Kluwer Mediation Blog

Continuing the conversation on mediating competition law disputes

Anna Howard (Centre for Commercial Law Studies, Queen Mary University of London) and Suzanne Rab (Serle Court) · Wednesday, September 28th, 2016

Earlier this month we published the first part of this two-part series on the mediation of competition law disputes. In this, the second part, Suzanne Rab, a barrister at Serle Court specialising in EU and UK competition law and regulation with a busy practice as a mediator, continues to share her insights on mediation in this niche area of disputes.

Anna: ***You've provided us with some examples of the benefits of mediation in competition law disputes. Are there any drawbacks of using mediation in competition law disputes?***

Suzanne: Mediation will not be appropriate for all competition disputes. Whether it is worth exploring will depend on a variety of factors and each case will turn on its own circumstances. Perceptions of drawbacks can sometimes be expressed in terms of myths about mediation, e.g. it is a bar to litigation, it's a sign of weakness, it's a compromise, it's risky because you have to show your hand, it's a waste of time and money if it fails. In my experience, once it is accepted that mediation puts the parties in control over what they reveal and what they decide, these myths can be dispelled.

Although not a drawback, as such, rather something to be alert to throughout the mediation of a dispute between competitors, revealing competitively sensitive information can, of itself, be a breach of competition law. The mediation must be conducted with this in mind.

Are there any key differences between the mediation of a competition law dispute and the mediation of other disputes. And, if so, what are these differences?

Owing to the specialist and often technical nature of these disputes, the mediator can be deployed to their full potential where they have a level fluency in the underlying competition law and economic issues. A mediator that lacks specialist competition law expertise may even find that their role is marginalised to that of a messenger and that they have to rely more on caucusing between the parties in order to move the process on. A mediator that has competition law experience will have a heightened sensitivity to the risks of breaching competition law during the mediation – such as from the sharing of competitively sensitive information as just mentioned or even in the terms of settlement. Such experience and expertise also allows the mediator to:

– identify opportunities for value creation, for example by being able to envisage what a (legally enforceable) replacement distribution agreement might look like which reflects the parties'

expressed interests;
– be focused on robust reality testing of the parties' views due to the mediator's informed perspective on the substantive issues, though mindful not to expand their role into the giving of a legal opinion as such where their role is not an evaluative one; and
– conduct the mediation efficiently and in a manner which is conducive to settlement because they are able to cut through the detail and distil those matters which are most relevant to the competition law dispute.

One approach of which I have had experience is co-mediating where a subject-matter specialist mediator works alongside a "lead" mediator. The parties might prefer a mediator who is an experienced mediator, who has sector experience or specialist legal knowledge of the area and also has a particular style or approach to mediation. This full set of skills may not be found in one person but by having co-mediators with defined areas of expertise and roles, a variety of complementary approaches can be brought to the mediation.

In your experience, what brings parties to competition law disputes to mediation?

An awareness of some of the benefits of mediating competition law disputes, as addressed in the first part of this series, leads some parties to come to mediation. On a more general note, a number of factors may prompt parties to try mediation, including:

– at the suggestion of one of their advisors or someone in the team who has already had a good experience of mediation;
– a recognition that their legal case might not be rock solid, a recognition which often comes as a result of receiving advice from more than one source;
– a change in the overall commercial situation in which the parties find themselves, for example a small dispute may take on a more pressing significance if the party is then facing litigation by another adversary which is related to the initial dispute;
– the parties have pursued litigation, have reached impasses, the costs are escalating and there is a need for closure and to move on; and
– last, but by no means least, a recognition that it is not all about the money. Parties would like the opportunity to have their say and put their issues to the other side and, in the catharsis of mediation, to purge the toxicity of past events. Only by doing this will they feel able to accept a settlement.

An example of where non-economic aspects were at the heart of a dispute was the mediation of a dispute arising from alleged attempts by a competitor, Party A, to interfere with Party B's negotiations with prospective customers. Amongst the issues raised were that (allegedly dominant) Party A had entered into exclusive agreements with prospective customers which prevented them contracting with Party B and also the denigration by Party A of Party B's reputation in the market. Mediation allowed Party B to put the derogatory imputations before Party A. The parties agreed a time limitation on Party A's exclusive arrangements with customers and a commitment from Party A that it would not cast unfounded aspersions on Party B with prospective future customers.

Have you attended a mediation in the role of counsel to a party in a competition law dispute? And, if so, with that hat on, what were the key learning points on the mediation of competition law disputes which you gained from that experience?

