The Market for Arbitrators and The Market for Lemons

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Catherine A. Rogers (Arbitrator Intelligence, Inc.)

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Long before the now-popular phrase "pale, male, and stale," leading arbitrators were instead often referred to as a "club," a "cartel," or even a "monopoly." Those references were meant metaphorically, even jokingly. The irony is that they turn out to hold important truths that are promiscuously intertwined with the pale-male-stale moniker.

To understand both, we must first examine the Market for Arbitrators, and later the Market for Lemons.

The Market for Arbitrators

The market for international arbitrators is shaped by two defining features. The first is ***high barriers to entry***: it is **really hard** to become an international arbitrator. The second is profound ***information asymmetries***: it is **really difficult** to obtain information about arbitrators and not all participants have equal access to that information. Because most arbitration is confidential, parties must resort to person-to-person research about arbitrators' track records. That process is most effectively—but not necessarily most efficiently—conducted by big, repeat players.

Rapid growth in an industry usually triggers increased competition among various

players who vie for a larger share of the expanding market. International arbitration is a case in point: exponential growth in the number of international arbitrations intensely amplified competition among law firms, institutions, hearing sites, legal seats, universities, academics, and arbitration-related organizations.

International arbitrators, however, have been largely exempted from similar competitive pressures. Instead, we continue to see reappointment of a relatively small group of leading arbitrators who are already well-known. The reasons are barriers to entry and information asymmetries.

On the one hand, arbitrators face less competition from new market entrants. It is incredibly difficult for new and more diverse arbitrators to get their first appointments and even more difficult to establish professional reputations after that first appointment. Like established arbitrators, newer arbitrators' performance in their first arbitrations is unlikely to be discernable beyond the few participants in those arbitrations. Thus, even highly talented newcomers may remain obscure to the larger market and cannot provide meaningful competition for established arbitrators.

The need to grow the market for arbitrators, particularly by identifying talented newcomers, is particularly acute now as a wave of lower- and mid-value cases come out of the COVID crisis.

On the other hand, leading arbitrators with strong reputations are not necessarily incentivized[fn]This reference is not questioning the fact of arbitrators' professional integrity. It is instead a theoretical observation about their structural incentives.[/fn] to perform at their best. Even mediocre performance by an established arbitrator is unlikely to be discernable by other than those few participants in a particular arbitration.

And that brings us to the second part of this essay's title.

The Market for Lemons

The term "market for lemons" was first coined in 1970 by US economist George Akerlof in his Nobel-prize-winning article by the same name. In American slang, a "lemon" is a car that is found to be defective only after purchase. Akerlof's model

demonstrates that asymmetries between buyers and sellers about the quality of goods can cause deterioration in the market to the detriment of everyone.

Specifically, when sellers generally know of cars' defects, but buyers do not, the price buyers are willing to pay sellers will be reduced by the risk that they might be buying a lemon. Meanwhile, sellers will be willing to sell at the reduced price only if they are actually selling lemons because otherwise they will be selling perfectly good cars at a discount.

The result, Akerlof's theory predicts, is that sellers of quality cars will exit the market, eventually leaving only sellers of lemons, precipitating a downward price spiral, and potentially resulting in market collapse.

Now, to be clear, I am not accusing international arbitrators of being intentional monopolists or suggesting the kind of market collapse that Akerlof's model predicts. Having spent my career studying and working with international arbitrators, I know the vast majority of them have reputations that are hard-fought, well-earned, and highly deserved.

I am saying, however, that lack of diversity among arbitrators is at least partially the result of lack of information in the market and a resulting lack of meaningful competition for arbitrator services.

I am also hypothesizing that the cost of the few "bad apple" arbitrators (to mix my metaphoric fruits) is not limited to disappointment in a specific case. Yes, parties in a particular case may be disappointed by unwarranted delays, ill-preparedness, or insufficiently reasoned awards. But, consistent with Akerlof's model, an inability to identify in advance which arbitrators might raise such concerns may reduce confidence in *all* arbitrators. Information asymmetries about arbitrators, in other words, might at least partially explain the recent rise in publicly aired concerns about arbitrators and the related flurry of recent efforts to regulate arbitrators.

If I am correct that lack of diversity and some concerns about arbitrator conduct are at least partially a market problem, then what we need is a market solution.

That is what Arbitrator Intelligence provides.

Arbitrator Intelligence Reports

To understand how our Reports will affect the market, let's consider one of our first Reports on Roque Caivano.

You may not have heard of Caivano, but Chambers describes him as *"one of the most important commercial arbitrators in Argentina by far [and]…an excellent person, lawyer [and] very qualified and experienced in this area."* This tidbit may pique your interest in Caivano, but can you find colleagues who can provide details about his track record?

Our Report on Caivano provides feedback from 9 participants about 4 different arbitrations in which Caivano sat as an arbitrator, but which are not publicly available. It contains both factual information about these arbitrations, as well as evaluations from the participants. For example, one responder, when commenting on the efficiency of the proceedings, indicated "It was a fast-track arbitration. It only lasted 6 months. Very well organized."

Meanwhile, we also have a Report on Fernando Cantuarias, who is currently sitting on two ICSID annulment panels in *Teinver v. Argentina* and is often described as one of the leading arbitrators in Peru.

In our Report on Cantuarias, we have feedback from 25 participants regarding 19 non-public arbitrations. With more data, we can provide in Cantuarias' Report all sorts of fascinating insights that simply could never be assembled based on ad hoc individual research.

