The International Arbitrator Information Project: From an Ideation to Operation

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Catherine A. Rogers (Arbitrator Intelligence)

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In a recent post, here, I argued that the time has come to move on from the gumshoe clue-hunting approach currently employed to select international arbitrators. Existing practices are severely outdated and unduly expensive in an era of information and technological efficiency. The process for selecting arbitrators, I argued, should be more transparent and key information about arbitrators should be more equally accessible. The solution I proposed is what I have termed the "International Arbitrator Information Project," a project that would aim to provide reliable, online one-stop-shopping for information about arbitrators. This post sketches some of the features and challenges that would be involved in launching the Project.

As its name suggests, the International Arbitrator Information Project would primarily be a research project. Its aim would be to collect and provide parties with easy electronic access to critical information for making informed decisions in the arbitrator selection process. A project of this sort raises many questions about form, sources, and management. Those are the topics this post seeks to explore.

The best way to describe the Project is to start with an explanation of what it would *not* be. It would not be a new advertising space for international arbitrators. It

would not be a for-profit resource. It would not be an arbitrator-related version of Wikipedia. It would not be the equivalent of a grocery store "comment box" that acts as a receptacle for all gripes, or a tabloid that collects reckless an scintillating gossip. It would, instead, be defined by its purpose, which would be to increase equal access to comprehensive, substantive, and reliable information about arbitrators through network-based research and responsible editorial policies. While the details for accomplishing these aims may evolve, the remainder of this blog sketches the basic form of the Project and addresses some issues that will be raised in implementing it.

In the Project, each arbitrator would have a dedicated webpage that would be electronically searchable. Each page would include standard biographic information, such as education, professional training, nationality, language skills, and arbitration experience. Arbitrator webpages would also include links to all publicly available arbitral awards associated with the arbitrator, and all judicial opinions (translated into English or summarized in English) that reference the arbitrators or their awards. It would also include links to arbitrators' academic and professional publications, again fully- or partially-translated into English where necessary. Additionally, the Project would also allow searchable access to publications by other arbitrators and academics that comment on the relevant arbitrator's publications, awards, and judicial decisions that rule on or reference those publications or awards.

While all this information is useful for parties, the most critical, and the most elusive and costly information to track down regards arbitrators' case management skills, predilections, and demeanor as an adjudicator. Parties seek information about an arbitrator's actual conduct on arbitral tribunals—including whether the arbitrator is willing to allow or disallow certain procedures (such as document exchange, including so-called "e-discovery"), has strong case management skills, adopts a strict constructionist (or a more flexible) approach to contract interpretation, is willing to assert (or reject) an expanded view of arbitral jurisdiction, as well as the arbitrator's decisional history, temperament, or intellectual orientation on particular issues. Currently, as described in my earlier post, this information is typically collected through ad hoc, piecemeal individualized inquiries. Counsel usually rely on so-called "ISO" emails to gather this information, and follow up through individualized research and more personal phone calls to colleagues in the field to refine it.

There are several problems with this ad hoc, "ISO" methodology. First, individuals with the most essential insights on these critical questions are more likely to be candid and forthcoming if an inquiry originates from someone they know. The results are predictable. Leading arbitration specialists must undertake these time-intensive inquiries themselves to get the most full and accurate answer, and cannot farm them out to more junior colleagues with lower billing rates. If you are a party or counsel outside that elite group altogether, tough luck. Finally, even when senior partners make inquiries directly, however, there are limits. Memories can be faulty; assessments can be biased or self-interested; information can be outdated.

Increasingly, another problem has emerged—new, relatively unknown arbitrators. As the number and variety of disputes has increased, so has the number of arbitrators. Tracking down information on newer arbitrators, particularly from outside the well-known European and North American hubs, can be especially difficult.

The International Arbitrator Information Project would provide a more cost-effective, systematic, and equally accessible source for this critical information. It would gather this information through means designed to solicit reliable and useful feedback, specifically through structured questionnaires requesting substantive assessments on specific questions. By treating the effort as a research project as opposed to a potential for-profit product, and by involving academic institutions and arbitration trade organizations, the Project would ultimately aim to reconfigure how information about arbitrators is generated, disseminated, and used in arbitrator selection processes. Given the increasingly sophisticated empirical research being developed about arbitrators and arbitral decisionmaking patterns, it may also include cross-references to that research.

