

Kluwer Arbitration Blog

What do the Clients Want – International Litigation or International Arbitration?

Lisa Bench Nieuwveld (Conway & Partners) · Tuesday, November 15th, 2011

Is the international litigation gaining strength over international arbitration? Is it true that in-house counsel would rather fight it out in the courts of the country versus dealing with arbitrators who take too long, expensive attorneys in the international arbitration arena and the threat that the country involved will find a way to not recognize and enforce an arbitral award despite being a signatory to the New York Convention of 1958?

This past spring, I moderated a panel at a joint ABA Section of International Law and Los Angeles Bar Association Conference on International Arbitration. This panel provided a view from the client on choosing international arbitration versus going to the local courts. In other words, the idea was to hear what the client really thought. Among the panelists were representatives from a large, well known international food company who provided us practitioners with some candid thoughts to chew on. One of the representatives made it very clear that rarely would they choose international arbitration. Although a past preference, the process has become too long and too expensive. Trusting attorneys to reign in overburdened arbitrators appeared to be one of the reasons given. Another was that it simply made more sense to them to go to a country (I believe the example given was the Ukraine) and take their chances on their court system. With a judgment from the local courts, the client felt there would be a better chance of getting their judgment enforced than with an arbitral award. It would likely not take as long and there would not be a window for, let's just say, interesting behind the scene events, to happen which prevent an otherwise sound arbitral award from being enforced.

I know I was not alone in being a little surprised to hear this and as an international arbitration practitioner, a little disheartened. However, it appears that predicting what a client wants, as a whole, would be fool hearted. Why? No two clients think alike.

This past week, as I enjoyed Dublin while attending the ABA International Law Section's Fall Meeting, I enjoyed listening to a panel about mining in Africa. From joint ventures to dispute resolution mechanisms, the panel addressed the entire gambit. This included giving us the privilege of hearing from a client – a large, multinational mining company. The thoughts I heard were – in Africa, we are definitely not risking the courts, we will choose for international arbitration. It sounded like the complete opposite of the thoughts expressed at the panel in Los Angeles.

OK – so hope remains. Perhaps it is the region, perhaps it is the industry, perhaps it is simply the personal preference of the General Counsel for a client that influences which path is chosen. But

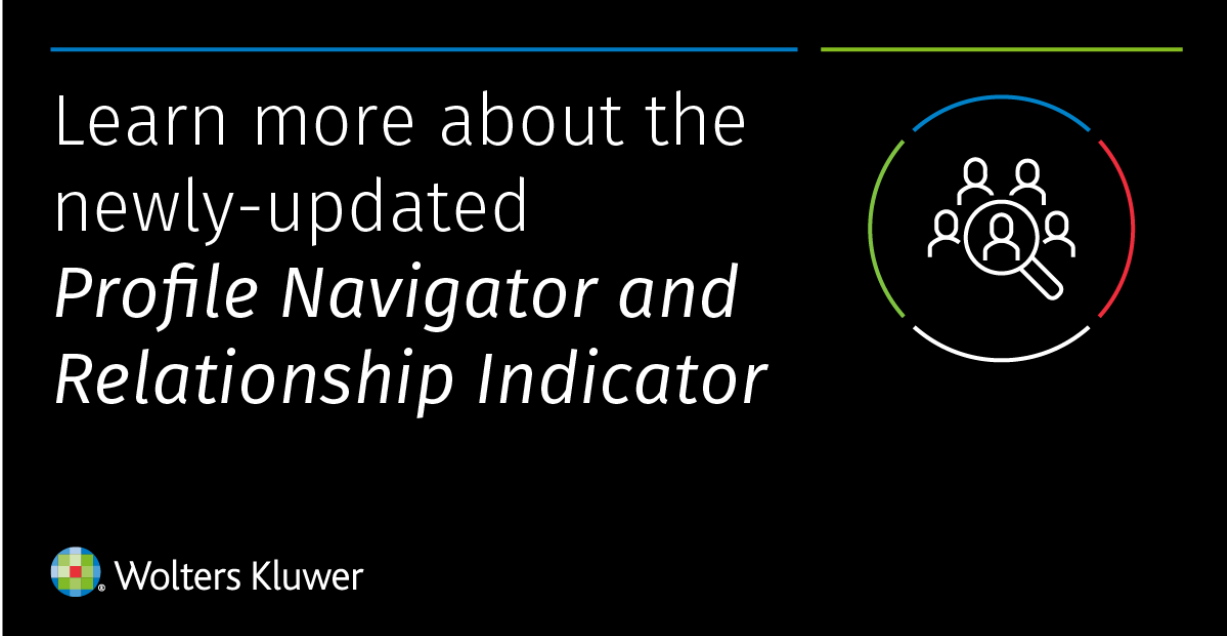
international arbitration's is alive and well. That being said, I cannot deny the increasing interest in international litigation over international arbitration. It is not a blank – this is always better over this. Instead, it is something to consider with every single jurisdiction. The panel I moderated in Dublin addressed exactly this issue – a client wanted to expand and the panelists from varying jurisdictions advised on whether litigation or arbitration would be preferred and why. That would make for a fascinating in-house counsel handbook.

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This entry was posted on Tuesday, November 15th, 2011 at 5:49 pm and is filed under [Domestic Courts](#), [International arbitration](#)

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