

Puppies or Kittens?

How to Better Match Arbitrators to Party Expectations

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I. How Uncertainty Over Arbitrator Soft Skills and Procedural Orientation Contributes to Dissatisfaction with International Arbitration

We often hear that international arbitration's primary advantage is its procedural flexibility. The parties are theoretically able to make informed choices about the type of proceeding they wish to have, and tailor the proceeding to their needs and strategic goals. While this flexibility easily allows for a dispute to be resolved in a manner consistent with parties' expectations, this article proposes a means to address a serious flaw in the mechanism for choosing the right arbitrators to deliver such procedure.

For the last several years, international arbitration has faced continued expressions of user discontent.¹⁾

Most of the criticism – expressed at conferences, articles, and in surveys – has presumed that user dissatisfaction is primarily with the time and cost of proceedings.²⁾ But not everyone agrees that procedural efficiency should be the primary goal of international arbitration. In an eloquent departure from the popular criticism of arbitration, Prof. Rusty Park argued that parties and tribunals ultimately place the greatest value on the truth-seeking function of the arbitral process even

¹⁾ The Queen Mary School of Arbitration attempted to approach the topic empirically, and came back with discouraging numbers: half of the respondents to the 2010 International Arbitration Survey – Choices in International Arbitration stated that they had been disappointed by the performance of an arbitrator, *available at* www.arbitration.qmul.ac.uk/docs/123290.pdf, last visited on September 6, 2015.

²⁾ The criticisms are hardly recent. *See, e.g.* The Dynamic of Time and Cost, *Global Arbitration Review* (2009) 4 (2), *available at* www.globalarbitrationreview.com/journal, last visited on July 9, 2010; The Dynamic of Time and Cost–The Sequel, *Global Arbitration Review* (2009) 4 (3), *available at* www.globalarbitrationreview.com/journal, last visited on July 9, 2010; Hoebek & V. Mahnken & M. Koepke, *Time for the Woolf Reforms in Construction Arbitration*, *International Arbitration Law Review* (2008) 11 (2) (calling for the adoption of multiple steps to streamline and shorten arbitration proceedings); J.-C. Najjar, *Inside Out: A User's Perspective on Challenges in International Arbitration*, *Arbitration International* (2009) 25 (4) 515.

if it may occasionally be at the expense of the time and cost required to arrive at a quality decision.³⁾

Many institutions have taken the criticisms to heart, and devoted considerable efforts to developing innovative techniques to control the time and cost of international arbitration. Despite this, user dissatisfaction remains. This could perhaps be, as Douglas Horton noted, simply that “*change occurs in direct proportion to dissatisfaction, but dissatisfaction never changes*”⁴⁾. But it could also be that the various initiatives have approached the problem from the wrong angle, or on the mistaken assumption that all users expect the same things from all arbitrators.

The authors of this article consider that this assumption is wrong – that party satisfaction is not correlated exclusively with time and cost in arbitration. We suggest that user dissatisfaction is the product of something more basic – the absence of reliable selection criteria that would enable parties to make a truly informed choice between the available options – be it those that are likely to result in a shorter proceeding or those which might even lengthen it.

One may wonder whether this distinction is purely theoretical. And indeed, in the experience of the authors, users will often prefer a swift proceeding, a limited number of submissions and a narrowly-tailored hearing: less time, lower costs, regardless of the side of the table on which they sit, as claimant or respondent. But there are also cases where users will prefer to have an in-depth issue assessment, ample time to build their argument, and arbitrators who will allow a more comprehensive investigation of documents and other evidence – even if that means investing more time and cost in the proceeding.⁵⁾

Neither of these choices is inherently better or worse and it is likely that each choice will satisfy some parties, but not all.

The trouble, we find, is the difficulty parties face in making this choice by relying on imperfect and scarce information about how arbitrators actually conduct proceedings. As far as the authors are aware, there is no equivalent of Yelp or TripAdvisor or Amazon Reviews for international arbitrators. Parties have no forum to express or debate desired characteristics of candidates.

³⁾ W. R. Park, *Arbitrators and Accuracy*, Journal of International Dispute Settlement (2010) 1 (1) 25.

⁴⁾ Douglas Horton (July 27, 1891, Brooklyn, New York – August 21, 1968, Randolph, New Hampshire), an American Protestant clergyman and academic leader.

