

Kluwer Arbitration Blog

Free Riders or Collective Actors?

Catherine A. Rogers (Arbitrator Intelligence) · Wednesday, May 31st, 2017 · Arbitrator Intelligence

After several years in the planning, one year in the making, and many months in the testing, [Arbitrator Intelligence](#) (AI) will on 1 June 2017 launch its AI Questionnaire or “AIQ.” The formal unveiling will occur in Singapore at an event hosted by the Drew & Napier law firm, supported by the Singapore International Arbitration Center, and officiated by none other than AI Advisor Gary Born.

The idea behind the AIQ is relatively simple: to replicate the types of information parties currently obtain through ad hoc, person-to-person telephone inquiries. At the end of each case, AI will invite parties, with the help of arbitral institutions like SIAC, to provide objective information and professional assessments of arbitrators’ case management and decision making. When sufficient information is collected, it will be made available to the international arbitration community through “AI Reports.”

AI Reports will provide information about everything from arbitrator rulings on document production, to arbitrator questions during hearings, to their reasoning in arbitral awards, to their calculation of interest rates.

AI has already been identified as an important innovation that will benefit the arbitration community. James Hope called it a “welcome attempt to prevent such complacency on the part of some arbitrators” and the American Lawyer Magazine identified AI’s plans as an “immediate and market-friendly way to promote the diversity of decision-makers in all global arbitration.”

But there is one big question. And by “big,” I mean the entire success of the project hinges on this question: Will the international arbitration community pitch in to complete AIQs at the end of arbitrations? Despite the obvious and acknowledged benefits of data that will be collected through the AIQ, economists predict that projects like this, which require Collective Action, face an almost insurmountable Free Rider Problem.

Put simply, Collective Action requires that a large number of people work together (in our case, the by providing systematic responses to the AIQ at the end of arbitrations) to achieve some common objective (in our case, the production of sufficient collective data that AI Reports can be produced). But while each individual in the international arbitration community may share a common interest in accessing AI Reports, each also has a conflicting interest in hoarding their time or their insights.

Meanwhile, if individuals believe that the collective act will occur without their individual

contributions, then we have what economists refer to as a Free Rider Problem. Economists predict that individuals will take advantage of being able to use a common resource or collective good (in our case, the AI Reports) without paying for it (in our case, by not contributing any AIQ responses necessary to create those reports).

Contrary to economists' dire predictions, we believe that AI can inspire Collective Action and avoid the Free Rider Problem. What makes us so confident? We have at least five reasons.

1. People Crave Information about Arbitrators more than Chocolate

In a recent survey by the law firm [Berwin Leighton Paisner](#) on diversity in international arbitration found that 81% of respondents wanted to give feedback about arbitrators at the end of cases—that sounds like a pretty resounding expression of self-interest in acting in a way that also contributes to the collective good! In that same survey, 92% of respondents wanted more information about new and lesser-known arbitrators. Since when do 92% of people surveyed agree on anything?!?

By comparison, only [90% of people surveyed](#) globally like chocolate. While taking the AIQ may not be as tasty as sinking your teeth into a rich chocolate treat, we do believe the overwhelming desire both to provide feedback and to have information about arbitrators will make completing AIQs a rewarding experience in itself.

2. International Arbitrationists Already Defy the Economists

The international arbitration community has a long and distinguished history of engaging in collective action for the benefit the community and despite conflicting individual self-interests. One of the most poignant, and relevant, examples is the adoption and widespread use of the IBA Guidelines on Conflicts of Interest in International Arbitration.

Arguably, individual arbitrators have a compelling self-interest in narrow, ill-defined grounds for disclosure and disqualification. Nevertheless, in 2004 a collection of some of the brightest and most prominent arbitration specialists developed the Guidelines. They have since become an essential point of reference for parties, lawyers, arbitrators, and institutions.

In 2014, individual vs. collective good was reexamined when the IBA considered “advance waivers,” which make it easier for arbitrators to avoid cumbersome disclosure obligations and sometimes frivolous potential challenges. But again in the 2014 revisions, the drafters of the IBA Guidelines chose the collective good and legitimacy of the system over the individual convenience of arbitrators, even if most of the drafters also serve as arbitrators.

Particularly in light of what has been some exacting critiques of international arbitrators' lack of diversity and accountability, we believe the community will again rise to act collectively in supporting the AIQ.

3. AI Is Engineering Collective Action

AI is not leaving the potential for a Collective Action Problem to chance—we are actively engineering our way around it.

Virtually every survey faces the question of how to encourage responses. Several solutions from research into survey design and implementation are already incorporated into the AIQ.

For example, we kept response time for each Phase (there are 2 phases) to 15 minutes or less. We have also worked to make the AIQ easy to take—in Phase II, key data is prefilled and you can take either Phase of the AIQ on your mobile phone!

Meanwhile, research in the field indicates that people are more likely to respond to surveys when they understand the larger goals their responses will help support. AIQ will promote AI's general mission of increasing fairness, transparency, accountability, and diversity in the arbitrator selection process. See Reason 2, above.

Research also indicates that people are more likely to respond to surveys when they commit in advance to taking the survey. Borrowing from the remarkable success of The Pledge in respect to gender diversity, AI is inviting individuals, law firms, and parties to support and commit to responding to the AIQ by signing the "AI Pact." We will be inviting individuals, parties, and law firms, to sign on to Pact when it comes online in the coming days.

Finally, as it develops its AI Reports (anticipated to be available about 1 year from now), AI is also hoping to use proverbial carrots and sticks to encourage participation in the AIQ. AI is contemplating some means of rewarding responders to the AIQ with individual benefits (a free AI Report anyone?), or limiting access/charging more to those who use AI Reports in cases, but do not contribute AIQ responses at the end of those cases (Free Riders beware!).

4. Supporting the AIQ Is Good for Client Relations!

Parties and their in-house counsel have the most to gain from the AIQ and AI Reports. Parties always want greater confidence and predictability in arbitrator appointments. Systematically collected information and related data analytics will promote these goals, and potentially save money in the process.

Moreover, in-house and outside lawyers' interests are not always perfectly aligned in selecting arbitrators. AI Reports will facilitate more meaningful collaboration and objective analysis in the arbitrator selection process.

At our recent previews of the AIQ (hosted by law firms like WilmerHale, King & Spalding, and the North American Branch of the Chartered Institute of Arbitrators), it was clear that parties and in-house counsel are acutely aware of the potential benefits, and want to see the international arbitration community pitch in to generate this collective resource. So, make your client(s) happy by filling out an AIQ!

5. AI Already Has Collective Support

If you remain unconvinced about AI's ability to overcome the Collective Action Problem, take a look at our extraordinary [Board of Advisors](#). These individuals represent a spectrum of interests and perspectives. Collectively, however, what they have in common is that they are all leading voices with rich professional experience. They all, also, are committed to improving international arbitration and support AI.

AI has also received a tremendous outpouring of support from other sectors in the international arbitration community. Perhaps most notably, young and diverse practitioners regularly contact us to express support and volunteer to help because they see AI as opening up a future for them. Information and technology are great forces for democratization and development of a robust

meritocracy. New arbitrators see that these forces will help create greater opportunities for career development and they want to participate in those efforts.

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After our June 1 launch in Singapore, AI will be continuing rollout of its AIQ in various other venues, from Hong Kong and Kuala Lumpur to Peru and Mexico. Watch for us! Sign up for The Pact! And let's get those AIQ responses coming in!


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