

# 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.<sup>1</sup>

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.<sup>2</sup> But not everyone agrees that procedural efficiency should be the primary goal of international arbitration. In an

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<sup>1</sup> 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: <http://www.arbitration.qmul.ac.uk/docs/123290.pdf>, last visited on September 6, 2015.

<sup>2</sup> The criticisms are hardly recent. See, e.g. The Dynamic of Time and Cost, Global Arbitration Review (2009) 4 (2), available at <http://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 <http://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. Najar*, Inside Out: A User's Perspective on Challenges in International Arbitration, Arbitration International (2009) 25 (4) 515.

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

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*"<sup>4</sup>. 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.<sup>5</sup>

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

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

<sup>5</sup> 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 <http://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: <http://www.adr.org>, last visited on June 15, 2010. For the frequent problem of tribunals being too busy to manage

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.

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.<sup>6</sup>.

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their cases in reasonable time, the ICC has revised its ICC Arbitrator Statement of Acceptance, Availability and Independence (2010), available at <http://www.iccwbo.org>, last visited on June 15, 2010. In the United States, see the College of Commercial Arbitrators (CCA), Protocols for Expedited, Cost-Effective Commercial Arbitration, available at <http://thecca.net/cca-protocols-expeditious-cost-effective-commercial-arbitration>, last visited on June 15, 2010.

<sup>6</sup> 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.

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.

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.<sup>7</sup>

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

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<sup>7</sup> M. McIlwrath, Selecting Arbitrators for Commercial Oil & Gas Industry Arbitrations, The Leading Practitioners' Guide to International Oil & Gas Arbitration, (James M. Gaitis ed., 2015), available at [www.arbitrationlaw.com](http://www.arbitrationlaw.com), last visited on September 7, 2015.

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.<sup>8</sup>

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.*"<sup>9</sup> 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.

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

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<sup>8</sup> For a fuller discussion of the problem as it exists only in the oil & gas industry, see *M. McIlwrath, Selecting Arbitrators for Commercial Oil & Gas Industry Arbitrations, The Leading Practitioners' Guide to International Oil & Gas Arbitration*, (James M. Gaitis ed., 2015), available at [www.arbitrationlaw.com](http://www.arbitrationlaw.com), last visited on September 7, 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").

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

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?<sup>10</sup>

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,<sup>11</sup> 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.<sup>12</sup> 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

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

<sup>11</sup> Available at: <http://www.arbitration.qmul.ac.uk/docs/123290.pdf>, last visited on September 7, 2015.

<sup>12</sup> 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 *A. 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 p 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.*"

others are not so convinced.<sup>13</sup> Being aware of a potential arbitrator's view prior to appointment could prove to be invaluable.

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

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<sup>13</sup> 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 (2000) *Arbitration International* Vol 16 No 3 261 at 267; "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.*

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.

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.<sup>14</sup> 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.

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<sup>14</sup> The awkward mix of metaphors did not escape the authors' attention.

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<sup>15</sup>, 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),<sup>16</sup> 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 experience and whether it was acquired as counsel, arbitrator, or expert, as well as their nationality and country of residence. The public database offered by Arbitral Women allows parties to search for arbitrators based on what the arbitrator claims is their "Legal System of Expertise" and "Legal Expertise".<sup>17</sup>

These declarations by arbitrators are useful to parties, but at best they offer only rudimentary guidance to the soft skills as to how the arbitrators will actually conduct the proceedings. For example, a party may find a candidate in the Arbitral Women database who claims "Legal System Expertise" in France but has "Legal Expertise" in English law, from having practiced in London for several years. A party might infer from this that the arbitrator is likely to have the styles and preferences of a civil-law trained lawyer, but will be experienced and open to common-

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<sup>15</sup> Available at: <http://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.")

<sup>16</sup> See <http://www.energyarbitratorslist.com>, last visited on September 7, 2015.

