Kluwer Arbitration Blog

Anti-Arbitration: On Things Undeniably Good and a Different Kind of Neutrality

Michael McIlwrath (MDisputes) · Tuesday, October 5th, 2010

Two recent incidents reminded me of just how much, in international arbitration, impressions and even reputations can completely miss the mark. One was a discussion I recently had with a well-known arbitrator who only half-jokingly commented on my "anti-arbitration" view, although he then qualified me as appearing more moderate than my fellow members of the Corporate Counsel International Arbitration Group (CCIAG). Another was a colleague who recently met with a senior case manager of an arbitration institution, and was asked if her colleague (me) is still "anti-arbitration".

There is a lot that is wrong with these statements.

First, and just to set the record straight, I am not a member of the CCIAG, although I do admire the organization's remarkable accomplishment of highlighting the concerns of in-house counsel in only a few years since its inception. (In full disclosure, two of my GE colleagues are members, and one of them is the founder.)

Second, and more important, I had never thought of the CCIAG, and certainly not myself, as being anti-arbitration.

The CCIAG, a gathering of corporate in-house counsel, has rapidly become an active and important voice in international arbitration. Nothing that the group has said or done to date could be characterized as anti-arbitration. Their website (https://www.cciag.com) expressly states the group's principal goal is to ensure "that international arbitration provides its users with a robust, flexible, timely and cost effective procedure for the resolution of international disputes. CCIAG members have a common view that many aspects of international arbitration must be enhanced in order to achieve this goal". Among the CCIAG's accomplishments to date is the organization's participation in the revisions to the UNCITRAL rules, providing input from a constituency that otherwise would have been absent amid service providers and academics. Not by any stretch of the word could any of this be termed anti-arbitration.

As for myself, while I may sometimes be called – at least in polite company — an "outspoken" in-house counsel, I do not think I have an anti vein in my body. I certainly could not find one in any of the podcasts I have done (many featuring leading figures in arbitration), articles, or a recent book with co-author John Savage that Kluwer has stressed should be plugged mercilessly in my guest-posting. The name of the book, thank you for asking, *is International Arbitration and*

Mediation: A Practical Guide. It is not a salacious rant against arbitration, although it does include some amusing anecdotes.

There is a common theme among the activities of the CCIAG, my own writing, and the published works of other in-house counsel. This commonality is that we all suggested ways in which arbitration can do so as to better meet party expectations, but we have never said it should not be done. In fact, our suggestions generally cite the same problems and our proposed improvements can be remarkably similar.

For example, in setting out one proposal for improvement, T*he View of An International Arbitration Customer: In Dire Need of Early Resolution*, 74 Arbitration 3 (2008), a GE colleague, Roland Schroeder, and I suggested that arbitration practice would better suit party needs if tribunals would decide potentially dispositive issues early in the proceedings. Unbeknownst to us, a team of three in-house lawyers at our competitor Siemens were simultaneously formulating similar recommendations in an article of their own, P. Hoebeck, V. Mahnken, M. Koebke, *Time for Woolf Reforms in International Construction Arbitration*, Int. A.L.R. 84 (2008).

Neither article could be construed as anti-arbitration. In fact, labeling in-house corporate counsel "anti" or even "pro-" arbitration misunderstands the role that in-house counsel play. Put simply, we do not think about dispute resolution in those terms. We have an obligation to our client (in my own case GE shareholders) to assess the most suitable form of dispute resolution for each contract and each possible type of dispute. If any of us were to say, "I'm anti-arbitration," the obvious question from other in-house folk would be, "So how do you do business in places that lack honest, reliable courts?" The answer is, maybe you don't. For the rest of us, there is arbitration. Like it or not, it's often all we've got, which is why so many of us want it to be better.

For myself, I try to maintain what could be called dispute-resolution neutrality, for lack of a better term. For example, for a contract involving the delivery of highly technical equipment, I would likely recommend that the dispute resolution clause provide for arbitration over the courts of Milan, if that were the only other alternative. This preference is based on a view that highly technical issues are likely to be handled better in arbitration than in Italian courts. But if the commercial court of London is an option, my preference could easily shift to the courts or be neutral as between courts or arbitration. Nothing is written in stone, and in-house counsel preferences always depend on perceptions of the available options.

Dispute-resolution neutrality also extends to relationships with arbitral institutions. I do not sit on the courts or committees of any institution, with the exception of CPR, which is user-funded. It's not just, to borrow Groucho's line, because I wouldn't want to be a part of any group that would have me as a member. (That's a pretty good reason, though.) Rather, being aligned with a particular institution might compromise an in-house counsel's independence when advising the company on which institution to prefer. In-house counsel who occupy any type of privileged position with arbitration institutions must necessarily address whether doing so presents a conflict of interest if their company may one day pay for the institution's services when a dispute arises.

