
- assisting the development of mediation practices to suit the needs of Commercial Mediation users; and
- providing a voice to respond to consultations and issues of importance to the users of Commercial Mediation".

We have already been busy. On 31 January 2012 the formal launch of the Group was attended by over 130 lawyers from the City's top law firms, in-house counsel from leading corporate and public bodies, with mediators, the bar, members of the judiciary and Ministry of Justice representatives. One of the main purposes of the launch was to discuss the results of the Group's recent survey on topical mediation issues, which aimed to compare and contrast the views of

mediators and mediation users.

The results of the survey have already provoked debate, including from the Editor of this blog. Here is a recap of the key findings. Roughly 67% of commercial litigators opposed making mediation compulsory in all commercial disputes; 47% favoured imposing cost penalties on parties that do not participate in good faith; 51% supported the suggestion that courts should recognise an independent mediation privilege; 68% supported an interventionist role for the mediator; and 64% thought that mediators should not handle more than 2 one day mediations per week.

The launch also included a live voting session where the audience voted in response to these and other questions on behalf of either “consumers” or “providers” of mediation services. The most notable divergence of opinion between the two groups was as to whether mediators should take an interventionist role (73% of mediators agreeing versus 59% of users on the night) and whether mediators should handle no more than 2 one day mediations per week (only 57% of mediators agreeing versus 64% of users).

The Group is now moving on to consider some specifics. We have a very broad membership base (currently over 60 firms, clients and other institutions) and have identified three key areas on which to focus in the medium term. They are: the quality of mediation services; compulsory mediation; and privilege and confidentiality in mediation. Subcommittees have been set up to debate each of these issues, to consider the user’s viewpoint and to explore what further steps we might usefully take (whether by formal recommendations or opening informal dialogue with other key players in the mediation world).

The inclusion of quality of mediation services as a topic is not an expression of concern but, we hope, a route for constructive feedback. Although those responding to the survey with experience of mediators being underprepared were in the minority, there was a healthy consensus that further methods might be introduced to improve the overall service they received. These included CPD requirements, preliminary interviews of mediators by the parties, access to reports of feedback on mediators from previous users and some assurance as to the number of mediations conducted by mediators on a weekly or monthly basis i.e. to counter overtrading. We will be developing these thoughts further in subcommittee and look forward to raising them, and any further suggestions, with the wider community in due course.

Whether, and if so in what circumstances, mediation should be compulsory is a long standing debate. But it has been revived with the recent implementation of the EU Mediation Directive with its provision in Article 5 requiring that judges be given the power to invite parties to have recourse to mediation if considered appropriate. Of course, this falls far short of compulsory mediation. However, the Directive makes it clear that individual Member States are not prevented from introducing legislation to make mediation compulsory or subject to incentives, provided this does not prevent access to the judicial system. Lord Justice Jackson also stopped short of recommending compulsion, but did endorse various tools such as directions requiring the parties to meet and discuss the possibility of mediation, requiring explanations from parties as to why they refused to mediate and cost orders. Nevertheless some countries, such as Canada, Italy and Japan, do have compulsory elements and we will be exploring the pros and cons.

Finally, the current law on privilege and confidentiality raises a number of questions of which users may not be aware when choosing to mediate or on which they may require further clarification. Recent cases such as *Cumbria Waste Management v. Baines Wilson* and *Farm Assist*

v. Secretary of State for the Environment, Food and Rural Affairs do provide some guidance. In the latter, Mr Justice Ramsey helpfully drew distinctions between without prejudice privilege and legal privilege, which can be waived by the appropriate parties to the dispute, and confidentiality which, whilst binding both the parties and the mediator, may be overridden by the court where it is necessary in the interests of justice to do so. He went on both to acknowledge calls for a separate head of "mediation privilege" whilst at the same time upholding a witness summons requiring the mediator in that case to give evidence as to the conduct of the mediation. Clearly this area is open for further debate.

As for the future, we expect that the Group's current deliberations on these topics will throw up themes from the users' perspective which can be shared with mediators, judges and the rest of the mediation community. We also hope the dialogue will be 'two way' with the wider members of the Group being educated as to the merits of mediation as a tool. We will no doubt move on to new topics and hope to coordinate with other initiatives such as CEDR's Innovation Lab. An event being planned for the Autumn will bring together Group members and mediators on a "getting to know you" basis. In the meantime we are spreading the message that the Group is moving ahead, both with commercial clients of our members, and with mediators – addressing the Civil Mediation Council at its May 15 Conference.

In the meantime, if you would like to receive further information about the Commercial Mediation Group, sign up as a "user", or simply provide feedback on any of the issues discussed above, please do get in touch. We look forward to joining you in the debate.

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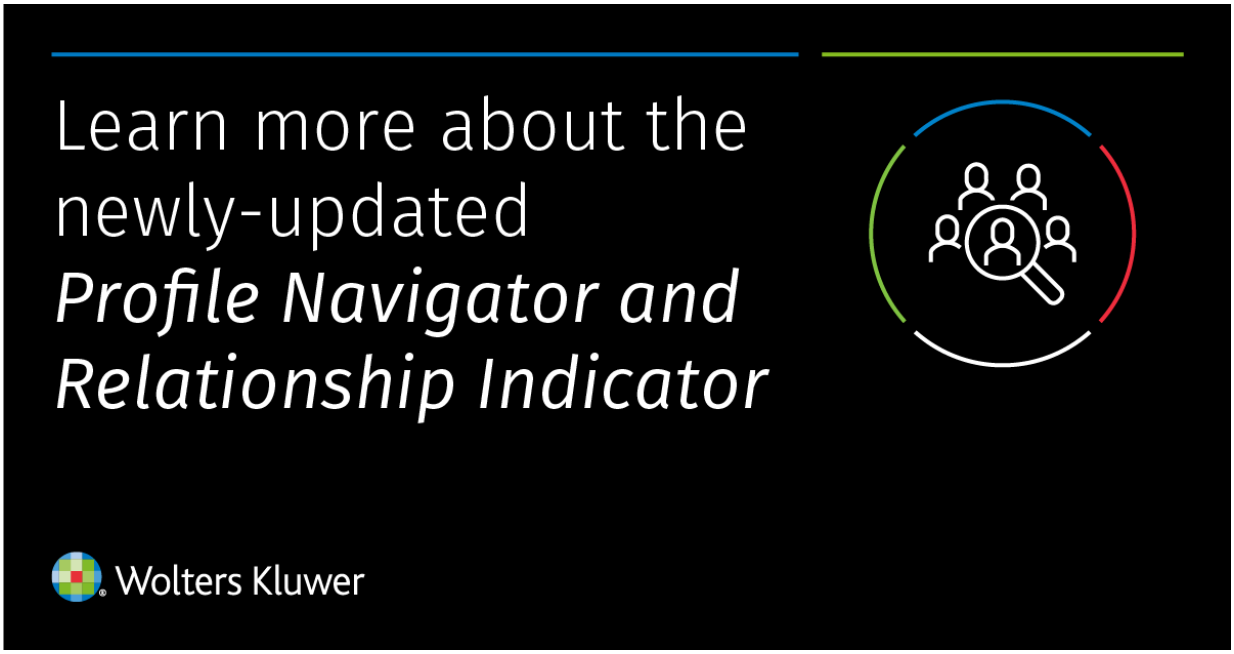

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