

Transparency in Arbitration

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A Practice Note addressing the steps that several arbitration organizations have taken recently to improve transparency in the arbitrator selection process and the arbitral process. It also describes other recent initiatives of academics and practitioners to promote transparency, accountability, and diversity in arbitration.

SCOPE OF THIS NOTE

Businesses facing international disputes have an increasing range of options to resolve them beyond national courts in the US and the UK: mediation, arbitration, and courts functioning in English in the Netherlands, Germany, Belgium, France, Dubai, and Singapore (see Report of the Legal High Committee for Financial Markets of Paris (HCJP), dated May 3, 2017, § 7). International arbitration remains a key means of resolving international disputes but it has reached the end of an era in which users and potential users perceived international arbitrators as a club limited to a small group deciding cases in ways known only to the other members of the club. To retain its legitimacy and pre-eminence, arbitration has begun to offer enhanced transparency about arbitrator selection and the arbitration process.

The more visibility into institutional decision-making processes and, by extension, decision-makers, the more likely it is that potential users of international arbitration will view the arbitral process as reliable and legitimate (see Heunsik Park & John Blenkinsopp, *The roles of transparency and trust in the relationship between corruption and citizen satisfaction*, 77(2) Int'l Rev. of Admin. Sciences 254 (2011) (reviewing the literature on transparency and finding that transparency and trust play a substantial role in curtailing corruption and enhancing citizen satisfaction)).

Several arbitration organizations and other prominent entities have initiated projects to foster greater transparency and overall

confidence in the system and its outcomes. These projects complement each other and offer an independent lens into the arbitral process. Institutional initiatives have primarily focused on arbitrator selection and removal. Other projects, such as Queen Mary University's Arbitrator Intelligence, have been working to offer objective data on arbitrators.

The best window into arbitrators' or judges' approach to decision-making is the awards and decisions themselves. However, international commercial arbitration awards generally are not publically available except to the extent that there have been judicial confirmation or vacatur proceedings. Even these may be difficult to access. These developing projects are the next best thing to having access to the actual awards.

Imposing greater pre-appointment disclosure requirements on arbitrators about the number of concurrent appointments allows parties to assess whether an arbitrator is likely to have enough time to focus on their arbitration. Increased transparency in arbitrator selection is also likely to have the benefit of improving diversity among arbitral tribunals. Without access to information about new or lesser-known arbitrators, parties to arbitrations tend to select well-known and frequently appointed arbitrators.

An increasingly frequent complaint is that this system reinforces the appointment of primarily older white males with a lengthy track record, hindering the participation of women, minorities, younger lawyers, and other more recent entrants to the world of arbitration. A growing body of literature suggests that more diverse groups in any human endeavor make better decisions than monolithic ones. If biographical and experience information about lesser-known arbitrators is as equally accessible as information about well-known arbitrators, users are likely to feel more comfortable appointing new faces. Diversifying arbitral panels might also create more interest in using arbitration in the first place, if the parties perceive that at least one tribunal member will be similar to them.

The international arbitration community has come a long way in shedding light on the arbitral process. Artificial intelligence is the next frontier that will transform the world of arbitration in the same way it has already begun to transform litigation. Many companies and users of dispute resolution services worldwide have begun to

focus on predictive justice, tools based on algorithms, and large amounts of data that improve predictability and efficiency and help settlements. For example, in the US these tools help better understand the approach federal judges take with decision-making and offer statistical data about damages and attorneys' fees (see Lex Machina, Patent Litigation). In France, startups, such as Case Law Analytics, have begun to use artificial intelligence to predict outcomes and help settlements in certain business disputes (Le Monde, Des « juges virtuels » pour désengorger les tribunaux, January 1, 2018). Just as companies and users seek increased efficiency and predictability in the resolution of lawsuits, they will expect the same in international arbitration.

This Note addresses the steps that arbitration organizations have taken recently to improve transparency in the arbitrator selection process and the arbitral process. It also describes other recent initiatives of academics and practitioners to promote transparency, accountability, and diversity in arbitration.

EFFORTS OF ARBITRATION INSTITUTIONS TO IMPROVE TRANSPARENCY

THE INTERNATIONAL BAR ASSOCIATION

The International Bar Association took a major step toward transparency in 2004 when it announced its Guidelines on Conflicts of Interest in International Arbitration (the Guidelines).