<sup>17</sup> See [http://www.arbitralwomen.org/index.aspx?sectionlinks\\_id=7&language=0&pageName=MemberSearch](http://www.arbitralwomen.org/index.aspx?sectionlinks_id=7&language=0&pageName=MemberSearch), last visited on September 7, 2015.

law style procedures. But this would be at best an inference, generalization, or even just stereotyping.

In the adjacent dispute resolution field of international mediation, however, the International Mediation Institute (IMI)<sup>18</sup> has taken this notion of "self declaration" a step further. In addition to listing user feedback about performance, IMI also publishes mediator statements about their soft skills of their "style" of mediation, and how they typically approach disputes. For example, if a party is looking for a mediator who can conduct both "evaluative" and "facilitative" type mediations,<sup>19</sup> the database provides a number of certified mediators who claim to do both. The database goes further by publishing detailed statements from mediators about how they handle cases.

For example, a mediator who self-identifies as both evaluative and facilitative is Bennett Picker, a US-based mediator whose own "description of mediation style" includes the following:<sup>20</sup>

*I begin my work with parties and counsel by asking them what they expect of me and then affirmatively explore important issues such as any need for exchanged submissions, the substance of ex parte submissions which permit me to identify the underlying issues, the identity of the participants and issues of authority.*

In his statement in the IMI database, Picker goes on to describe his views of mediation and how he works with parties to settle their disputes. From a user perspective, this takes much of the guesswork out of the appointing process. A party does not have to ask a colleague for information about how Picker is likely to conduct a mediation – they can get this directly from Picker himself. Consultation with a colleague who has used Picker in the past is likely to be more informed, for example about whether this particular style is a good fit for the case at hand.

In this note, we put forward a genuinely modest proposal that builds on the limited notions of soft skills found in both the EAL and Arbitral

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<sup>18</sup> See <https://imimediation.org>, last visited on September 7, 2015.

<sup>19</sup> Very broadly, "evaluative" and "facilitative" are two very different approaches to mediating disputes. The first approach involves helping the parties understand the strengths and weakness of their cases (evaluation) and the other that focuses on identifying a resolution of the parties' underlying interests in resolving their conflict, and which is not limited to the strengths of their cases.

<sup>20</sup> See <https://imimediation.org/bennett-picker>, last visited on September 7, 2015.

Women databases, and to a greater (but still limited) extent IMI's database of certified mediators. The proposition is simple: that arbitrators themselves should state their soft skill preferences – or their lack of a desire to state them – for very specific categories relevant to the conduct of proceedings.

This is the equivalent of a "do you like puppies or kittens?" test. In responding, arbitrators are not given the opportunity to say whether "it depends on the case", in order to make themselves appealing to as many different parties as possible, but to take a position, even a neutral one, on the criteria. We credit our friend Nikolaus Pitkowitz for creating a list of arbitrator selection criteria for discussion purposes at the 2015 Vienna Arbitration Days.

#### A. Arbitrator Style and Preferences Questionnaire

1. Delegation: do you believe it is acceptable for an arbitrator to delegate work to a junior lawyer who is not a member of the tribunal?

1 (always) 2 (sometimes) 3 (it depends) 4 (rarely) 5 (never)

2. Tribunal secretaries: do you believe that it is acceptable for a tribunal to appoint a secretary to assist it with the administrative tasks relating to the proceedings?

1 (always) 2 (sometimes) 3 (it depends) 4 (rarely) 5 (never)

3. Preliminary or early decisions: do you believe it is appropriate for tribunals to attempt to identify and decide potentially dispositive issues early in a case, even if one of the parties does not consent to this?

1 (always) 2 (sometimes) 3 (it depends) 4 (rarely) 5 (never)

4. Settlement facilitation: do you believe arbitral tribunals should offer to assist parties in reaching a settlement, and actively look for opportunities to do so?