The Project undoubtedly raises a number of important practical and legal questions. Who would provide that feedback—counsel or parties? Could arbitrators themselves provide feedback, and would doing so be consistent with confidentiality obligations? How would the process control for the possibility of distortions by disgruntled losing parties and overly buoyant prevailing parties? Would feedback be publicly attributed to the person providing it? If not, how would contributors be accountable? How would the Project obtain arbitrator-specific information since most conduct is undertaken as a member of a three-person tribunal? How would confidentiality about the parties' dispute and arbitral

proceedings be protected? Could the Project be potentially liable for defamatory or otherwise improper postings?

There may also be some structural obstacles, such as a "collective action" problem and incessant "free ridership," meaning that narrow self-interest in maximizing their own information relative to others would deter parties and counsel from willingly participating. Moreover, some may be skeptical that, as so-called "rational actors," leading arbitration specialists might never agree to any mechanism that would threaten what some have characterized as a tight, monopolistic control over the market for arbitrator services. There are undoubted other challenges, in addition to those listed here, that would have to be overcome to implement the Project. These are not, however, insurmountable obstacles.

Several of the legal issues can be resolved by predicating participation on consent and support from the arbitration community. Arbitrator webpages would be created for those who consent to participate in the Project. Arbitrators might readily consent as an opportunity to build and enhance their reputations. As noted in my previous post, the Project would give newer arbitrators and arbitrators from outside the central North-American and European arbitration hubs a mechanism for developing and enhancing their reputations. Alternatively, parties—both commercial parties and States—could spur voluntary participation by indicating that they will select arbitrators from among those listed in the Project. Relatedly, parties are already consenting at ever-increasing rates to publication of awards as well as participation in various surveys about arbitration. For similar reasons, there might be reason to assume some general willingness to participate.

Whatever issues could be bridged through consent, there would still be a need for responsible, neutral editorial polices. The Project would have an editorial board comprised of leading international arbitrators, specialists, and party-users, as well as an outside advisory board comprised of representatives from arbitral institutions. The editorial board would set policies to ensure content is professional, credible, and germane. These editorial policies might include procedures for allowing responses and clarifications to particular posts, as well as standards and procedures for assessing and removing inaccurate or inappropriate material. The critical marker for any editorial policy or procedure would be how well it will ensure the Project provides information that is fair, neutral, and constructive.

No matter how well planned, the Project could only be successful if it were able to

garner broad support within the international arbitration community. The aim would be to encourage a professional norm that parties' and counsel commit to contributing useful, responsible feedback for the growth and legitimacy of the system. Such support could be encouraged by structural incentives. For example, party- or law-firm-access to the Project could be conditioned on agreement to provide information in the case for which information is sought. As noted above, pressure from parties would be essential, but they have the most to gain from increased transparency and accuracy in arbitrator selection, as well as reduced costs.

Organizations that provide collective representation for parties, such as the OECD or the Corporate Counsel International Arbitration Group, should realize that their constituencies have much to gain and encourage participation. Participating arbitral institutions, meanwhile, could encourage parties and counsel to contribute, most specifically by assisting in the distribution and collection of questionnaires, in exchange for institutional access to the Project. This offer might be particularly enticing to regional institutions, whose resources in this regard are more limited, but whose input and contributions will arguably fill information gaps that currently exist for major European and North American institutions.

Ultimately, I am optimistic about the potential for the Project. The international arbitration community has proven to be highly innovative community that is intensely concerned with its own legitimacy. As a result, it has been a largely responsible custodian of the procedures and standards that govern the conduct of proceedings. Meanwhile, parties have become increasingly active in recent years, insisting on measures to make arbitration more responsive to party needs, particularly in terms of efficiency and cost-effectiveness. The combined effect of these two features is that a range of competitive and cooperative forces have emerged within the international commercial arbitration community to induce a tempered, but voluntary and steady, march toward greater transparency, increased protections for fairness and impartiality, and more accountability. Support for the creation of the International Arbitrator Information Project would be a consistent and natural continuation of these essential trends.