General Standard 3 of the Guidelines sets out the standards that govern an arbitrator's impartiality and independence obligations and require certain disclosures. General Standard 3 requires the arbitrator to disclose any facts or circumstances that may "give rise to doubts regarding the arbitrator's impartiality or independence," including, for example:

- The relationship between the arbitrator or the arbitrator's firm, or both, to a party or an entity that has a pecuniary interest in the award.
- The relationship between the arbitrator and the dispute, including whether the arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties and whether the arbitrator had a previous involvement in the dispute.
- The arbitrator's direct or indirect interest in the dispute.
- The arbitrator's relationship with the parties or counsel.
- Previous services provided by the arbitrator or the arbitrator's firm for one of the parties in the case, including whether the arbitrator has been appointed on two or more occasions by one of the parties or an affiliate of one of the parties and whether the arbitrator currently serves or has served within the past three years as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.
- The relationship between arbitrators.

"[A]ny facts or circumstances that may be relevant in [the parties'] view" should be disclosed by a prospective arbitrator before the acceptance of the appointment or after that if the arbitrator learns of them after being appointed (Guidelines General Standard 3(a)). The duty to disclose is ongoing (Guidelines General Standard 3(b)). Disclosure of this information by a prospective arbitrator before

accepting the appointment, particularly concerning the number of previous appointments by a party or law firm, provides one potential avenue to obtain the type of information that is likely to boost parties' confidence in the fairness of the arbitral process.

Arbitration institutions have recognized that transparency promotes confidence in the arbitration process and predictability and can help dispel the concern that international arbitration "is limited to a small and closed circle of players of unknown identity" (see José Ricardo Feris, *New Policies and Practices at ICC: Towards Greater Efficiency and Transparency in International Arbitration* ICC Bulletin, at 9). Many major arbitration institutions have recently taken steps to promote transparency.

AAA/ICDR

The American Arbitration Association (AAA) and the International Centre for Dispute Resolution (ICDR) have taken steps recently to enhance transparency in arbitrator selection. In 2013, the AAA introduced the Arbitrator and Mediator Search Platforms, which allows users to search its complete roster of arbitrators and mediators. The roster includes more than 6,000 arbitrators. It is searchable by key words, which makes it possible for users to conduct targeted searches for potential arbitrators by areas of expertise, geographic areas, languages, and background. The ICDR, the international arm of the AAA, has made its own international roster available for similar searches in 2017. That roster includes approximately 750 international arbitrators. This tool allows parties in cases filed with the ICDR to conduct extensive due diligence about possible arbitrators. A growing number of users take advantage of this resource.

The ICDR has signed the Equal Representation in Arbitration Pledge to ensure, whenever possible, that:

- "Gender statistics for appointments (distinguishing those made by parties from other appointments) are collated and made publicly available."
- "A fair representation of female arbitrators will be appointed."

In many cases, AAA and the ICDR also assist the parties in selecting an arbitrator. These institutions conduct an administrative conference by phone with the parties at the beginning of each arbitration to obtain, among other topics, their input on the desired qualifications of the arbitrators. The AAA or the ICDR then provides a list of prospective arbitrators and their biographies to the parties with a deadline for each to state their preferences. AAA's Enhanced Neutral Selection Process offers the opportunity to the parties to jointly interview potential arbitrators on these lists or ask them for an agreed set of written questions (see *The Top 10 Ways to Make Arbitration Faster and More Cost Effective*).

The AAA has also established an Administrative Review Council (ARC), an executive-level, administrative decision-making authority to resolve certain issues, such as challenges to arbitrators. AAA has publicized its standards for removing arbitrators. From 2013 through 2016, the ARC has reviewed 743 issues, including 517 arbitrator challenges. The ICDR is expected to launch its own version of ARC in 2018.

The AAA and the ICDR also make information about the costs and duration of proceedings publicly available. Among other things, they have indicated that the median time to render an award in a case

in which the amount in dispute ranges between \$1 million and \$9.9 million is 414 days. In a typical ICDR arbitration, the target length is approximately 11 months.

THE ICC

The International Chamber of Commerce (ICC) has recently taken steps to increase transparency in several areas. In January 2016, the ICC began to publish information about arbitrators in pending cases. This information is available on the ICC's website and focuses on arbitrations registered on or after January 1, 2016, in which the Terms of Reference have been established. Unless the parties have opted out of publication, the ICC's website identifies:

- The names and nationality of arbitrators.
- Their role as sole arbitrator, chair, or co-arbitrator.
- Whether the arbitrators were appointed by the ICC Court or the parties.
- Whether the arbitration is active.