1 (always) 2 (sometimes) 3 (it depends) 4 (rarely) 5 (never)

5. Early views of strengths and weaknesses of claims and defenses: do you believe arbitrators should provide parties with their preliminary views of the strengths and weaknesses of their claims and defenses?

1 (always) 2 (sometimes) 3 (it depends) 4 (rarely) 5 (never)

6. IBA Rules of Evidence: do you believe international tribunals should apply the rules in proceedings even if one of the parties objects to their application?

1 (always) 2 (sometimes) 3 (it depends) 4 (rarely) 5 (never)

7. Document disclosure: do you believe it is appropriate for international tribunals to grant a party's request for e-discovery?

1 (always) 2 (sometimes) 3 (it depends) 4 (rarely) 5 (never)

8. Skeleton arguments: do you prefer for parties to provide a summary of their arguments to the tribunal before the hearing?

1 (always) 2 (sometimes) 3 (it depends) 4 (rarely) 5 (never)

9. Chair nominations: do you believe co-arbitrators should consult with the parties who appointed them before proposing names for a chair to the other co-arbitrator?

1 (always) 2 (sometimes) 3 (it depends) 4 (rarely) 5 (never)

10. Arbitrator interviews: are you available to be interviewed by the parties before being appointed (in accordance, for example, with the Guidelines for

Arbitrator Interviews published by the Chartered Institute of Arbitrators)?

1 (always) 2 (sometimes) 3 (it depends) 4 (rarely) 5 (never)

11. Arbitrator interviews: if you are appointed as a co-arbitrator, do you think parties should interview a prospective chair that you and the other co-arbitrator have identified, before agreeing the appointment?

1 (always) 2 (sometimes) 3 (it depends) 4 (rarely) 5 (never)

12. Counsel misconduct: for a counsel that has engaged in misconduct, do you generally take steps while the proceedings are underway, or include consideration of the misconduct in a subsequent award of costs, or do you believe it is not within the responsibility of the arbitral tribunal? (choose only one)

- (a) Discipline during proceedings, immediately when misconduct occurs
- (b) Discipline both during proceedings and in subsequent award on costs
- (c) Take misconduct into consideration in cost award
- (d) Do not believe counsel misconduct is responsibility of the tribunal

13. Costs: do you believe it is appropriate for a party to recover all of its reasonable costs (including counsel fees) if it has prevailed on its claims or defenses?

1 (always) 2 (sometimes) 3 (it depends) 4 (rarely) 5 (never)

14. Costs: do you believe it is appropriate for a party to recover the reasonable costs of any in-house counsel who conducted or assisted the party's conduct of the arbitration?

1 (always) 2 (sometimes) 3 (it depends) 4 (rarely) 5 (never)

15. Do you view yourself as conducting proceedings more in the style of the common law, the civil law, or no preference/depends on situation?

1 (common law) 2 (more common than civil) 3 (no preference/it depend) 4 (more civil than common law) 5 (civil law)

16. Please provide a statement of how you prefer to conduct arbitration proceedings in cases in which you have been, or could be, appointed:
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The above questions are suggested merely as examples of what might be asked, and the authors do not claim they represent a definitive list of areas of interest, soft skills, or arbitrator preferences.

When the idea of such a list was first floated during a session at the Vienna Arbitration Days 2015, the reaction from the audience was mixed. A number of those present expressed strong opposition and said they would never provide such information about themselves. This reaction, we must note, appeared mainly from more senior arbitrators in the room. It may be that younger practitioners, who seemed much more open to the proposal, are simply more accustomed to having information about service providers readily accessible on the internet. Or it may be that they view information as a means of gaining access to arbitration appointments.

In any event, there is utility for parties in knowing which arbitrators refuse to provide this sort of information, just as it will be useful to know which arbitrators consistently answer that they are neutral or non-committal as to any particular style or preference. The lack of a response – or a neutral response – is something that parties can use to differentiate arbitrators during the selection process. A party seeking an arbitrator with a strong civil-law preference, for example, will not put high in its rankings an arbitrator who claims to be neutral as to which type of procedure they prefer.