⁵⁾ The International Chamber of Commerce (ICC) Task Force which published the report *Techniques for Controlling Time and Costs in Arbitration*, ICC Publication 843 (2007), available at www.iccwbo.org, last visited on June 15, 2010. The International Centre for Dispute Resolution (ICDR) has issued the *ICDR Guidelines for Arbitrators Concerning Exchanges of Information* (2008), available at www.adr.org, last visited on June 15, 2010. For the frequent problem of tribunals being too busy to manage their cases in reasonable time, the ICC has revised its *ICC Arbitrator Statement of Acceptance, Availability and Independence* (2010): www.iccwbo.org, last visited on June 15, 2010. In the United States, see the College of Commercial Arbitrators (CCA), *Protocols for Expeditious, Cost-Effective Commercial Arbitration*, available at www.thecca.net/cca-protocols-expeditious-cost-effective-commercial-arbitration, last visited on June 15, 2010.

What is lacking is easily accessible information about the procedural preferences and soft skills of the people that parties may consider appointing as arbitrators. As a result, parties tend to rely on two proxies for these qualities: the arbitrator's nationality and the arbitrator's legal qualification.

Both of these, however, may be based on inaccurate assumptions that may disappoint the parties' expectations. While it would be unrealistic to expect that basic legal training would not influence the arbitrator's preference in establishing procedure and assessing evidence, it should not be taken as a substitute for proper research into arbitrators' preferences.

Similarly, arbitrators will rarely know what it was about them that led the parties to appoint them in a particular case, and thus may make their procedural decisions based on their own assumptions of how the parties see them.

The guessing game is therefore a two-way street. Parties (and institutions) will attempt to guess how the arbitrators will behave before appointing them, while the arbitrators, once appointed, will rarely know how they were perceived by the parties or what they expected at the time of the appointments.⁶⁾

With such a situation, the fact that there is dissatisfaction with international arbitration should not be surprising. On the contrary, it is remarkable that the other half of all parties queried by the Queen Mary survey takers did not feel the need to complain to the about arbitrator performance.

The authors propose a simple, obvious means of taking the guesswork out of arbitrator selection: ask the arbitrators to publicly declare their procedural preferences and soft skills.

If arbitrators themselves provided some of the information necessary for parties to make an educated choice – an informed, strategic decision – this would facilitate the fulfillment of party expectations. It would be an important step to increasing the parties' satisfaction with the proceeding, and enhance the overall reputation of international arbitration.

II. The Current Approach to Arbitrator Selection is Fundamentally Flawed

The selection of both party-appointed and institutionally-appointed arbitrators is a painfully inexact process. Whilst in recent years arbitrators have embraced modern technology and e-disclosure, considered the use of innovative methods of case management, and acknowledged the importance of soft skills, none of this information about an individual arbitrator is generally available to parties at the time of selection.

⁶⁾ Obviously, once proceedings are underway, arbitrators and parties have the opportunity to confer about the conduct of the case, but this generally occurs in a formal context where parties and tribunal must react to positions being advanced and compromise, such as in negotiating a procedural timetable. These circumstances may provide little or no information about what the party expected of the arbitrator at the time of appointment.

In appointing an arbitrator a party is seeking, as much as possible, to identify an individual with an approach to procedural issues, case management, handling of evidence and settlement, that aligns as closely as possible with the party's view on how the arbitration should be conducted. Yet, there is a dearth of available information as to how an arbitrator is likely to conduct a case. Obtaining this information can be the single most difficult challenge when identifying candidates for nomination.⁷⁾

In the absence of alternatives, parties are forced to rely on anecdotal information transmitted by word-of-mouth, unreliable channels and dubious filters. Limited and often unverified information is given in secrecy, supplemented by information that is often sterile or simply gleaned from a curriculum vitae.

The flaws of such an approach are less apparent in a profession that shares a relatively small pool of arbitrators, in which all participants have worked together at some point in time, and there is a high degree of personal familiarity. A close-knit community allows sufficient information sharing. But with the growth of international arbitrations and expansion of parties involved, this picture has not been an accurate one for several years. Word of mouth is rarely a sufficient means of obtaining accurate, relevant information about an arbitrator candidate.⁸⁾

The pool is widening, and the system must evolve alongside it, in order to allow the parties to access all appropriate candidates.

III. The Importance of Soft Skills and Knowing the Arbitrator's Approach to Case Management

The generally-accepted qualities an international arbitrator should possess are described by Gary Born as "*personal competence, intelligence, diligence, availability, nationality, and integrity of an individual, as well as the individual's arbitration experience, linguistic abilities, knowledge of a particular industry or type of contract, and legal qualifications*".⁹⁾ No-one is going to argue with that list of attributes. In fact, they could be considered the core requirements of any arbitrator a party would consider appointing.

