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# Kluwer Arbitration Blog

## Generating Needed Information about Arbitrators, One Arbitration at a Time

Catherine A. Rogers (Arbitrator Intelligence) and José María de la Jara (Bullard Falla Ezcurra +) · Saturday, September 15th, 2018 · Arbitrator Intelligence

One of the most critical moments in any international arbitration is the appointment of arbitrators. As Rusty Park has explained, “just as ‘location, location, location’ comprise the three key elements in sustainable real estate value, so it has been observed that ‘arbitrator, arbitrator, arbitrator’ endure as the most critical factor in the integrity of any arbitration.”

Despite the vital importance of selecting the right arbitrator, there is a shocking paucity of information on the most relevant issues about arbitrators’ decisional history and their case management skills and predilections.

The disclosure of such information is generally treated as confidential and proprietary. Even now in 2018, it is generally assumed that the only way parties can obtain information about arbitrator decision-making is through confidential, off-the-record, person-to-person exchanges by their lawyers. Put more simply, arbitrator selection relies on 19<sup>th</sup> Century technology.

This method produces several negative consequences. First, the lack of information about arbitrators distorts the market for international arbitrators and makes it more difficult for diverse arbitrators to establish their reputations and, consequently, increase their likelihood of appointments. Particularly as we see some of the greatest case growth in regions like Latin America, Africa and the Middle East/North Africa, there is a clarion call for more arbitrators from these regions.

Second, lack of information about arbitrators undermines the predictability and efficacy of arbitrator appointments for the parties. No other aspect of corporate decision-making relies on such a collection of informal impressions and industry gossip instead of concrete data, research, and analysis. Why make an exception in such a critical context as the appointment of the person who

will decide the dispute?

These shortcomings in arbitrator selection are often treated as inevitable and inescapable because it is thought that the arbitration system is private and arbitral awards are generally confidential. In other words, the assumption in international arbitration has been that you could have either information about arbitrators or confidentiality, but not both.

Arbitrator Intelligence (AI) has hacked this seeming impasse. Through our AI Questionnaire (AIQ), we are using more modern technology to collect information about arbitrators while maintaining confidentiality of arbitral proceedings and outcomes. The AIQ collects key information about arbitrations, but does not retrieve information that would reveal the identity of the parties. We also ensure the anonymity of the contributor of the AIQ, but we verify the authenticity and experience of contributors through a separate registration process. Data analytics based on this information will soon be available in our forthcoming Arbitrator Intelligence Reports, to be distributed by [Kluwer](#).

While it remains to be seen what this information hack will mean to international arbitration, there are many reasons to believe it will produce important changes.

First, information alone can be an important, market-based tool against corruption. In other contexts, certainly information and transparency has been demonstrated as an effective means of both deterring corruption and increasing the possibility that corrupt practices will be exposed. For example, Brunetti and Weder<sup>1)</sup> investigated the relationship between freedom of press and corruption in 68 countries. Based on their research, they predict that if Nigeria had the same level of freedom of information as Norway, its level of corruption would drop precipitously.

Second, information can break the diversity paradox. Most arbitration practitioners say they are supportive of increasing diversity among arbitrators, but do not themselves appoint diverse arbitrators. One important reason is that they do not have sufficient information about newer and more diverse arbitrators. As a [Bryan Cave Leighton Paisner survey](#) demonstrated, 92% of respondents wanted more information about newer and more diverse arbitrators.

Third, information will make arbitrator selection for parties and arbitral institutions more efficacious and the market for arbitrators more functional. More information would necessarily allow parties to make more informed choices as among established arbitrators, and open up opportunities for young arbitrators, more women and people from regions outside North America and Europe.

In these respects, Peru represents a particularly important example. To create a functional alternative to the often-corrupt Peruvian courts, a (relatively) new Peruvian law requires that all disputes arising under State contracts be submitted to arbitration.<sup>2)</sup> Another recent Peruvian law expressly permits the appointment of foreign arbitrators in domestic arbitration.<sup>3)</sup> Together, these reforms are important innovations based on the promise that a well-functioning arbitration market could provide a much-needed form of reliable dispute resolution. These reforms have also, not surprisingly, led to a virtual explosion in the number of arbitrations.<sup>4)</sup>

In light of its regional importance, AI, in collaboration with the [Bullard Falla Ezcurra+](#) law firm and the [Lima Chamber of Commerce Arbitration Center](#), organized a “Flash Campaign” in July to collect AIQs on Peruvian arbitrators. The campaign involved recruiting mostly young practitioners interested in doing something concrete to promote diversity and reduce corruption.