This information shows, among other things, that in 2015 the ICC Court made 1,313 appointments and confirmations of arbitrators, which involved 907 arbitrators from 77 countries. This information draws attention to a broad group of potential arbitrators and helps foster diversity by identifying arbitrators who otherwise are likely to have remained unknown. The ICC Court has signed the Equal Representation in Arbitration Pledge.

To protect the confidentiality of the arbitral process, the information on the ICC's website does not include case-specific information, the economic sector or industry implicated in the arbitration or the arbitrator's approach to decision-making.

As of 2017, the ICC issues a letter to the parties, on request, outlining the reasons for certain of its decisions. This reflects a policy change of the ICC on the communication of reasons for certain internal decisions, including decisions on challenges of arbitrators, and is reflected in Rule 11(4) of the ICC Rules. The ICC began to change its policy in 2012.

The ICC has also increased transparency about the costs of arbitration. The ICC's administrative expenses and arbitrators' fees are based on the value of the claims in each case. Accordingly, on October 10, 2017, the ICC published Notes to Parties and Arbitral Tribunals on the Conduct of Arbitrations which provides guidance on the costs of arbitrations concluded before the issuance of a final award (see ICC, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration).

The ICC has also made efforts to increase transparency in other areas, such as time limits to render awards and guidance on the disclosure of conflicts of interest. For more information, see José Ricardo Feris, *New Policies and Practices at ICC: Towards Greater Efficiency and Transparency in International Arbitration*, E-Chapter, ICC Dispute Resolution Bulletin 5 (2016).

CPR

The International Institute for Conflict Prevention and Resolution (CPR) has similarly increased its efforts to promote transparency in arbitration. CPR's Due Diligence Evaluation Tool was launched in

2010. This tool contemplates that lawyers representing parties to an arbitration can conduct due diligence on arbitrator candidates by interviewing lawyers recently appearing before the prospective arbitrator. The tool provides users with a grouped listing of potential questions for use in connection with the interviews that are specifically designed to help a more informed evaluation of potential arbitrator candidates. Topics covered by the tools include, for example, the nature and complexity of the arbitrations and mediations in which the candidate has served as well as the candidate's prior performance (for example, preparedness, disposition, and effectiveness).

Virtually all of CPR's appointments are made by the parties with the list/ranking process. During that process, the parties are provided with information regarding the potential arbitrators' availability, disclosures, and rates. CPR can also query the candidates with additional questions the parties may have and provide answers to the parties during the selection process.

CPR has signed the Equal Representation in Arbitration Pledge. Several years ago, CPR also launched the Diversity Commitment to encourage signatories to "actively support the inclusion of diverse mediators and arbitrators in matters to which we are a party or counsel" (see <https://www.cpradr.org/strategy/committees/diversity-task-force-adr>).

OTHER LEADING ARBITRAL INSTITUTIONS

Leading arbitral institutions that administer both commercial and investment arbitrations have taken steps toward transparency. For example, in 2006 the London Court of International Arbitration (LCIA) became the first leading arbitral body to adopt a rule requiring it to provide reasons for its decisions on challenges to arbitrators and to publish abstracts of its decisions on challenges. Most recently, the Singapore International Arbitration Centre (SIAC) Rules 2016 provides that decisions "on any challenge to an arbitrator under this Rule 16 shall be reasoned, unless otherwise agreed by the parties" (SIAC Rule 16). The Stockholm Chamber of Commerce (SCC) provides reasons for its decisions on challenges to arbitrators as of January 1, 2018 (see SCC Board to Provide Reasoned Decisions on Arbitrator Challenges). The Hong Kong International Arbitration Centre (HKIAC) has not yet enacted a comparable rule that requires the provision of reasons, but is instead discretionary on this point (see HKIAC Practice Note on the Challenge of an Arbitrator).

In 2015, the LCIA issued a report on costs and duration data relating to the proceedings administered under its rules. The SCC similarly published a report that focuses on the costs of commercial arbitrations and the manner in which SCC tribunals apportion these costs based on the outcome of the case. The report describes how party conduct influences both the tribunal's apportionment decisions and the recoverability of costs. There is also an HKIAC report and a SIAC report regarding the costs and duration of arbitrations they administer.

