Kluwer Arbitration Blog

The International Arbitrator Information Project: An Idea Whose Time Has Come

Catherine A. Rogers (Arbitrator Intelligence) · Thursday, August 9th, 2012 · Arbitrator Intelligence

As Rusty Park remarked, "[I]n real estate the three key elements are 'location, location, location,' … in arbitration the applicable trinity is 'arbitrator, arbitrator, arbitrator."' Empirical studies consistently verify that parties' ability to select arbitrators is one of the primary reasons they select arbitration as a means of dispute resolution. Parties also consistently vote with their feet by rejecting available options to have arbitral institutions or appointing authorities select arbitrators on their behalf.

Parties seek to actively participate in the arbitrator selection process—the ultimate form of forum shopping. The arbitral tribunal can, in the absence of party agreement, determine such pivotal issues as the seat of the arbitration, the choice and interpretation of substantive law, the availability of particular procedures (such as interim relief, joinder of third parties, witness examination, and document disclosure), the nature and extent of hearings, and the allocation of costs and fees. And, of course, the tribunal ultimately decides the substantive outcome of the case.

For these reasons, in a recent survey, 90% of respondents designated "reputation" as the single most important factor in selecting an arbitrator. In part, these respondents were inevitably commenting on an arbitrator's overall reputation for integrity, intelligence, and acumen. In addition, however, they were likely commenting on an arbitrator's reputation regarding particular sub-issues relevant to their specific case strategies. These issues might include whether an arbitrator is willing to allow or disallow certain procedures (such as those mentioned above), 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, and the like.

Although an arbitrator's capabilities in all these respects are critical, information with regard to specific arbitrators is not generally available through public sources. There is limited public information about many arbitrators. Moreover, the process for obtaining the piecemeal information that is available often resembles a cloak-and-dagger intelligence operation from a 1950s *film noir* than a modern process of information collection, management, and assessment.

The primary means counsel use to obtain information about prospective arbitrators are ad hoc research and personal inquiries—a lawyer's equivalent of sleuths' shoe-leather research to track down clues. Large law firms and corporations solicit general information from colleagues who have had recent experience with those in the pool of potential arbitrators. So-called "ISO" emails

are routine in large-firm litigation and arbitration practices. Information generated from these general inquiries is then followed up on, usually through individualized research and more personal phone calls to colleagues in the field.

Those doing the research hope the individuals they contact can provide the most accurate and specific feedback about arbitrators on issues that are most essential to the case at hand. Research also includes scouring academic works, judicial opinions that might be authored by (or comment on) an arbitrator, and those rarely published arbitral awards to glean insights about the arbitrator's decisional history, temperament, or intellectual orientation on particular issues. Given the stakes (and the players), it is a surprisingly low-tech process with an inherently hit-or-miss quality. It can also be quite expensive.

The nature and accuracy of information generated by any particular inquiry can vary depending on the identity of the person asking the question, the person responding, and the arbitral candidate. Opinions about arbitrators are based on individual perceptions filtered through experiences in particular cases. They are necessarily subjective, and they can be incomplete or outdated. More importantly, individuals' willingness to share candidly sensitive information about arbitrators may also depend on how well they know or trust the person making the inquiry. If someone were asked about a particular arbitrator, that person would necessarily be more willing to disclose unflattering information to someone whom the person knows well and trusts. The effect of this individualized sorting of inquirers is that, at least hypothetically, counsel for opposing parties in the same arbitration could pose the same inquiry about the same candidate to the same person, but receive different responses!

Economists call this phenomenon "information asymmetry." An information asymmetry exists when one party to a transaction has superior information that can be used to that party's advantage in the transaction. The information asymmetries in the market for arbitrator services may be uniquely severe because it is a largely closed system, largely private, and non-transparent. In other ways, they resemble information asymmetries in other contexts. For example, information asymmetries about arbitrators tend to favour insiders and larger, well-funded parties, and tend to undermine the efficient functioning of the marketplace. As noted above, sources are likely to be more forthcoming about arbitrators in response to the inquiries from known colleagues, which often means senior arbitration experts—whose billing rates can exceed $1000/hour. The fact that they are in the best position to obtain the most accurate feedback keeps both the information within a relatively small circle of insiders and the cost of obtaining that information very high.

