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Information about Arbitrators – An Empirical Assessment

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On 9 May 2018, the School of International Arbitration at Queen Mary University of London, in partnership with White & Case LLP, launched the 2018 Queen Mary/White & Case International Arbitration Survey: The Evolution of International Arbitration. As its title suggests, the survey sought to assess user perceptions of the evolution of key issues in international arbitration, both by looking at recent developments but also by challenging respondents to predict what the future of international arbitration might hold in store. The findings of the survey draw from an unprecedented pool of 922 questionnaire responses and 142 interviews.

One of the key topics addressed by the 2018 Survey is information about arbitrators. While based on the report of the Survey, this post aims to explore in a slightly greater depth the following four sub-topics mainly by resorting to the data collected during the Survey's research phase.

- **Most used sources of information about arbitrators**

Many people in the arbitration community would argue that the arbitrator selection process is probably the most important stage in an arbitration. What is one of the key features of arbitration—the parties' ability to participate in the arbitrator selection process, that is—thus turns into a significant responsibility for arbitration users and their external and in-house counsel. It was only natural, therefore, that we asked our respondents about the sources of information they call on when faced with the task of shortlisting and appointing their sole arbitrator or, more frequently, their respective co-arbitrators. Respondents were provided with a list of six options ["word of mouth", "from internal colleagues", "publicly available information (e.g., industry reviews, legal directories and other databases or review tools)", "arbitrator's own online profile", "from external counsel", "arbitral institutions", "other"] but were also free to add other sources.

The four most selected sources of information about arbitrators were: "word of mouth" (77%), "from internal colleagues" (68%), "publicly available information (e.g., industry reviews, legal directories and other databases or review tools)" (63%), and "arbitrator's own online profile" (55%). The top source of information in this ranking is reflective of the considerable competitive edge that some users and their counsel enjoy by being part of a network of sophisticated peers. Understandably, the quest for arbitrators is sensibly less of a challenge when one is able to collect all the necessary information about this or that arbitrator by simply making a few phone calls. In fact, as some interviewees have confirmed, in many instances the research on potential arbitrator candidates is done by merely making use of the internal resources of the organization, whether it

be a global law firm or a large multinational corporation. Indeed, several of the legal professionals that have been interviewed during the research for the Survey mentioned that, being mindful of this practice, their respective law firms are working on devising real databases with various types of data on the arbitrators that the firm interacted with. Needless to say, however, all this information would mostly be used for internal purposes only as the current perception among sophisticated counsel is that access to such data still constitutes a competitive advantage.

The in-house counsel subgroup reflected a markedly different outcome: 80% of respondents fitting this profile, listed "from external counsel" as their primary source of information about arbitrators. This heavy reliance of in-house counsel on the information and advice of external counsel is largely consistent with a similar finding of our 2010 Survey (p. 27).

It should not come as a surprise, then, that the second most selected source of information was "from internal colleagues". While this result is likely to reflect the rather high number of private practitioners amongst respondents,[1)] it also shows the considerable advantage enjoyed by practitioners who, by virtue of their position in large international law firms, have access to a sophisticated professional network in which intelligence on arbitrators is easily within their reach.

Arguably, there is a stark substantive contrast between these first two most popular sources of information and the following two, namely "publicly available information" and the "arbitrator's own online profile". What separates the two categories is, of course, public availability: while the two most popular sources suggest the idea of a closed network, inaccessible to users outside of it, the third and fourth sources are by definition made available to the public at large. The significant popularity of the two "public" resources may well serve to explain what has come to be known in the arbitration community as the *informational asymmetry*.´[2)] Indeed, there appears to be a troubling gap between, on the one hand, users and practitioners with easy access to arbitrator intelligence through their own internal or external network of peers and, on the other, less well-placed users and counsel who for various reasons are not in the position to make use of such readily available avenues. Understandably, then, those who fall into the latter category turn to publicly available resources for information about arbitrators. Indeed, both respondents and interviewees have commended the existence of public databases containing information on arbitrators (the ones that stood out were GAR's Arbitrator Research Tool and Arbitrator Intelligence).

- **Level of access to information about arbitrators**

There seems to be a general consensus in the arbitration community about the fact that users are in need for more—or, rather, for more easily accessible—information about arbitrators. What is more, this perceived lack of information seems to be on a lot of people's minds as almost every other arbitration-related conference features a panel on the topic. As more than nine out of ten respondents to the Survey indicated that international arbitration continues to be the preferred method of resolving cross-border disputes (p. 5, Chart 1), the practice of arbitration is expected to reach new heights in the foreseeable future. It would follow that the need for more proficient arbitrators will increase accordingly. In this likely scenario, the first signs of which are already manifest, access to relevant and reliable information about arbitrators becomes as important as ever. With this in mind, we asked respondents whether they were satisfied with their level of access to enough information to make an informed choice about the appointment of arbitrators.