INVESTOR-STATE ARBITRATIONS

In July 2014, the United Nations Commission on International Trade Law (UNCITRAL) adopted the Mauritius Convention on Transparency (see Legal Update, Mauritius Convention on Transparency set to

enter into force with Swiss ratification ([W-007-6954](#)). Under the Mauritius Convention, parties to certain investment treaties consent to apply the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and do so using a Transparency Registry. The Transparency Registry is searchable by keyword, respondent (that is, a State), treaty, and economic sector. For each matter included on the registry, the database provides information about the outcome, the parties, and links to relevant documents, including awards. The content sought to be captured on the database is robust, but the overall collection of data is too small to provide any meaningful insight into particular arbitrators and their decision-making process and trends. In part, the available data is limited by virtue of the database's limitation to treaty-based investor-state arbitrations. It began only in 2014.

The UNCITRAL Transparency Rules include important "exceptions to transparency" that pertain to "confidential or protected information" and to the "integrity of the arbitral process." In particular, they define as "confidential or protected information:"

- Confidential business information.
- Information that is protected against being made available to the public under the treaty.
- Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State and, in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of this information.
- Information that if disclosed would impede law enforcement.

(UNCITRAL Transparency Rules, art. 7(2).)

Under Article 7 of the UNCITRAL Transparency Rules, the arbitral tribunal, after consultation with the disputing parties, makes arrangements to prevent confidential or protected information from being made available to the public. The rule provides a special exception for the State parties to prevent disclosure of information that a State considers "to be contrary to its essential security interests." Article 7 recognizes a series of "exceptional circumstances" that warrant restraint or delay in the publication of information where this publication would "jeopardize" the integrity of arbitral process.

EFFORTS OF PROMINENT ACADEMICS AND PRACTITIONERS IN THE ARBITRATION COMMUNITY TO ENHANCE TRANSPARENCY

Academics and practitioners in the arbitration community have also been developing publicly available tools to advance the goals of transparency and predictability in arbitration.

ARBITRATOR INTELLIGENCE

Arbitrator Intelligence (AI), launched in 2015 after a successful pilot, is a non-for-profit project of Queen Mary University and Penn State. Its mission is to promote transparency, fairness, and accountability in the selection of international arbitrators by increasing and equalizing access to crucial information about arbitrators and their decision-making. AI aims to provide two significant services:

- Publish information about arbitral awards.
- Develop a questionnaire (AIQ) and database of information about specific arbitrators that it will use to generate reports.

For more information, see Catherine Rodgers, *The International Arbitrator Information Project: From an Ideation to Operation*, Kluwer Arbitration Blog, December 10, 2012.

By arming lawyers with more complete and objective information about potential arbitrators, AI seeks to make it possible for in-house lawyers to have a more meaningful dialogue with their outside counsel about arbitrator selection. It aims to make information about arbitrators more equally and efficiently available to parties. To compile information about awards, AI relies on contributions from parties, as well as publicly available information. AI also relies on software that permits it to search the web for information about awards filed publicly in courts, domestically and abroad. While using the internet to mine public court filings is an important and efficient innovation in the development of transparency tools, it has some limitations because not all awards are filed in court and not all court dockets are electronically accessible. (In time, the latter limitation should diminish, especially in the US and other advanced industrial jurisdictions.)

AI focuses on building out a database of information about specific arbitrators by using its Arbitrator Intelligence Questionnaire (AIQ). The primary source of information for its database is to consist of responses to the AIQs. AI will then analyze the data provided in the AIQ and compile it into reports to be made available on the Wolters Kluwer Arbitration Blog.

The AIQ was developed in coordination with the Penn State Survey Research Center. It is designed to compile objective, quantitative data about arbitrators. Prior versions of the AIQ were pilot tested and commented on by several of AI's external advisors and commentators who represented a range of stakeholders and areas of expertise. AIQ notes that its goal is to develop a tool that relies on existing current practices used by the International Mediation Institute and the Almanac of the Federal Judiciary.

The sample AIQ is divided into two phases. The first section of the AIQ requests only objective information about the arbitration, including:

- The nature of the arbitration.
- The industry.
- The economic sector.
- The arbitral rules that governed the arbitration.
- The legal seat and language of the arbitration.
- The full names of the arbitrators.
- Information about the arbitral proceedings, including about
 - the relief claimed;
 - counterclaims;
 - the relief granted;
 - interest rates;

- the award; and
- the allocation of fees and costs.

The second portion of the AIQ solicits information regarding

- Challenges to arbitrators.
- Interim measures.
- Jurisdictional challenges.
- Case management.
- The conduct of hearings.
- Questions from arbitrators.

The second portion of the AIQ also asks a series of questions designed to gain information about:

- The responder's perspective on the tribunal's treatment of certain legal issues.
- The performance of the tribunal and solicits comments from the responder.