Apart from abstract economic arguments, using ad hoc personal inquiries to piece together an arbitrator's reputation is a bizarrely outdated technique in the modern Information Age. For virtually every other product or service, technology provides consumers with all manner of information, often neatly collated, searchable, and with multiple points of relevant comparison. Take the trivial example of a $25 book purchase on Amazon.com. In deciding whether to add that book to a virtual shopping cart, a consumer can access professional reviews, sometimes hundreds of reader reviews, recommendations of similar books, competing price options, evaluations of the vendor's reliability, and the like. Meanwhile, innumerable websites have popped up offering collective evaluations of various service providers, from doctors, lawyers, accountants, and law professors, to hair stylists, plumbers, and palm readers. For many of these websites, the service providers being evaluated not only participate willingly, but regard it as a means of building their reputations among a wide audience. Yet, international arbitrator shoppers still treat the process like an information scavenger hunt.

Perhaps the time has come for an International Arbitrator Information Project, a resource to provide reliable one-stop-shopping for information about arbitrators. The Project would collect and provide instant electronic access to all available and relevant awards, publications, judicial opinions, and commentaries about individual arbitrators. It would also include a mechanism for providing feedback about arbitrators. The challenge will be to solicit reliable and useful feedback, and avoid feedback that resembles the gripes that disgruntled customers cram into grocery store comment boxes. Constructive and reliable information about arbitrators will be sought primarily through questions addressing the specific issues that are currently pursued through ad hoc inquiries. Judicious editorial policies and procedures will provide safeguards against unprofessional postings and disclosure of confidential information.

Developments in recent years may signal that the international arbitration community is ready for the Project. State parties in investment arbitration have become more assertive. They are less tolerant of information asymmetries that systematically benefit law firms and arbitrators, but increase the cost of arbitrator selection and potentially disadvantage parties in particular cases. In addition, many new arbitrators have been introduced into the international arbitration community from regions that are customarily outside of the traditional core of international arbitration practice. With respect to these newer recruits, Anglo-American and Euro-centric law firms and companies may find themselves on the losing end of information asymmetries.

Arbitrators may now also be seeing the advantages of feedback. Arbitrators are coming under greater pressure from parties and arbitral institutions to demonstrate efficiency and value for the considerable sums paid for arbitration services. One bad-apple arbitrator can undermine perceptions about the performance of the entire tribunal. On the other hand, the mere potential for feedback may act as a deterrent for an errant arbitrator. It may also be a remedy for the other members of a tribunal to differentiate themselves and avoid being collectively impugned. Weeding out “bad” arbitrators may also increase the potential for appointments by “good” arbitrators. Moreover, publicly available feedback may allow more junior arbitrators, women arbitrators, and arbitrators from outside the traditional international arbitration hubs to establish strong reputations and increase their chances of appointment.

Finally, arbitral institutions may also benefit from more publicly available information about arbitrators. Currently, if an arbitral institution knows about serious past misconduct by an arbitrator, it has limited options. It can avoid appointing that person when it acts as an appointing authority or remove it from its list of arbitrators (if it is an institution that maintains such a list). An institution cannot, generally, advise parties about this information as the parties select the arbitrators who will preside in their case. An arbitral institution, nevertheless, suffers when it administers an arbitration that goes awry because of arbitrator misconduct or ineffectiveness. With increasing competition among them, arbitral institutions may welcome the opportunity to reduce appointments of ineffectual arbitrators through increased publicly available information.

With all these potential benefits, and cognizant of the many challenges that remain, perhaps the time has come for the arbitration community to support the launch of the International Arbitrator Information Project.

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