⁷⁾ M. McIlwrath, *Selecting Arbitrators for Commercial Oil & Gas Industry Arbitrations*, in *THE LEADING PRACTITIONERS' GUIDE TO OIL & GAS ARBITRATION* (James M. Gaitis ed., 2015), available at www.arbitrationlaw.com, last visited on September 7, 2015.

⁸⁾ For a fuller discussion of the problem as it exists only in the oil & gas industry, see McIlwrath, *supra* note 7, available at www.arbitrationlaw.com, last visited on September 6, 2015 ("even a highly connected and informed party cannot possibly be familiar with all potential candidates who may be considered or proposed for an international arbitration; nor will they always have access to colleagues who have had meaningful experiences with a particular arbitrator in the past").

⁹⁾ G. Born, *Int'l Commercial Arbitration: Commentary and Materials*² (2009) at 1389.

But how to distinguish among candidates who all possess these personal attributes?

Parties are generally driven by practical considerations that are not found in Born's list. There are many differences in the approaches the arbitrators can take towards matters of procedure. For example, does the arbitrator do all the work themselves or delegate the work to a junior lawyer? Do they routinely appoint a tribunal secretary? What is their availability to devote sufficient time to the dispute? Will they actively suggest settlement to the parties or remain silent on the issue? How do they manage cases? Have they ever used innovative case management techniques?¹⁰⁾

The real difficulty lies in identifying whether an arbitrator under consideration possesses the skills a party is really looking for. In the 2010 International Arbitration Survey: Choices in International Arbitration conducted by the Queen Mary School of International Arbitration,¹¹⁾ respondents emphasized the importance of arbitrators' soft skills, which they categorized as the "ability to work well with the other members of the panel, the parties and their lawyers and generally adopt a helpful and friendly demeanour". Interviewees said that in their experience good soft skills had a positive impact on the efficiency (and hence cost) and the overall experience of conducting an arbitration.

Before we consider how an arbitrator might communicate more detailed information to her or his potential appointers, we address what an arbitrator might want to communicate. Some of the information is obvious, such as availability and the arbitrator's use of tribunal secretaries. Other information could be far more illuminating, in particular, the arbitrator's approach to whether or not it is appropriate to suggest that the parties consider settling the dispute. This is a highly divisive issue.¹²⁾ It has been said that the settlement of a dispute through agreement of the parties "*is of the essence of the spirit of arbitration*", but others are not so convinced.¹³⁾ Being aware of a potential arbitrator's view prior to appointment could prove to be invaluable.

¹⁰⁾ We credit N. Pitkowitz for creating a list of arbitrator selection criteria for discussion purposes at the 2015 Vienna Arbitration Days.

¹¹⁾ Available at www.arbitration.qmul.ac.uk/docs/123290.pdf, last visited on September 7, 2015.

¹²⁾ See, in particular, L. Greenwood, *A Window of Opportunity? Building a Short Period of Time into Arbitral Rules in Order for Parties to Explore Settlement*, *Arbitration International* 2011 and Arthur Marriott, QC "*Breaking the Deadlock*", *Arbitration International* 2006 Vol 22 No 3 at 411. See also B. Cremades, *Overcoming the Clash of Legal Cultures, the role of Interactive Arbitration*, *Arbitration International* 1998 Vol 14 No 2 157 at 160: "*Traditionally, it was an agreed doctrine within the world of arbitration that an arbitrator's duty should not be mixed with any mediating activity or intent to reconcile. This was one of the greatest dangers widely highlighted in arbitration seminars as it was stated clearly that an arbitrator who initiated conciliation or mediation was exposed to the risk of an eventual challenge.*"

¹³⁾ See K. P. Berger, *The Settlement Privilege: a General Principle of International ADR Law*, *Arbitration International* 2008 Vol 24 No 2 at 265; F. S. Nariman, *The Spirit of Arbitration: the Tenth Annual Goff Lecture*, *Arbitration International* 2000 Vol 16 No 3 261 at 267;

Other information provided by the arbitrator could be more pragmatic, for example, a new entrant to the market could supply references to counter the assumption that an experienced arbitrator is always preferable or disclose his or her average turnaround time for publication of an award following the close of proceedings in order to emphasize his or her availability and diligence.

A more experienced (and sought-after) arbitrator may also want to disclose their award turnaround time, in order to dispel the belief that a busy schedule means a delay. There are arbitrators who manage their schedules well, despite being constantly in demand. There are also arbitrators who do not deliver on time, even though they are significantly less busy.