In the brief two weeks of the Campaign, Arbitrator Intelligence received over 30 AIQs, 28 of which were seated in Lima, Peru. Because most AIQs involved 3-person tribunals, responses provided information about 60 instances of arbitrator conduct and decision-making in different sectors (construction, energy, insurance, among others). These AIQ responses included arbitrations administered by different institutions (Lima’s Chamber of Commerce, AMCHAM, Ad-hoc, CIAC, among others).

The AIQs asks a range of questions, from dates and dollar amounts, to arbitrators’ interpretive methodology, their responses to requests for documents or interim relief, and the quality of questions during hearings. The AIQs do NOT ask for the names of the parties or the law firms, or the identity of the person completing the AIQ. In this way, through the Flash Campaign, we collected a lot of information about arbitrators, but maintained the confidentiality of the arbitrations.

The Flash Campaign also demonstrated the critical importance of engaging young arbitration practitioners. Over 23 young Peruvian practitioners participated in the Flash Campaign, inspired both by the potential to do their part to increase diversity and reduce corruption. They were also incentivized by some tantalizing prizes. Sandro Espinoza won 1<sup>st</sup> place and a plane ticket to the United States for Penn State International Arbitration Day, which will focus on Latin America.

Meanwhile, Mayra Bryce and Carla de los Santos tied for 2<sup>nd</sup> Place, and were awarded signed copies of Gary Born’s treatise, *International Arbitration: Law and Practice* and Catherine Rogers’ *Ethics in International Arbitration*.

AI is taking this information gathered from the Peru Flash Campaign to develop a AI Reports, which will analyze the information collected about an arbitrator. As with the AIQ, in the process of developing the prototype AI Report, we will be seeking input from selected experts as well as the general public.

In the meantime, you can also get directly involved in efforts to hack the information gap. Arbitrator Intelligence, together with the Bullard law firm, will soon be seeking to replicate the success of the Peru Flash Campaign in various regions.

Starting with Latin America, AI is in the process of recruiting AI Ambassadors for on Brazil, Colombia, Argentina, Chile, Mexico, Costa Rica, Guatemala, Panama, Ecuador and Peru. These AI Ambassadors will reaching out to lawyers, law firms, arbitration centers, young international arbitration groups, and parties to participate in the new AIQ Campaign in Latin America. In comparison to the Peru Flash Campaign, in the new LatAm AIQ Campaign, the number of participants will be bigger, the time longer, the prizes better, and the number of AIQs collected much higher.

Stay tuned, because we will soon have a call for Ambassadors in the MENA region.

AIQ responses collected during these AIQ Campaigns will help shine a bright light on arbitrations in these regions, on the institutions that administer them, and the arbitrators who decide them, all while maintaining the confidentiality of those same arbitrations.

If you are in Latin America, you can [apply now to be an AI Ambassador](#), and a call for Ambassadors in MENA will be coming soon.

If you are not in these regions, you can still help us bridge the information gap in international arbitration. Just take a few minutes to fill out an AIQ at the end of your next arbitration!

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### References

- ?1 Brunetti, Aymo & Weder, Beatrice. “A free press is bad news for corruption,” *Journal of Public Economics*, Elsevier, vol. 87(7-8), 2003, pages 1801-1824.
- ?2 Article 45.1, Legislative Decree N° 1341 amending the Law N° 30225 of state contracts: “Disputes arising between the parties regarding the execution, interpretation, resolution, non-existence, ineffectiveness or invalidity of the contract are resolved, through conciliation or institutional arbitration, according to the agreement of the parties. The regulation defines the exceptional cases for recourse to Ad Hoc arbitration. Disputes over the nullity of the contract can only be submitted to arbitration”.
- ?3 Article 1, Legislative Decree N° 1231 amending article 20 of the Legislative Decree N° 1071 regulating arbitration: “The natural person who is in full exercise of their civil rights may be an arbitrator, provided that they have no incompatibility to act as an arbitrator and have not received a final criminal conviction for an intentional crime. Unless otherwise agreed by the parties, the nationality of a person will not be an obstacle to acting as arbitrator”.
- ?4 Contraloría General de la República. “El Arbitraje en las Contrataciones Públicas durante el periodo 2003 – 2013”, page 123: “In relation to the average annual growth rate of the arbitration awards, we have that for the period 2003-2008 this was 3%; while for the period 2009-2013 it was 25%”.

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