Transparency in International Arbitration: What Are Arbitrators and Institutions Afraid Of?
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What gets measured, gets done. What gets rewarded, gets repeated.—Peter Drucker

This is a fundamental axiom of modern business, and yet one which has yet to find its place in the world of international arbitration. Reducing the time and cost of arbitration has been a central focus of users for years, and yet surprisingly few steps have been taken to measure the performance of arbitration institutions and arbitrators and to make the information available to those who seek their services. Institutions have made commendable efforts to respond to user concerns with initiatives and protocols designed to reduce the time and cost of arbitration, but for these initiatives to realize their full potential, another need must first be addressed: users and practitioners require reliable information about whether they are being implemented in actual practice, as well as other, standardized information about performance that would allow them to choose, and reward, those institutions and arbitrators whose actual conduct of proceedings most closely matches their expectations.2

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2 See, e.g., G. Born, International Commercial Arbitration, at 1674 (Kluwer Law International 2009) (summarizing various initiatives regarding arbitrator qualifications and performance, and noting that “proposals to increase the amount and accessibility of information concerning international arbitrators offer constructive possibilities… This would not constrain the parties’ choice of arbitrators, or offer a means of advancing parochial or entrenched interests, but would instead assist parties in identifying the most qualified, competent arbitrators for their disputes”); M. McIlwrath, “Grading the Arbitrator,” 73 Arbitration 224, at s227 (2007) (lamenting the quality of information
INTRODUCTION

The growing concern of corporate users over the excessive length and cost of international arbitration is well documented. In recent years, these concerns have prompted many of the world’s premier arbitration providers to introduce a number of procedural innovations—mainly institutional protocols, guidelines and rule changes—all designed to foster greater efficiency in the arbitration process. These innovations have been welcome news to the corporate community.

But as institutions continue to improve their rules and protocols, questions naturally arise as to what is working and what is not, and what may be working better in one area versus another. Commercial parties routinely make considered decisions of which rules and institutions are better suited to resolving their disputes, in the belief that their choice will lead to a more effective process that best meets their needs. Yet when negotiating and drafting a dispute resolution clause, it is reasonable for parties to ask: what is the difference, if any, between Institution A and Institution B in terms of time, cost and quality? Is one better suited to the nature of the disputes that might be expected? While anecdotal evidence abounds, there is little in the way of standardized, objective data regarding time and cost by which parties can effectively assess the performance of an institution, or compare the performance of different institutions, in order to make useful and practical decisions. This increases the likelihood of a mismatch between a user’s expectations/needs and an institution’s performance, creating a greater potential for dissatisfaction, and it also makes it far more difficult for users to systematically select those institutions (and their arbitrators) who have taken concrete steps to better meet party expectations.

Even more needed, and more wanting, is the availability and distribution of accurate information about arbitrators, who remain a predominant factor in the speed and efficiency of the arbitral process even with the many innovative initiatives of institutions. Indeed, while these institutional initiatives properly seek to encourage more efficient behavior by all participants, most of these initiatives emphasize the authority and responsibility of the tribunal to impose greater control over the process—which, therefore, begs the question, are they doing so? Seasoned users and practitioners have all experienced arbitrators (and institutional case managers) at different ends of available to parties about arbitrator performance today as equivalent to “what could charitably be called hearsay”, and calling for a more systemic approach to assessing arbitrator performance).