Kluwer Arbitration Blog

BIT claim or Contract Claim?

Lisa Bench Nieuwveld (Conway & Partners) · Thursday, December 16th, 2010

Despite what the title may imply, this is not another prose on the legal theories around whether a BIT claim could be made in lieu or in addition to a contract with an arbitral clause in place. It is more about – should it?

In my years of practice, working on both types of cases, I have definitely noticed a trend. Many attorneys seem to simply find the BIT work "sexier" or at the very least they definitely want to be able to claim that they have an on-going BIT case. Some of the attorneys I have been privileged to work with really were not motivated by whether or not it was a BIT or commercial claim, but I have definitely worked with those who were. This leads me to the ethical question – what is truly motivating those attorneys? Status or what is best for the client?

Looking to the American Bar Association's Model Code of Professional Conduct, a couple provisions imply that the attorney's representation must be to completely do what is reasonable and best for the client. Article 1.3 states, "A lawyer shall act with reasonable diligence and promptness in representing a client." Article 2.1 states, "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice…." I think the most important term mentioned is candid.

Looking to an example outside of the US, I refer to the karakter gedragsregels, as the ethic codes are called in The Netherlands. Having spent time working in the Netherlands, I felt it was a prime example to also consider. Looking to Rule 5 ("regel 5"), it states, "Het belang van de cliënt, niet enig eigen belang van de advocaat, is bepalend voor de wijze waarop de advocaat zijn zaken dient te behandelen." In other words (and this is a very unofficial translation), It is the client's interest and not that of the attorney which the attorney must consider when representing the client.

Of the attorneys I have worked with, they truly cared about the client's concerns, but it was evident that a balancing act (or battle) was going on inside. Should I push forward the BIT strategy or the contract strategy (assuming no overlap in this simplified example of course)? It was not always clear that pushing the BIT strategy benefited the client in any respect. It can definitely create more public pressure, but at what costs? Is it merely that the attorney is not thinking of the business aspects and practical concerns for the client? I had to ask myself, was the motivation here the ability for the particular attorney or law firm to claim that they were representing a client in a BIT case – believe me, it does sound sexier and amongst the arbitral community I have certainly witnessed the pleasure the attorneys clearly feel when being able to make that claim.

I would argue that it is indisputable that competent representation means laying before the client

ALL reasonable and supportable options, to the extent the information the client has provided allows. This invariably includes the possibility of a BIT claim, should it exist. The public pressure it can create is certainly a positive and, as a practitioner, the BIT claims are definitely enjoyable to pursue. At the same time, clients (even large businesses acting as investors in a foreign country) can be vulnerable – to their emotions, to their view of the events, etc – and thinking more about what is the best route – looking completely to the attorneys guidance – and not on which route results in the best prospects for their continued business prospects/relationships.

I am certainly not anti-BIT claims. Like others, I have enjoyed the BIT work immensely and enjoy being able to claim my experience in this area. However, commercial arbitrations are equally enthralling, equally important. I wonder, how many suffer from the temptation to present the BIT in a more enticing light, just so they can claim to represent a client in a BIT case? I really do wonder.

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