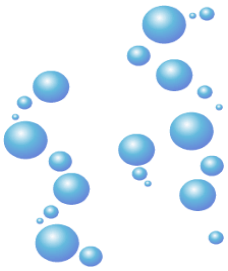
Kluwer Mediation Blog

Dispute Resolution Clauses in Commercial Contracts : The Case for Later Settlement

Geoff Sharp (Brick Court Chambers / Clifton Chambers) · Monday, December 2nd, 2013



I don't mean to argue against the undeniable wisdom of inserting a dispute resolution clause in a commercial contract at the drafting stage.

Conventional wisdom says settle your disputes as early as possible – like bubbles off the ocean floor, conflict expands as it rises to the surface and finally explodes into the air.

What's not to like… it makes absolute sense to agree a dispute resolution framework before a dispute arises.

But there is a BUT.

Most clauses (and there are hundreds of versions) are drafted on the premise that the dispute should get to mediation sooner rather than later.

Some are multi layered; 1) first negotiate, 2) move on to mediate, 3) then arbitrate or litigate as a last resort.

Many have strict time frames, often measured in days, so one side can force the selection of a mediator and convene the mediation within a very short time of the dispute arising.

But, these clauses risk pushing people through the doors of the mediation room too soon… before the dispute is mature, before the raw edges have been rubbed off.

The risk is that parties come to the table without adequately defining to themselves, and each other, what the dispute is all about – what it is they agree and disagree upon and without adequate document exchange (and to be honest without adequately spending time *in the conflict* and all that doing that brings with it).

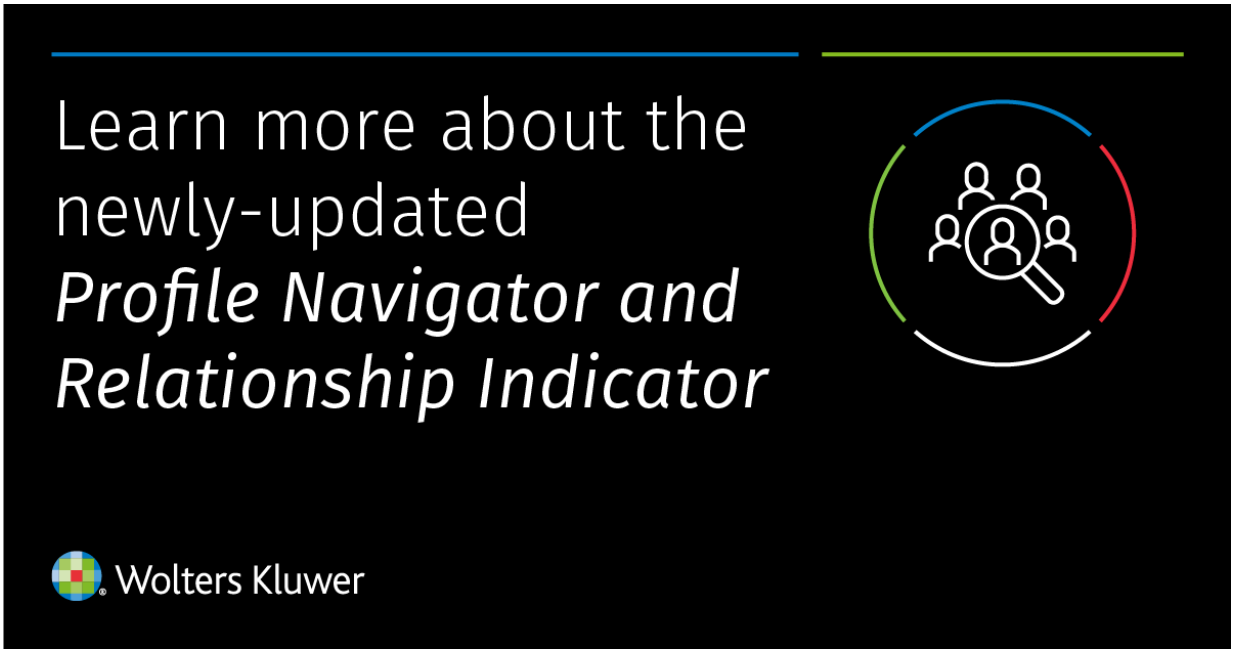
Like a ripe cheese, these things take time.

> And let's not forget that attempt at settlement of legal disputes can happen anytime and often around these milestones in the life of the litigation;
>
> 1.engagement after the initiating event but before court proceedings are issued– this often takes the form of direct negotiation between parties and/or between lawyers. Sometimes that may include a shot across the bow in the form of a draft a statement of claim – in my view one of the most effective techniques (akin to Yassar Arafat's AK47 and olive branch at the UN – "don't let me drop either")
>
> 2.upon the issue of the statement of claim – where shortly afterwards there is a kind of "okay, we got your attention – now you want to talk?" – in my experience, one of the least effective techniques for a whole bunch of reasons
>
> 3.any time up to the trial – often after discovery of documents/exchange of witness briefs – given lawyers' obsession for wanting to know everything and anything remotely relevant to their case, this is perhaps the most popular time to raise the prospect of mediation
>
> 4.surprisingly, I see mediation happening during trial – often a day or two in and where counsel have seen which way the wind is blowing suggesting to the trial judge that an adjournment for discussion might be helpful – often there is a price to pay as judges do not like adjourning trials booked in the court's calendar simply because counsel get the ta-ta's – other times the judge promotes the wisdom of a discussion, often where it is clear there will be no winners, no matter which way the decision swings and what is really needed is an outcome that the court simply cannot order
>
> 5.even more surprisingly perhaps, after first instance trial but before any appeal. See Complex Civil Appeals (http://www.mediate.com/articles/FalkJbl20131122.cfm)

More Resources:

JAMS Clause Workbook : A Guide to Drafting Dispute Resolution Clauses for Commercial Contracts (http://www.jamsadr.com/clauses)

Drafting Dispute Resolution Clauses that Work (http://www.bellgully.com/resources/resource.01414.asp)



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