Kluwer Arbitration Blog

Anti-Arbitration: The Uninvited Guest at the Table

Michael McIlwrath (MDisputes) · Tuesday, October 12th, 2010

In last week's post, I mentioned how some outspoken in-house counsel have undeservedly acquired a reputation for being anti-arbitration for having advocated improvements. I tried to explain how most in-house lawyers will want to be perceived as "dispute resolution neutral," i.e., open to whatever type of procedure may best achieve the party's goals.

So what the heck is going on? Why is it that when users express concerns about how arbitration is actually conducted, and encourage improvement, that this constructive criticism can lead one to being called "anti-arbitration"?

The answer, to be blunt (you're supposed to be blunt in blog posts), is that a part of the international arbitration community really does not want change to occur. In some respects, resistance to change is normal in any environment, where the voices of those who think things can always be better confront the voices of those who wish things to stay the way they are. But while most of the community has embraced input from in-house counsel, a contingent has been hostile to it, even openly resentful of the presence of this self-invited guest at the table. This isn't just resistance to change because it will make things different; it's treating a vocal community of users as a threat.

Lest anyone think I'm exaggerating, let me give just a few examples from experience. One was an ICC arbitration hearing some years at which the opposing counsel, a partner at an international law firm, demanded that I be ejected from the room because "it is accepted procedure that parties should not participate personally in the hearing." (The request was denied). Recently, one of my GE team-mates participated at a conference in which a well-known arbitrator /law firm partner (multi-national firm) launched into a diatribe excoriating in-house counsel who dared venture into the actual practice of international arbitration, a field he suggested that would be better left to professionals like himself.

Perhaps my own best example of antipathy towards party input is the article I mentioned in last week's post, in which a GE colleague and I set out a proposal for early disposition of critical issues. After presenting our proposal in the form of a paper at an IAI Paris conference on the same topic, a young arbitration practitioner in London encouraged us to submit it to a well-known journal affiliated with an international arbitration institution there.

The journal's editorial board, consisting of leading professionals in international arbitration, sent us a polite rejection letter that invoked the board's guidelines against publishing articles "that focus on cases with which the authors have been involved directly". Well, that guideline, if it truly exists,

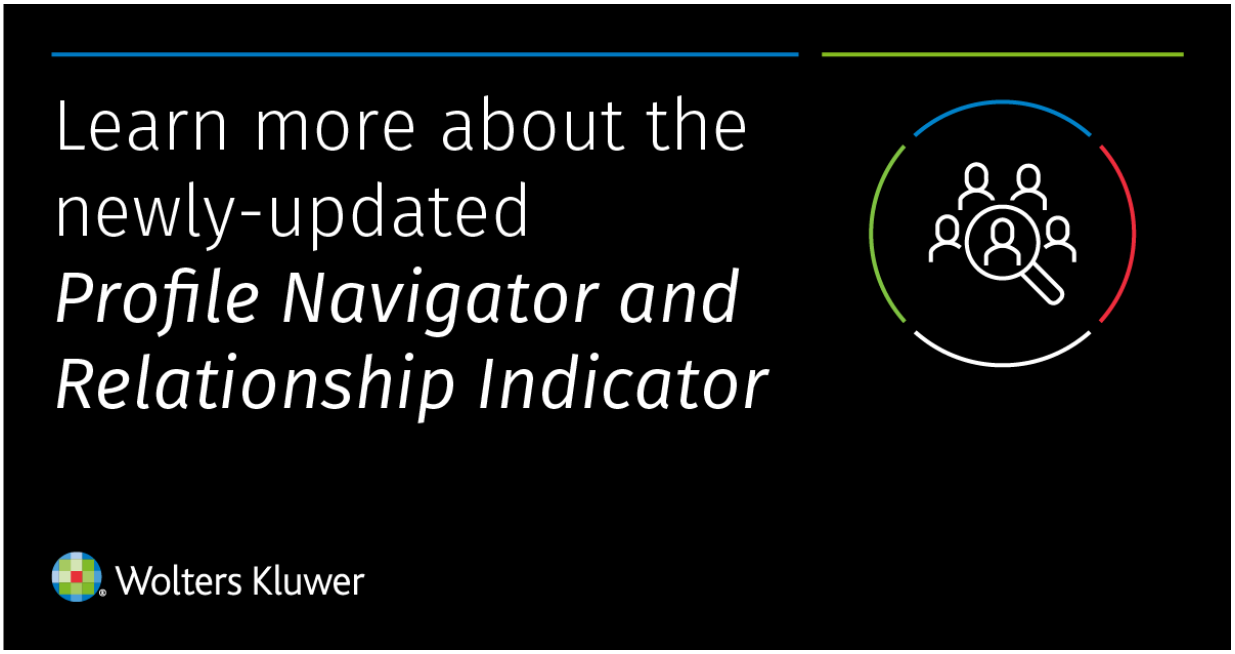
pretty much rules out any insight we in-house counsel might provide about how parties live and perceive international arbitration practice. (Fortunately for us, the article was requested by other journals and was ultimately published by Arbitration, the CIArb journal, as The View of An International Arbitration Customer: In Dire Need of Early Resolution,74 Arbitration 3 (2008); we have been pleased to see its frequent citation in articles and books that discuss proposals to improve arbitration procedure).

In all events, this intrusion of in-house counsel views is not momentary, even if some quarters are not delighted at the idea of us speaking out. The formation of the CCIAG and its accomplishments to date is just one example of a trend that is bound to continue. And the inclusion of these views can only be viewed as contributing to the various initiatives in the last several years to make arbitration practice better conform to what we users say we want.

What does this mean in the medium and longer term? For one thing, it means that service providers, meaning arbitrators and arbitration institutions, must accept the notion that parties will no longer remain silent about the quality of the services they are paying for. That was never a model for serious growth anyway. No business can be successful by ignoring its customer base, and customers will always desire more and better information so they can move their business to the higher quality providers.

Almost all of the major international arbitration institutions have adopted various reforms designed to meet user demands for speed and efficiency of procedure. But users still have a difficult time distinguishing which institutions actually ensure these changes are implemented, and which arbitrators are most receptive to them. So we can reasonably expect the next major changes in international arbitration practice to be addressed and helping users separate the wheat from the chaff when choosing institutions and arbitrators.

But we'll leave that as the cliff-hanger for next week's installment of Anti-Arbitration in which I've invited my GE colleague, Roland Schroeder, as co-author. In the meantime, don't forget to pick up some extra copies of, International Arbitration and Mediation: A Practical Guide. Being truly practical (the word in the title), the book is especially good for holding down desktop papers and keeping doors closed firmly shut during these windy autumn months.



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