## B. Where Would This Information Be Available?

A concise list of arbitrator soft skills and preferences could be made available in individual web pages of arbitrators, in a stand-alone database, or adopted by any of the existing databases, such as ArbitratorIntelligence, Arbitral Women or the EAL.

It could also be adopted by arbitral institutions, as a means of distinguishing themselves from other institutions. Indeed, why shouldn't arbitral institutions get in front of the transparency trend by just asking arbitrators to self-declare their styles and procedural preferences? In any event, the change is already underway – the only question is who will take the lead, and who will be left behind.

## V. So Why Do It? Numerous Benefits of Making the Selection Process More Transparent

Whenever an idea of publishing information on arbitrator performance is introduced, the criticism most often heard is one about the objectivity and accuracy of data collected, since the assumption is that this information will be shared by parties and their counsel. It is not unreasonable to be concerned about whether satisfaction with outcomes may unfairly influence how parties perceive the arbitrator's handling of a case. Obviously, this concern is not present when it is the arbitrators themselves who will provide the information about how they conduct proceedings.

Some arbitrators may feel that publicly declaring their own preferences and soft skills may actually inject additional confusion for parties, since many important questions seem to call for an "it depends" answer. Some arbitrators perhaps feel that not disclosing their preference may allow for more appointments, because not having classified oneself – not expressing a preference for puppies or kittens – might lead parties to appoint them on the assumption that they will like whatever it is best to like for a particular case.

However this may not be the safest bet. The 21<sup>st</sup> century flow of information renders it inevitable that parties will have some information and assumptions about their preferences. The question is only whether these are accurate assessments and whether the next party who appoints

the arbitrator on the basis of such assumptions will be satisfied or dissatisfied with an unexpected performance.

The current system of relying on word-of-mouth information perpetuates bias, inequality, stereotyping, imperfect information flow, and users' dissatisfaction. However if the entire process of arbitrator selection is made more transparent, there will be numerous benefits to both the parties and the arbitrators.

*Firstly*, it will lead to greater party satisfaction. By being aware of an arbitrator's preferred approach to issues such as case management and settlement, a party can make a more informed choice as to the appropriate arbitrator for the dispute in question. Increasing a party's "buy-in" to the process naturally reduces the likelihood that a party will feel that they have not got what they bargained for. This should increase the predictability of the arbitral proceeding, and lead to greater satisfaction with the arbitration process.

*Secondly*, it will counter the imperfect information flow. A proper understanding of an arbitrator's soft skills will be a far better predictor of his or her approach to an arbitration than nationality. This should reduce the often flawed assumption that where an arbitrator was legally trained will automatically dictate the manner in which he or she will approach the conduct of an arbitration. A superficial assessment that a dispute 'requires' a civil or common lawyer should become a thing of the past. An arbitrator's soft skills, including their legal reasoning skills, will affect the outcome of an arbitration more than specialist knowledge of the subject matter of the dispute or qualification in the governing law of the contract. In fact, "*a tribunal is more likely to get the law right with a good arbitrator applying a foreign law than with a mediocre arbitrator applying her or his domestic law*"<sup>21</sup>.

Moreover, providing more information at an early stage is a chance for the arbitrators to set the record straight about their preferences and build their reputation on facts and not assumptions. An arbitrator would then also have a better understanding of why they were appointed for the dispute, together with a greater awareness of the key drivers for the parties. This will grant the arbitrators an added layer of confidence that the way they conduct the case is in line with parties' expectations.

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<sup>21</sup> M. McIlwrath, Selecting Arbitrators for Commercial Oil & Gas Industry Arbitrations, The Leading Practitioners' Guide to International Oil & Gas Arbitration (James M. Gaitis ed., 2015), available at: [www.arbitrationlaw.com](http://www.arbitrationlaw.com), last visited on September 6, 2015.