Another interesting set of questions would be the arbitrator's approach to evidence gathering and document production. How much weight does the arbitrator give to oral testimony as opposed to documentary evidence? What is the expectation for presentation of evidence? Is it likely that the tribunal would set aside several weeks for hearings in order to allow for witnesses to be heard or are they more likely to provide a truncated hearing schedule? These considerations may form crucial points of the party's overall strategy.

The arbitrator may also want to disclose what case management philosophy the arbitrator employs. Which skills does the arbitrator have for managing parties and procedure? What are the mechanisms the arbitrator uses for time management – is the arbitrator fond of sharp deadlines that compel focused work, or does the arbitrator prefer to afford the parties a little extra time to deliver? How tolerant of the parties' dilatory tactics is the arbitrator? Does the arbitrator actively work to prevent tactics that would be unreasonably wasteful or disproportionate to the amount in dispute? Does the arbitrator use allocation of costs to sanction inefficient handling of proceedings?

A desirable skill in a tripartite tribunal may be an arbitrator's ability to keep the panel on track and ensure that the other arbitrators provide full attention to the law and applicable facts. In other words, can the arbitrator mediate between the other two arbitrators? Does the arbitrator play well with others? Does the arbitrator play too well with others, and in fact does not challenge a perspective offered by other members? How likely is the arbitrator to involve other arbitrators in extensive discussions on facts or law? And instead of just considering the quality of a certain arbitrator, consider how likely is the arbitrator to increase the quality of the entire panel?

The authors of this article do not seek to set out an exhaustive list of questions the parties may find useful, or the arbitrators may wish to address. Instead we merely provide an example of what should be considered a widening, but in no way limiting, measure to more transparency.

“until the resolution of a dispute by settlement is considered once again to be a constituent function of arbitration, ADR will take over and displace it as a pragmatic and workable alternative”. C. Koch & E. Schäfer, *Can it be Sinful for an Arbitrator Actively to Promote Settlement?* The Arbitration and Dispute Resolution Law Journal 1999 153 at 184 *et seq.*

Parties, on the other hand, should feel comfortable demanding answers to all these questions, even though at present the only known means is via direct interview of an arbitrator. It is inefficient – and effectively impossible – to personally conduct exhaustive interviews with all the available candidates across the globe. Hence it is crucial that a part of the drive for higher transparency fall to the arbitrators themselves.

IV. The Puppy or Kitten Test: A Proposal for Arbitrators to Declare Their Case Management Preferences, If Any

Real growth of international arbitration will introduce new parties to the practice, and an increase in party diversity coupled with an increased number of cases will generate a need for new faces to sit as arbitrators.¹⁴⁾ The inexorable trend is towards a practice that looks nothing like the situation often lamented today, with a limited number of parties and counsel who appoint the same handful of arbitrators whom they know to be reliable. With growth will come diverse parties and counsel around the world who must frequently appoint arbitrators about whom parties will demand as much information as can be made available.

In fact, the authors believe that, for all but the highest-value disputes, this moment has already arrived. The practice of international arbitration is one where there is high demand for information about the soft skills of arbitrators, but availability of that information has yet to catch up.

There are some promising projects afoot that aim to shed light on how arbitrators actually conduct proceedings and decide cases. Notable among them is Arbitrator Intelligence,¹⁵⁾ a publicly-accessible database that will make available both published and unpublished arbitral awards and feedback from users. Once the database is populated, parties will have access to information about how arbitrators (or tribunals on which they sat) conducted cases in which they put their name on arbitral awards, and as such is likely to be applicable where parties are considering candidates with an established track record.

Other publicly accessible databases provide only very rough indications of arbitrator soft skills. Among these are the Energy Arbitrators List (EAL),¹⁶⁾ a database that lists arbitrators vetted by users and counsel practicing in various energy-related fields. The EAL allows arbitrators to declare their specific industry experi-

¹⁴⁾ The awkward mix of metaphors did not escape the authors' attention.

¹⁵⁾ Available at www.arbitratorintelligence.org/ (“In addition to arbitral Awards and other independently developed resources, *Arbitrator Intelligence* will collect quantitative feedback from users and counsel about key features of arbitrator decision making. Information will be collected through surveys that allow users to provide feedback on specific questions such as case management, evidence taking, and Award rendering. When fully developed, *Arbitrator Intelligence* will allow Members to search accumulated information to aid in their arbitrator selection process”).

¹⁶⁾ See www.energyarbitratorslist.com, last visited on September 7, 2015.