

Arbitration Institutions: Five Things Your Website Must Do To Attract Cases

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Teresa Garcia-Reyes, Michael McIlwrath (General Electric Company)

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TO: Secretary General, Arbitration Institution

FROM: In-house counsel involved in a major contract negotiation

Madam/Sir,

We are both in-house litigation counsel for a large international company, and your institution was recently proposed for the disputes clause in an important contract. Since neither of us had any previous experience with your institution, we searched your website for information to help us determine whether to accept.

We had no trouble finding your arbitration rules. Unfortunately, we found almost nothing else to give us comfort on the quality and impartiality of their implementation. Therefore, we felt obliged to reject the proposal and recommend a different institution's rules in this particular contract negotiation.

This is not the first time this has happened. At least once a month, and at times more often, we reject a proposed institution due to the lack of basic information about how they operate.

Therefore, as we move into the new year, we decided to share our suggestions on how your website could be updated to make your institution easier to accept than to reject. Below are some of the most basic things we typically look for when we visit an institution's website, and we found that none of them were present on yours.

- **Names and relevant information about the leaders of your institution and/or its arbitration court.** This is the minimum level of transparency we expect to see. Information about who runs an institution will tell us much about its competency, international capability, and impartiality. You will have to forgive us for being suspicious when an opposing party proposes an unfamiliar institution that is not transparent about its leadership.
- **List of arbitrators.** Obviously, all parties crave some assurance that the institution will appoint impartial, competent arbitrators in the absence of party agreement. If you have a list, publishing it is the first step towards making a party like us feel more comfortable. From just a quick glance at the names, we can assess how international your list is (are the arbitrators predominantly local lawyers or from different countries?) and whether it is a modern, diverse list or a crusty fraternity. As you can imagine, we're reluctant to send significant disputes to an "old boys club" of which we are not members. And the more information that you provide beyond just names (such as the arbitrators'

expertise or information about how they manage proceedings), the more we are likely to feel comfortable accepting arbitration under your rules.

- **Quality assurance.** There are three areas of the arbitration process where quality can be an issue: the appointment of arbitrators, the conduct of the proceedings, and the drafting of the arbitral award. With respect to the first, very few institutions publish information about how they identify candidates for arbitrator (for example, how they select from their own lists) or vet their competency. For some institutions, we suspect that paying a fee or being a friend of the senior leadership are the only requirements for arbitrators to be added to their list; and failing to pay a fee or dying are the only ways to be removed. Therefore, if there are criteria you consider in order to add or remove names from your list of arbitrators, it is a pity not to mention this on your website. As to quality during the course of the arbitration, we found no provision in your rules nor any contact information on your website for raising concerns if a party thinks a case is not being managed properly. We suggest you consider making this addition, so that you can intervene to avoid bad experiences before they happen. With respect to awards, if you have a process for reviewing drafts for errors before they are published to the parties (scrutiny), your website should describe it and the people who are responsible for it.

- **Data on case load.** If this information is not in English, or if it is buried in a massive brochure in downloadable pdf format, we may never find our read it in the short time we have to assess an institution. We should be able to determine, with only one or two clicks, how many cases your institution has administered in recent years, the general nature of the disputes (commercial, real estate, sports, etc.), whether any were international, and average duration of proceedings.

- **Major initiatives.** We have found that people who work with dispute resolution institutions tend to be committed to the quality of justice in the communities they serve. As dispute professionals ourselves, we probably share many interests. For example, are you considering expedited arbitration rules, guidelines for efficient conduct of disputes, ODR rules, or combining mediation and arbitration? Have you made a commitment to diversity, and what are you doing as an institution to promote that commitment? Are you helping to educate the judiciary about arbitration? If your institution is doing good things, we would appreciate being able to read about them on your website.

There is nothing here that should be surprising or difficult, at least for institutions with good governance procedures and knowledgeable staff.

And yet many institutions, like yours, do not make any of this information available or easily accessible on their websites. As a result, we reject proposals to include them in our contracts, just as we recommended rejecting your institution in our company's current contract negotiation.

We recognize our letter may appear harsh. But please understand that we have had lamentable experiences with several other institutions over the years that did not promote quality, or lacked an appreciation of impartiality, or that simply were not equipped to administer an international case.

In fact, (former) secretaries general of other institutions have on two occasions boasted to us that their appointment procedures consisted entirely of appointing their friends, or calling their friends to ask for recommendations. In both cases, they believed this was a form of quality assurance. But ask yourself, if you had no other experiences with one of those institutions and were not a personal friend of its secretary general, would you accept to resolve disputes under its rules?

In dispute resolution, unfamiliarity gives rise to the perception of high risk. Yet there's an easy way to combat this. Assuming that you are running your institution to provide high quality dispute resolution, then being open about about how you are doing that – specifically, your governance and operations —

will instantly make you more familiar and, as a result, more attractive to parties.

In fact, you would even stand out in comparison with competing institutions that have yet to realize that transparency can help build their caseloads.