That is not to deny that anti-arbitration sentiments exist. They do. Entire businesses can be anti-arbitration. A business executive who believes to have been dealt with unfairly in an arbitration may show heartfelt antipathy towards the procedure. I have met more than my share of executives like this. We recently settled an award with a manager who declared that his company's "lesson learned" was not to include any more arbitration clauses in their contracts. The leap from

disgruntled executive to company policy can occur when the company has had little or no other experience with arbitration with which to compare their bad result, and do not need arbitration for international contracts.

But there is also an important anti-arbitration contingent in the international community. They are the ones who wish the practice to remain uncontaminated by the views of users, and who resist attempts to make the practice more accessible and better suited to our needs. A sure way to stifle growth of any market is to shield the product from the influence of informed customer choices.

This anti-arbitration contingent consists of the defenders of the status quo, who will predictably react with negativity to any constructive criticism. When Roland and I wrote about the problem of tribunals tending to defer all important decisions to the end of proceedings, we knew our proposal for change would have its detractors. So we included an entire section in our article on early disposition called, “The Undeniable Good of International Arbitration.” If there was a way to convey our view even more unambiguously, we couldn’t think of it.

Now, again for the record, I am not anti- things that are undeniably good, although I do not purport to speak for my co-author….

So if despite all that, we outspoken in-house counsel must still suffer the appellation “anti-arbitration” despite such extreme measures to ensure that our message is not misunderstood or misrepresented, then maybe it’s time to stop trying to set the record straight. Going with the flow instead of against it, I have entitled this series of guest-posts Anti-Arbitration. It has a nice ring to it.

I’ll be back next week with another thrilling installment of anti-arbitration. In the meantime, the holiday season is almost upon some of us (well, Halloween anyway), so don’t forget to pick up several copies of International Arbitration and Mediation: A Practical Guide for yourself and your children. (Ask Kluwer about the availability of volume discounts for trick or treating gifts!)

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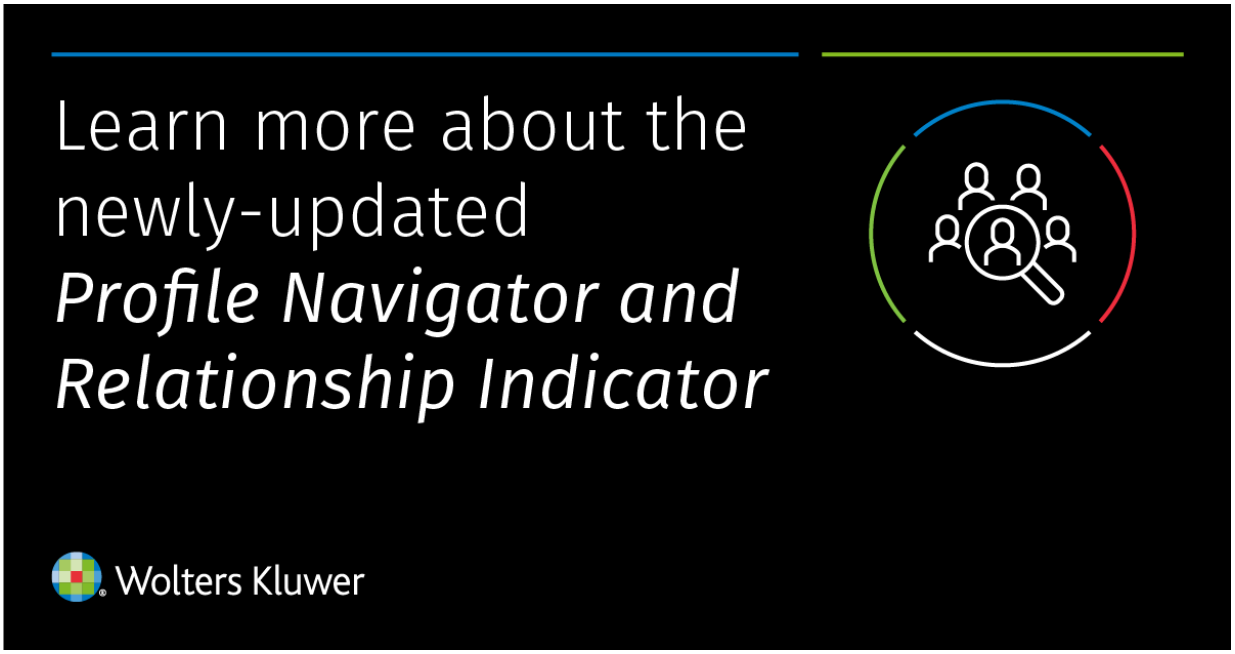

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