The AIQ concludes with a subjective question about whether the responder would "feel comfortable" having the arbitrator in a future unrelated case, to which responders can choose: strongly agree, agree, neither agree nor disagree, disagree, or strongly disagree.

To bolster the number of survey responses, AI has also worked to develop partnerships with law firms to solicit information about individual arbitrations. To that end, AI has launched an Arbitrator Intelligence Pact for parties to sign that commits them to, among other things, promote completion of the AIQ by parties and law firms. It has also developed, in essence, collaboration agreements with SIAC to encourage parties to submit responses to the AIQ and is working on developing similar agreements with other leading organizations. These partnerships, along with AI's status as an independent non-for-profit and the prominence of its founders, has helped generate goodwill in the arbitration community regarding the objectivity and fairness of the information provided.

The information compiled about specific arbitrators from AIQs is to be made available to customers in a "report" format for a fee. Specifically, AI partnered with Wolters Kluwer, which will provide AI's reports on Kluwer Arbitration, making this data available to all of Kluwer's users. There is likely to be other similar partnerships in the future to further disseminate the information. Before any AI report about an arbitrator is published, that arbitrator's consent must be secured. The arbitrator is also to have an option to withdraw consent.

The ultimate success of AI is likely to depend on the number of responders and the reliability of the data. If successful, these AI reports are likely to be a significant step toward the development of a pre-appointment transparency tool that parties can use to gather information about arbitrators, their processes, experience, and their relationships with particular firms.

THE INTERNATIONAL ARBITRATION DATABASE

Launched in May 2008 by the International Arbitration Society (IAS), the International Arbitration Database contains notable public decisions and awards, arbitrator biographical information, and relevant articles and other secondary materials relating to

international arbitration. While the database contains detailed information about certain arbitrations and specific arbitrators, the overall collection of data available on the database is still somewhat limited in scope because the information on the database is limited to a relatively small number of notable awards.

DISPUTE RESOLUTION DATA

Dispute Resolution Data (DRD) is a paid service that provides aggregate data about arbitration case types, location, and outcomes. DRD does not provide case-specific information or identify information about arbitrators, parties, or even arbitration organizations. DRD partners with dispute resolution organizations to obtain non-confidential data about arbitrations and also allows for individual case submissions from members. Many arbitration organizations have agreed to participate.

While DRD reflects a significant step toward promoting transparency, the resulting data is at this time not providing information about specific potential arbitrators. Because the data is aggregated and unavailable regarding specific cases, it does not make it possible for one to trace information to particular prospective arbitrators or providers. DRD is also based in significant part on information submitted by the arbitral institutions themselves. Therefore, it does not necessarily reflect the experience or perspective of practitioners or parties.

DRD provides valuable information to parties assessing whether to agree to arbitration or mediation. It offers data on average case length across all case types, the average ratio of claim size to award size, and developing overall strategies. It includes, for example,

- Data on the average amount of awards.
- The success rate and value of counterclaims.
- The prevalence of interrogatories.
- The rates of settlement and at what point, by case type, industry, and arbitration seat.

It does not currently include any data on the confirmation or vacatur of awards. Access to the database is offered on a subscription basis.

GLOBAL ARBITRATION REVIEW ARBITRATOR RESEARCH TOOL

Global Arbitration Review (GAR)'s Arbitrator Research Tool is a platform:

- Identifying lawyers recently appeared before certain arbitrators.
- Providing information about specific arbitrators (including publicly available awards, CVs, and procedural preferences) that are submitted by the arbitrators themselves.

Any arbitrator may submit a profile for free, if the arbitrator has sat with at least three other arbitrators during the past three years.

Arbitrators respond to a series of questions about their approach to decision-making and have the opportunity to attach public awards and articles. The arbitrator's profile also identifies co-arbitrators sitting with the arbitrator on cases and counsel appearing before them. The tool is searchable by name, gender, language, number of appointments, and countries sat in, among other data.

The biographical information and identification of co-arbitrators and counsel with experience about the arbitrator is likely to help arbitration users conduct due diligence on prospective arbitrators. The arbitrator profile provides a helpful road map of individuals to call about a prospective arbitrator. Some members of the arbitration community have questioned whether the information provided

is sufficiently objective because GAR is a commercial service. Arbitrators often “hedge” their responses in the Q&A.

For more information on the available tools to select arbitrators, see Checklist, Resources to help you find an arbitrator ([W-010-5269](#)).

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