For example, of those arbitrations in which Cantuarias sat, Claimants had no recovery in 24% and recovered less than half of the amount sought in 47% of arbitrations. These numbers may help explain why the vast majority Respondent-affiliated participants reported that the award was more favorable than expected, while only 7% of Claimant-affiliated participants reported an award more favorable than expected.

Cantuarias' Report also reveals that the most frequent standard used to order document production by Cantuarias tribunals was narrow categories of documents (9/19 or 44% of cases) or individually identified documents (10%). Because it is difficult to evaluate these rates in the abstract, we provide baseline comparisons to other tribunals in Latin America-seated arbitrations that we have in our database. Thus, for example, in contrast to document production based on narrow categories of documents being ordered by 44% of Cantuarias tribunals, other Latin American-seated tribunals issued orders based on narrow categories in 20% of cases and based on individual documents in 25% of cases. Meanwhile, tribunals on which Cantuarias sat never ordered document production based on broad categories,

whereas 10% of other Latin American tribunals did.

That brings me to our Report on Mirjana Radović, an arbitrator from Serbia.

This Report is based on feedback from one participant in one Stockholm Chamber of Commerce construction case in which Radović sat as a Claimant-appointed arbitrator. Although much narrower in scope, the value of a 1-arbitration Report is roughly equivalent to one phone call.

Even if based on only one arbitration, the feedback in this Report suggests that Radović came to hearings prepared, as illustrated by the feedback that she asked questions that reflected good knowledge of the case and helped clarify legal and factual issues in the case. Feedback also described the procedural rulings by Radović's tribunal as promoting fairness and efficiency. Finally the award in that arbitration was rendered in 480 days from commencement of the arbitration and 99 days from the close of party submissions. These times are faster (and sometimes significantly faster) than other similar cases in our database.

The importance of smaller Reports like Radović's is that we do not need to wait until we have multiple sources of feedback before we can produce a Report. We can produce a Report as soon as we have feedback from one arbitration. That

means that key information about newer arbitrators can now be more readily available to parties and those newer arbitrators do not need to endure potentially long delays for feedback about their skills to be more broadly known.

The Market-Based Benefits of Change

Michael McIlwrath and I have long debated whether Arbitrator Intelligence Reports represent a natural evolution from existing trends or whether it is a disruptive innovation that will reshape the market. Although it is always fun to debate Michael, the truth is that we are both right.

Recent years have seen many different reform efforts to aid parties and counsel in arbitrator selection. These reforms include publishing arbitrator names on institutional websites, collecting publicly available awards, and planning for systematic publication of redacted awards.

Although our Reports are part of this natural evolution, our unique platform to collect information through our specialized Arbitrator Intelligence Questionnaire or AIQ represents a dramatic advance in transparency and reduction in information asymmetries. These advances inure to the benefit of us all.

Benefits for Parties

Parties and in-house counsel are of course the biggest winners of this innovation. They benefit generally from the efficiencies noted above. But they also benefit by having an external source of objective information that enables them to engage in meaningful discussions about arbitrator selection with outside counsel, instead of relying blindly on recommendations.

Another potential benefit from our Reports is increased efficiency and efficacy in the process for selecting chairpersons, which also suffers from information asymmetries. Now, arbitrators proposed by an opposing party are often rejected immediately for no reason other than that their reputations are not known or easily knowable to the other parties. Parties are more likely to agree on proposed chairs—and thus avoid an institutionally appointed chair—if they start with a shared baseline of information about potential candidates.

Benefits for Law Firms

While some major law firms have fretted that our Reports may reduce their perceived value to clients, the reality is instead that our Reports will make their research and client advice more precise and efficient.

Consider, for example, how new issues such as rates of recovery, comparative evaluation of standards for document production, and approaches to awards of costs and fees can now be considered in arbitrator selection. Assessment of these considerations has until now been unthinkable because research is limited to a handful of anecdotal exemplars.

Imagine also if some of the proposed reforms are enacted to significantly limit reappointments by the same law firm, party, or third-party funder, or to limit or effectively preclude arbitrator interviews. Firms' institutional memories about arbitrators will be more limited and they will be less able to supplement those memories with direct interviews. Our Reports can fill potential gaps and may make it less necessary to ask arbitrators directly in interviews.

And, of course, law firms will always add value by supplementing and introducing a nuanced interpretation of the data and analytics in our Reports.

Benefits for Institutions

Institutions also benefit from our Reports. We offer our Reports for free to cooperating institutions that encourage their participants to provide us feedback at the end of their arbitrations. Information in our Reports can complement the information institutions have internally and supplement that information with data from arbitrators' performances in arbitrations administered by other institutions. This latter category of information is particularly valuable to newer, smaller, and regional institutions.

Benefits for All

By making information about arbitrators more readily available to all, Arbitrator Intelligence promises to help fix the broken market for international arbitrators and create more vibrant competition among arbitrators.

This forecast may seem ambitious, but we have concrete indications that suggest positive market changes are already happening.

SIAC, one of our cooperating institutions, provides notice in its Statement of Independence that it will be inviting counsel and parties to provide feedback at the end of the arbitration. Several arbitrators have told us that this notice about potential feedback was enough to keep them extra alert in conducting the arbitral proceedings and extra efficient in writing the award.

We all benefit when arbitrators are inspired to put in their best, including arbitrators themselves. The flurry of codes and other forms of regulation aim to improve arbitrator conduct, and even those sources concede that enforcement presents a tremendous challenge. Those who believe market-based solutions are superior to direct regulation should welcome our Reports as a market-based incentive for arbitrators to perform at their best. Moreover, by reducing information asymmetries, our Reports can create a more efficient Market for Arbitrators or avoid the pitfalls of a Market for Lemons.