

Kluwer Arbitration Blog

Piloting Arbitrator Intelligence

Catherine A. Rogers (Arbitrator Intelligence) · Thursday, April 10th, 2014 · Arbitrator Intelligence

On this blog, I have previously ([here](#) and [here](#)) questioned existing practices for how arbitrators are selected and argued that a new approach is both necessary and long overdue. To briefly recap those previous posts, the selection of arbitrators is one of the most sensitive and critical moments in an arbitration. Arbitrators not only decide substantive outcomes of disputes, but also are vested with extraordinary discretion to determine a range of issues that affect how the arbitration will proceed—from the scope of arbitral jurisdiction, to how the applicable law is selected, to the procedures for adducing evidence, to the availability of interim relief, to how costs and fees are awarded. Selecting the right arbitrators, in other words, has profound implications for both the arbitral process and its outcomes. Not surprisingly, therefore, parties spend considerable energy and resources trying to select just the right arbitrators.

Despite the importance of good intelligence in the process of selecting arbitrators, the most valuable sources of information about arbitrators are often not easily or equally available. On the one hand, ostensibly public information—such as cases, publications and articles—can be difficult to find. On the other hand, the most critical source of information—the ad hoc, anecdotal commentary practitioners collect person-to-person through individualized inquiries—is available almost exclusively to a core group of insiders who have the most direct and extensive knowledge about arbitrators. This information provides invaluable insights about how arbitrators will manage the tremendous discretion they exercise in the course of resolving a dispute. Moreover, those core insiders are, as a matter of human nature, more likely to share detailed and nuanced insights with other insiders they know well than with strangers. The result can be lopsided access to critical information during the process of constituting an arbitral tribunal.

This kind of imbalance potentially undermines the neutrality of the tribunal and perceptions of the legitimacy of the process. Notwithstanding these stakes, the international arbitration community has been slow to re-imagine or reassess the arbitrator selection process. Several trends are pressing the international arbitration community to move now. The number of arbitrators, parties and counsel entering the system are increasing, and their demographics are more diverse. These developments increase the need for a more reliable and equally accessible supply of information than the current word-of-mouth approach. Moreover, in-house counsel are seeking to play a more active role in selecting arbitrators and even traditional law firms are trying to find ways to obtain more and better information about arbitrators.

The solution, as I have proposed in earlier blog posts ([here](#) and [here](#)) and in my forthcoming book, *Ethics in International Arbitration* (Oxford University Press 2014), is an interactive not-for-profit

online resource to collect, organize and enable sharing of the collective intelligence that will be equally accessible to the entire international arbitration community. Although often mistakenly referred to as a “database,” it aims to be much more—an ushering in of a new way of thinking about how we select arbitrators. In more practical terms, the resource will facilitate a more sophisticated and informed selection process, equalize access to critical information, increase market-based accountability and enable potential new arbitrators to establish their reputations more efficiently and effectively. Information will include not only biographic details, but awards from cases in which arbitrators presided, publications, related commentaries and structured feedback from users and counsel. The resource’s new working title—*Arbitrator Intelligence*—reflects this broader ambition.

To initiate *Arbitrator Intelligence*, we will be launching a pilot project aimed at compiling a form of information that is quite valuable but not readily available: previously rendered, but as-yet unpublished, arbitral awards. Every time an award is sought to be annulled or recognized and enforced, the award is filed with a national court. While ostensibly publicly available, these court-filed awards remain largely unknown and inaccessible to most users of the system. They are like buried treasure that the pilot will seek to uncover and collect.

The pilot project will launch in June 2014 and run through December 31. Volunteers will be helped along by an interactive online platform whose central feature is a world map, where interested volunteers can click on their country to find a list of cases in which we believe court files may include an award. The site will also provide a forum for participants to supplement or correct information about existing cases and to contribute tips on how to find awards in different jurisdictions, as well as a place to share stories about how awards have been tracked down and, of course, a means of uploading PDF versions of awards into our award repository.

The goal of the pilot will be to collect in this less-than-6-month period 100 awards that have never previously been published. The 100-award goal is both modest and ambitious.

It is modest because it is only a fraction of the awards that may be available. We estimate that between 1000 and 1500 known court cases exist worldwide in which awards may be buried in court files. Anecdotal evidence suggests, however, that the known cases may be well-short of the full universe of national court cases in which awards exist. (The webpage will include a means for participants to supplement our list of cases with more cases in which awards have been filed). In addition to awards provided through searching of court filings, awards inevitably may also become available through other means, including voluntary publication by the parties or donations from organizations (such as law firms or NGOs) with awards already on file. Previously published awards will be separately collected by *Arbitrator Intelligence*, but they will not be counted toward the 100-award goal of the pilot project.

This seemingly modest 100-award goal is also ambitious even if it seems like a small number compared to the estimated number of awards that exist in court files. Most obviously, the entire enterprise of the pilot rests on the assumption that willing volunteers from around the world will take up the call and participate. The pilot is counting on large numbers of interested volunteers go down to local courthouses, excavate awards hidden in their files and submit the awards to the project. In some jurisdictions this task will be relatively easy, in others more difficult, and in still others impossible.

Even if the whole enterprise rests on an assumption of mass volunteerism, we are operating on

more than simple optimism. Over the past few years, literally dozens of unsolicited inquiries and offers of assistance have come in from arbitration practitioners from all over the world asking how they can help with the project. The pilot, in fact, was inspired by these inquiries and is an effort to capture and build on that momentum. It is a first step toward constructing a more ambitious and far-reaching mechanism to transform arbitrator selection into a process that is more efficient and systematic, as well as more fair, transparent and equally accessible. Many have expressed an active desire to help usher in that new future.

To that end, the pilot will also include several features to encourage and acknowledge participation. Contributors will be publicly acknowledged both on the website and (when they are eventually published) on the awards. Volunteers will also be eligible for prizes for categories like “the most difficult award to obtain,” “the most awards contributed by a single person or entity” and the like. Prizes will include leading professional arbitration publications, which several publishers, including Kluwer (yes, including a free copy of Gary Born’s treatise!), Oxford, Juris and LexisNexis, have generously agreed to contribute to the cause.

More information about *Arbitrator Intelligence* and about the pilot project will be forthcoming, both in this blog space and elsewhere. Stay tuned!

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