*Thirdly*, it will create more diversity. The current way in which arbitrators are selected is exclusive and highly susceptible to bias and stereotyping. The manner in which parties initially identify potential candidates for a tribunal is inherently biased against the appointment of new entrants to the market and diverse candidates generally<sup>22</sup>. Choosing familiarity is a human trait, especially for parties engaging in risk mitigation. And it is well known that in arbitration parties continue to appoint from a small pool of supposedly 'known' candidates, even in the face of dissatisfaction with the way in which arbitrations are ultimately conducted. Improving transparency will also promote diversity by allowing parties to better assess newer entrants and consider them alongside arbitrators whose soft skills they know through reputation and word of mouth.

*Fourthly*, improved diversity should improve quality. It is well known that diverse groups produce better outcomes.<sup>23</sup>

*Fifthly*, if the arbitrators distinguished themselves by providing potential appointers with more detailed information as to the type of arbitrator they are, particularly with regards to 'soft', i.e more practical skills, this would permit a party to make a more informed decision as to the best arbitrator for the dispute. Better information on arbitrators would hence promise to enhance the quality of the proceeding and the reputation of international arbitration.

*Sixthly*, if the arbitrator discloses from the outset their preferences, that increases the legitimacy of the entire process. For example, if from the outset it is disclosed to the parties that the tribunal's opinion on the *ex officio* powers of the tribunal is fairly liberal, and the parties do not

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<sup>22</sup> See, in particular, the TDM Special Issue on Diversity, July 2015, available at <http://www.transnational-dispute-management.com/journal-browse-issues-toc.asp?key=61>, last visited on September 7, 2015.

<sup>23</sup> For example, In relation to gender diversity there are numerous studies showing that gender-balanced leadership: 1) improves corporate governance; 2) lessens unnecessary risk-taking; and 3) reduces so-called 'group-think'. Two McKinsey studies have found that companies with 3 or more women in senior management functions scored more highly for each organizational criterion (such as direction, motivation, leadership, work environment) than companies with no women in senior positions and concluded that there was "no doubt" that the companies with greater gender diversity in leadership outperformed their sector in terms of return on equity and stock price growth. *McKinsey & Company*, Women Matter: Gender Diversity, A Corporate Performance Driver (2007), available at [http://www.europeanpwn.net/files/mckinsey\\_2007\\_gender\\_matters.pdf](http://www.europeanpwn.net/files/mckinsey_2007_gender_matters.pdf), last visited on September 7, 2015.

express disagreement with this, then the arbitrators may rightfully assume that the parties are expecting the proceeding to be conducted in a proactive way towards finding the truth. Of course, this would not take the parties' choice to simply state from the outset that this is not something they would favor. As previously mentioned, such conduct would afford the arbitrators an additional confidence that they are conducting the case in a way the parties wished and expected.

Without a doubt, there are numerous benefits to improving the selection process of the arbitrators by increasing the transparency of arbitrators' soft skills and procedural preferences. In fact, the authors believe that benefits of such improvement would be so great, they would by far outweigh any potential critique or legitimate concerns.

## VI. Conclusion: An Opportunity for VIAC

With each arbitrator actually declaring their preferences and style, the flow of inaccurate information will be lessened. It will give the arbitrator a chance to set the record straight, and be appointed on the basis of characteristics in accordance with parties' expectation. And there is no better way to assure parties' satisfaction than to honestly and transparently respond to their expectations.

While the authors believe that our proposal will help resolve some of the problems of international arbitration, we recognize that innovation is difficult in the conservative field of dispute resolution. Still, innovation that will provide more satisfied users is bound to have its rewards.

The Vienna International Arbitration Centre (VIAC) is well-placed to take this proposal from idea to reality. VIAC is no stranger to innovation. The institution was founded 40 years ago principally in response to problems companies based in eastern and western European countries were facing in the settlement of their disputes. In the 21st century, users are even more in need of this willingness to make a bold step in their direction.