It may come as a surprise to some that nearly three quarters of the total respondent pool (70%) responded in the affirmative (p. 21, Chart 20). Admittedly, it is likely that this high percentage is partly a reflection of the large number of private practitioners who participated in this study. That said, when results were broken down by respondents' primary role, some interesting variations surfaced. The full-time arbitrators' subgroup, for instance, reflected an even higher level of satisfaction: more than 80% of the subgroup indicated that they have enough information about their fellow arbitrators. Most notably, however, in the in-house counsel subgroup just over half of in-house counsel (57%) declared themselves satisfied with the level of information on arbitrators they have access to. This figure is particularly important in this analysis as in-house counsel, together with the companies they represent, are the end users and the central players of arbitral proceedings. It further reflects that information about arbitrators among arbitration users is scant and the need for more transparency in this regard has become obvious.

- **What other information do users want?**

Having established that there is certainly a perceived need among users of arbitration for more information about arbitrators, the survey sought to determine what kind of data would respondents like to have, or would like to have more of. Hundreds of respondents provided various answers to this enquiry but ultimately four recurrent themes emerged. It is perhaps noteworthy that all of these themes are in effect centered on the current and past professional engagements of the arbitrators.

By far the most sought-after pieces of information are prior decisions and awards rendered by arbitrators. Their relevance, respondents argue, is twofold. On the one hand, prior awards seem to be a window into the arbitrators' stance on various substantive issues. In order to make an informed choice, users want to have a clear picture of the arbitrators' prior experience in various industry sectors and to learn more about their views on this or that legal issue. As for the merits of a case, respondents were keen to know whether arbitrators have a predisposition to follow the strict letter of the law and its established understanding or, on the contrary, have shown openness to novel interpretations of the applicable statutes. On the other hand, and slightly more importantly, respondents found previous awards and decisions to be highly relevant for the information they contain on the arbitrators' procedural skills and preferences. Here, case management skills and the level of involvement during proceedings were often cited.

Respondents also showed interest in data that would indicate how busy the arbitrators are. To that end, users would appreciate any information that would reflect the number of ongoing engagements, including the number of cases in which the arbitrator is presiding.

However, no realistic proposals were advanced for how to address this issue effectively. Instead, a large part of the respondent pool cited arbitral institutions as the best placed stakeholders to take charge of the task. However, as several respondents and interviewees pointed out, this seemingly popular suggestion is not entirely feasible as a series of practical concerns would render its success doubtful (who would incur the significant additional costs? would institutions really have the qualified manpower to take on such a task? in niche industries with a scarcity of players, would parties really consent to publication of awards even in a heavily redacted version? etc.). Some are in fact convinced that this could be achieved only through a concerted effort made by everyone involved in the arbitral process.

- **Assessing the arbitrators**

The Survey set out to evaluate whether respondents would like to have the opportunity to provide an assessment of the arbitrators at the end of proceedings. The most popular answer speaks for itself: eight out of ten respondents indicated that they would. Some variations were noticeable in the subgroups based on primary role, however. While only 65% of full-time arbitrators stated that they would like to be able to provide feedback on their peers' performance, 90% of in-house counsel said that they would welcome the opportunity to provide an evaluation of arbitrators at the end of a dispute. The latter figure further reinforces the findings of the 2010 Survey which reported that three out of four corporations expressed the same view (p. 28, Chart 23).

On several occasions, the findings of the 2018 Survey underscore the key role played by arbitral institutions. By way of example, no less than 80% of respondents believe that it is the institutions that are best placed to influence the future evolution of international arbitration. These findings, however, must be read in light of the nuances provided by respondents and interviewees alike. Probably the most important qualification is that very few desired improvements can be achieved by arbitral centers alone and ensuring equal access to reliable information about arbitrators is surely not an exception.

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References

?1 Nearly half of respondents declared that their primary role is “private practitioner” and that the primary industry in which their organization operates is “legal”.

?2 See, e.g., C. A. Rogers, *A Window into the Soul of International Arbitration: Arbitrators Selection, Transparency and Stakeholder Interests*, 46 Victoria U. Wellington L. Rev. 1179 (2015).

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