When representing parties as their counsel in mediations I have learnt to allow the client to take

centre stage. I will have a much less vocal role in a mediation than when I represent my client in court. You must allow the client to tell their story. I recall one mediation when one party's solicitor gave an eloquent presentation which would not have been out of place in a court room. It was clearly received as such and was described as "playing to the gallery"… Not a particularly helpful start.

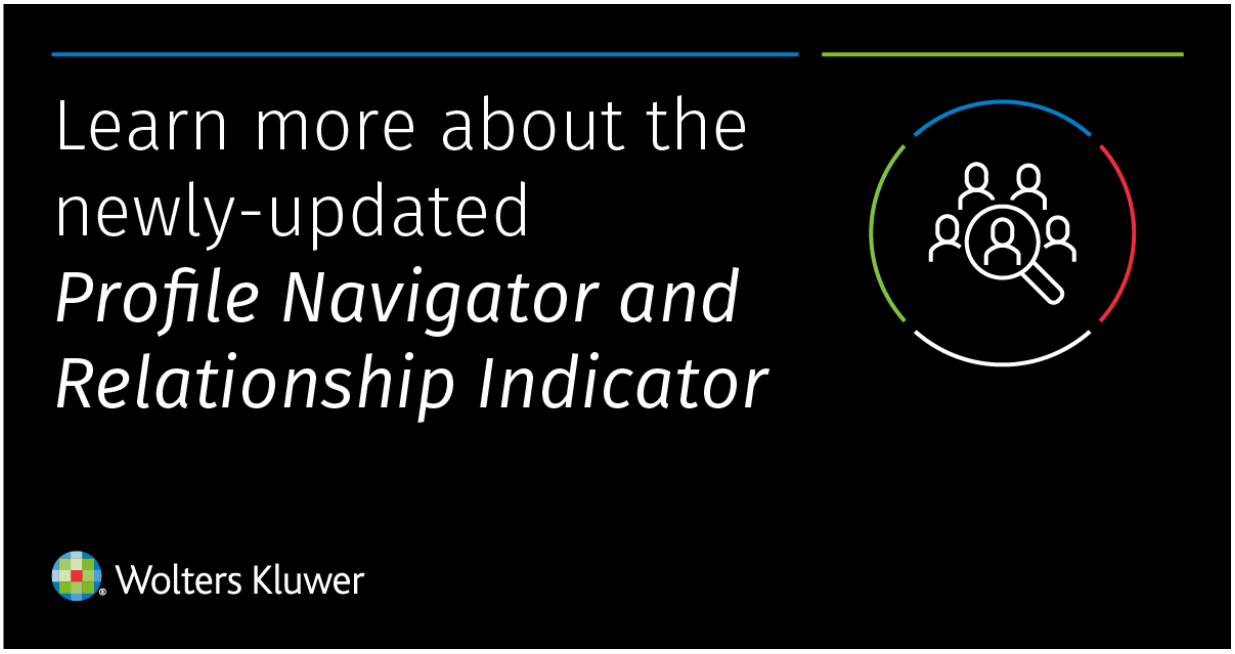
Also, in my role as a counsel I have been involved in drawing up the settlement agreements. It's key that the parties do not replace one problematic agreement with another. And here competition law knowledge can be essential: for example in an IP dispute the resolution may take the form of an agreement not to sue the other party for a patent infringement and it might involve a payment to that other party in return for their commitment to delay their market entry until expiry of the patents that are in dispute. Such arrangements have attracted the scrutiny of competition authorities, so it is an area to proceed with caution.

And finally, Brexit… You note in one of your recent articles on the mediation of competition law disputes that these disputes tend to be multi-jurisdictional. What, in your view, might be the implications of Brexit for the mediation of these disputes?

In principle, Brexit should not dampen the benefits of mediation of competition cases. The value of mediations is that they can address multiple legal issues in one jurisdiction neutral forum in a way that courts may be constrained in doing. Regardless of what a future UK relationship with the EU might look like, whether based on a Norway type EEA agreement, WTO arrangement or something in between like Switzerland, I don't believe that the substantive fundamentals of UK competition law principles will be very different from those we deal with today.

Where we might see a difference is where clients face an increasing risk of double jeopardy should the UK not secure an arrangement like the current one where there are procedures for allocation of the investigation of cross-border competition cases between the European Commission and the national competition authorities. Without these case allocation procedures actual or potential investigation by the Competition and Markets Authority in the UK in addition to the European Commission (or in the case of a Norway type agreement, the EFTA Surveillance Authority) will increase the alternative dispute resolution fora available in default of settlement. The additional complexity of the counterfactual might provide a tactical lever for negotiation and increase the prospects of a mediated settlement.

Many thanks Suzanne for your time and insights.



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