

Kluwer Arbitration Blog

Anti-Arbitration: Feedback on Your Recent Pitch

Michael McIlwrath (MDisputes) · Tuesday, April 12th, 2011

Dear Counsel,

Thank you for taking the time to present your firm's international arbitration practice, and also for the copies of the brochure and monthly newsletter. The many recent wins by your firm and the published articles demonstrate convincingly that you are quality professionals with a high-standing in the community.

I'm certain it was not your intention to make us feel as though we were just fungible in-house counsel holding the purse strings of a generic company on your prospective clients list. Yet the message may not always be what was intended. I therefore thought it might be useful to provide candid feedback about how your presentation was perceived.

There is a lot to be said for understanding your audience.

Just to give one good example, we were surprised that your presentation was focused entirely on arbitration and did not mention mediation at all. We in-house folks sometimes have the impression that external counsel view our interest in the subject as a cute personal hobby. It has actually been major company initiative for more than a decade, with the emphasis only been increasing as we globalize our operations.

Our desire to see more of mediation is not exactly hidden from view. We and some of our peer companies – Northrop, Shell, Nestlé – have provided substantial resources and even funding to help start the International Mediation Institute (IMI), a successful and growing initiative to promote quality and transparency in mediation across borders. We are also active with the CPR Institute, a leading mediation think-tank, and many of the company's lawyers speak publicly and have published about the benefits of mediation to resolve international commercial disputes, including (and especially) those subject to arbitration. A mediation requirement is often used as a risk-mitigator in the dispute clauses of our international contracts, a pre-requisite before initiating arbitration or court litigation.

It may be that there are practitioners in your firm with mediation experience, or maybe even lawyers in your group with an interest in broadening their skills. If so, we missed an opportunity to discuss how your firm might fit with our own aspirations.

As for the competitiveness of your fees, I imagine this topic comes up a lot in your pitches to in-house counsel, given the amount of time you spent discussing how you could help us “save” on

costs. You might have noted that was when my colleague, the one sitting on my left, began to doze off. Or maybe that was me. It's not that we are not interested in saving costs (although we speak in terms of cost avoidance, not savings, since whatever we spend is still money out the door); it's just that claiming competitive hourly rates and right-sized teams is, well, apparently part of every law firm pitch.

Maybe you could be the firm that will propose something truly different to get our attention on costs? If not, then maybe just say in passing that you're as competitive on fees as your competitors and leave it at that.

Finally, it seemed to us that much of your presentation was focused on landing the really big cases, which undoubtedly would be revenue-earning for any firm. The truth is, as we tried to explain, those cases are rare in our world. Most of our disputes are what you might call "physiological", if that term can be applied, or simply a "cost of doing business". They are sizeable enough to make a difference to our managerial colleagues, but in the low millions (or less) usually will not justify legal fees that run into the six figures. This is especially so when you consider that, on top of your fees, we'd still have to pay arbitrators, institutions, experts, and various incidental expenses associated with an international arbitration.

We haven't found a good way to resource those types of cases and, to be honest, neither have your competitors, as far as we can tell, even applying the most competitive of competitive rates. Fortunately for us, most international arbitration is not fast-moving. This allows parties, if they so desire, to find solutions other than hiring the arbitration team of a law firm. We might try to settle the case on our own, or mediate, or even conduct the arbitrations in-house, without outside counsel. That's a luxury that the timing of international arbitration affords us. It is not something we are set up to do with fast-paced disputes like injunctions in the US or adjudication proceedings in the UK. For those types of disputes, we're almost always going to need external help.

Since the pace of arbitration lends itself to building internal company competencies, perhaps that might have been an area your skilled team could help us with? It wouldn't mean huge revenues, but it might lead to a closer relationship.

And this takes us back to my initial example of mediation. To understand why we are strong believers and how your practice might fit with us, you would have needed to go deeper in understanding who we are as lawyers, how we operate as a company, and what kind of reputation and image we try to put forward.

I hope that you'll take my comments as constructive ones, and meant with good intentions. You really seem to be a good team of lawyers, and I'm certain you will make another client very happy.

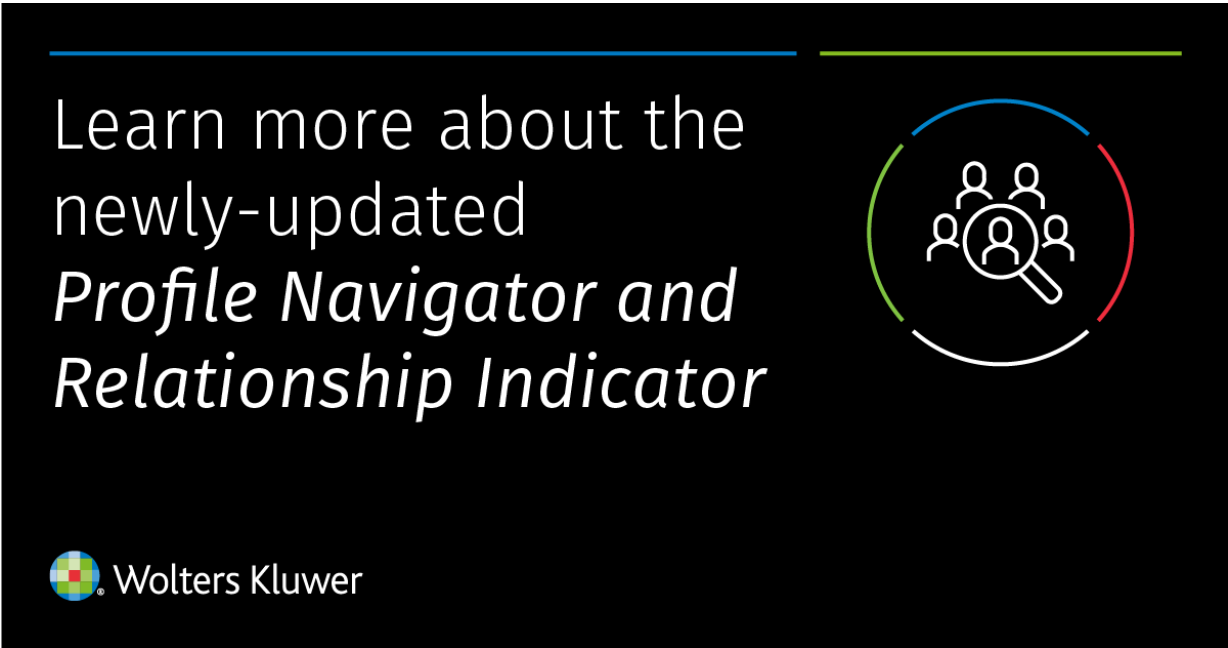
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