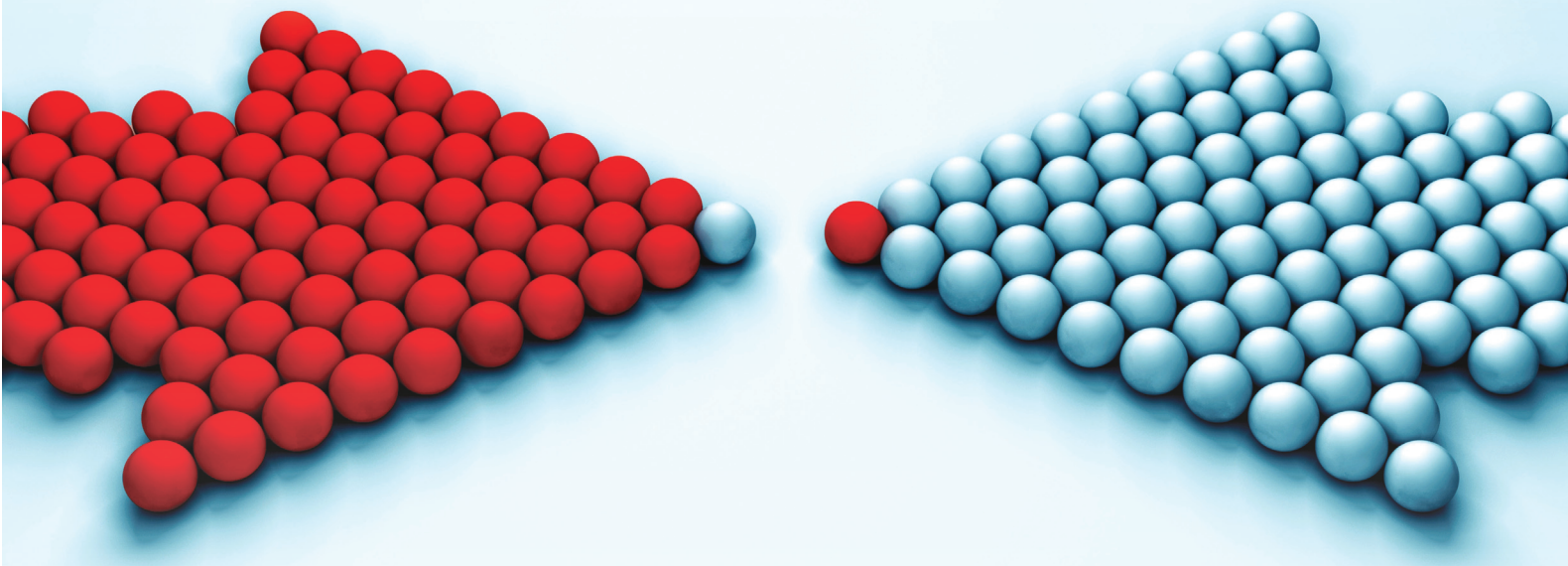
Conflict resolution in licensing

It is difficult to anticipate conflicts or disputes between parties, bound by a license agreement. However, conflicts and disputes can, and do, arise – often under the most unanticipated circumstances.



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The success or profitability of a licensing relationship can be threatened by conflicts and disputes, especially if the parties wind up in litigation. Often, one of the most efficient, cost-effective and basic steps parties can take is to attempt to reach a compromise at the earliest sign of conflict or dispute.

It is no secret that the vast majority of conflicts and disputes are resolved when parties directly engage in discussion or negotiation and reach a compromise. All too frequently, however, this is not the first step parties take in a conflict or dispute. Instead, parties typically elect legal action first, usually in the form of Alternative Dispute Resolution (ADR), such as mediation or arbitration, or litigation. Direct discussions between the parties may not take place until well into the ADR or litigation process. By that time, the parties have invested considerable time and money in the conflict or dispute and their willingness or ability to compromise can be substantially diminished.

EARLY STAGE DISCUSSION HELPS

Discussion at an early stage permits the parties to explore a resolution with as little hostility as possible. ADR and litigation are inherently adversarial processes. Tensions and acrimony tend to mount as ADR or litigation progress. By engaging in discussions outside of an adversarial process, it may be possible for the parties to reach a compromise they might not otherwise achieve.

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Direct discussion at an early stage is also beneficial with respect to time and cost. While ADR is ordinarily considered to be speedier and less expensive than litigation, ADR and litigation can take several months or years to complete. The arbitration and litigation processes involve numerous deadlines and

hearings, and often require extensive discovery and briefing. Even in the case of mediation, mediators may not be readily available to mediate a conflict or dispute or a mediator may require time to learn more about the dispute. These steps can involve a considerable amount of time, during which costs and fees mount. Direct discussions at an early stage can potentially conserve considerable resources that would be better allocated toward maximising the goals of the licensing relationship.

WHAT LICENSE AGREEMENTS OFFER

License agreements generally do not require the parties to engage in discussions prior to commencing ADR or litigation, although that is always an available option. Typically, license agreements identify the law and forum applicable to disputes. For example, a license agreement might specify that the laws of the United States apply to conflicts and disputes and that any action must be filed in a certain court in the United States. The license agreement might also require mediation prior to commencing arbitration (binding or non-binding) or litigation. It is not uncommon for licensing agreements (and contracts in general) to specify multi-step dispute resolution processes involving mediation, arbitration or, if necessary, litigation.

A provision can be included in license agreements requiring the parties to engage in "good faith" negotiations prior to resorting to ADR or litigation. Ordinarily, such a provision specifies a limited period of time (eg, 15 days, 30 days, etc) after notice of the conflict or dispute is provided by the aggrieved party to conduct the negotiations. If the parties cannot reach a settlement in that time frame, the license agreement ordinarily permits either party to submit the conflict or dispute to ADR, litigation, or a combination of ADR and litigation. Although such a "good faith" negotiation provision is not necessary, it is potentially beneficial because it forces the parties to engage in direct discussion before incurring the costs associated with ADR and litigation. A license agreement without the provision may permit the parties to bypass discussions altogether.

TO UNDERSTAND

It is inevitable that certain conflicts and disputes will require the help of a mediator or arbitrator, or the decision-making authority of a judge or jury. Not every conflict or dispute can be resolved through direct negotiation. It is not uncommon (or incorrect) for parties to use a third-party, such as a mediator or arbitrator. Indeed, in many cases, an objective third-party may be beneficial. Others may require a court of law to adjudicate the conflict or dispute. Nevertheless, it could potentially save the parties considerable time and expense to reach a compromise before proceeding to ADR or litigation.

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Guidance points for early stage discussions between parties

- Identify signs of conflict or dispute as early as possible
- Discussions should be conducted by employees or executives who possess the ability to fully settle the conflict or dispute. The goal is to quickly and effectively explore the possibility of a settlement
- Negotiations should be conducted expeditiously. Delays by one party can undermine the other party's willingness to compromise. Unreasonable delays can also subject the purportedly aggrieved party to further damage
- Conduct all discussions in "good faith", apply best-practices and adhere to business ethics standards (favourable to both parties)
- Make full and accurate disclosures. Far too often, parties think that they can withhold information and "put one over" on the other side – particularly when the "issue" is accounting and payment of royalties. Withholding information rarely, if ever, works or is advisable for two reasons. First, if the other side is suspicious (as they are likely to be if you are not forthcoming), you will not reach a resolution. The practical effect is that litigation will ensue and ALL of the information that you were withholding will come out during the discovery process – at a much greater cost to both parties. Second, if you have ANY interest in creating, growing or maintaining a mutually profitable long-term relationship with the other party, ie, the party with whom you have a licensing relationship, the worst thing you can do is to introduce suspicion and mistrust into that relationship
- If accountings are an issue, have the accountants for the two sides lay out and justify their respective positions in terms that the business types can understand and discuss
- Keep the lawyers as far away from the negotiations as possible! The simple truth is that most lawyers are litigators and not negotiators. They measure success by whether or not they "beat" their adversary and not by whether or not they were able to reach a compromise with them

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