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Arbitrator Intelligence – An Interview with Its Founder and Director, Professor Catherine Rogers

Patricia Shaughnessy

I. INTRODUCTION

Professor Catherine Rogers[1] envisioned, founded and now directs ***Arbitrator Intelligence***,[2] an innovative interactive online resource that combines technology and crowd-sourcing to increase accountability and access to information in the arbitrator selection process. The Journal of Technology in International Arbitration (JTIA) caught up with Professor Rogers, who has been busy travelling the globe working on and speaking about her many projects, including *Arbitrator Intelligence*, to interview her about the project and its potential development and impact on the selection of arbitrators. The interview was conducted by Patricia Shaughnessy.[3]

PS – The *Arbitration Intelligence* project is not only innovative but also controversial and without any obvious precursors. Where did the idea of the *Arbitrator Intelligence* project come from?

CR – I wrote an article about ten years ago in which I started to analyze issues relating to the arbitrator selection process. The piece considered the barriers to market entry and inherent information asymmetries that created an imperfect market for arbitrator services. In that academic work, I first proposed ideas

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[2] http://www.arbitratorintelligence.org/

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about how to solve the problem by enhancing availability and access to information needed when appointing arbitrators.

PS – How can the needed information be tailored to suit particular appointments?

CR – Making information readily accessible for the particular case issues and strategies presents an important challenge for *Arbitrator Intelligence*.   When looking for a party-appointed arbitrator, each party has already in mind a case strategy and a set of priorities that inform what kind of arbitrator it believes will be best suited to its particular case. For example, parties are often focused not only on the substantive issues, but on other considerations that may have profound effects on their case, such as whether they will be able to obtain (or avoid) interim measures or document production. Parties also often focus on whether a particular arbitrator's interpretive methodology is more formalistic and text-focused or more flexible and sensitive to overall equities. Based on these priorities, a party and its lawyers seek to discover information about prospective arbitrators that will help them determine which arbitrator will be most suitable in light of their priorities for the case.

PS – Parties have been appointing arbitrators for years. Aren't they already able to obtain this type of information?

CR – Parties make phone calls and send out emails to people within their networks, asking questions and seeking information about potential arbitrators. It is very ad hoc and relies on other people in the industry and within the inquirer's network. The answers parties and their counsel get depend on how well the person being asked knows the people making the inquiries. The more familiarity, friendship and trust, the more information will be shared.

PS – Doesn't this kind of "informal information" sharing result in more accurate information about prospective arbitrators? Doesn't the confidential nature of the inquiry encourage greater candor and sharing of insights?

CR – Not always and not reliably.   On the one hand, subjective information gathered on an ad hoc basis depends on luck of the draw, is filtered through subjective interpretations and can be

subject to memory lapses. Opposing parties in the same arbitration can ask the same person the same questions about the same arbitrator, and get two different answers. More robust info goes to the "insider"; the party, lawyer or law firm with a greater network may have better access and receive more accurate and detailed information. Regional firms and smaller firms may have less access as they may have a more limited network. Meanwhile, arbitral institutions often have to make arbitrator appointments, but they may not have the possibility of making these kinds of specialized, ad hoc inquires.

PS – So parties and lawyers who have more information to share based upon their greater experience in arbitration may have greater access to information? Kind of like swapping secrets? Won't the more experienced parties, lawyers and law-firms have an interest in maintaining an "insiders" advantage to accessing information?

CR – I think that used to be the assumption—that this is highly proprietary information that everyone should keep locked up like secret treasure. But in more recent years, I think the community has begun to realize that it is in everyone's best interest to ensure that arbitration is perceived as a fair process. It is also in everyone's interest to avoid surprises in arbitrator selection. On the other hand, what *Arbitrator Intelligence* seeks to do is create a more level "floor of information," not necessarily a level ceiling. Large firms and multinational corporate parties will always have more access to more information about arbitrators. But access to information needs to be made more equal and the process for obtaining it less haphazard.

PS – What was the initial response to your idea of starting *Arbitrator Intelligence* from the arbitration community?

CR – When I initially proposed the idea about ten years ago, I got significant push-back. Some big firms did not want this information accessible, which is understandable as they get a competitive advantage by effectively selling this information to their clients. Meanwhile, some arbitrators worried, again understandably, that more access to information about their work as arbitrators might be detrimental to their careers, particularly if disgruntled losing parties were to abuse the resource to register subjective or unfair complaints. Arbitral Institutions also seek to

hold themselves out as providing valuable arbitrator appointment services, meaning that they are particularly adept at identifying and selecting arbitrators, and may not have welcomed competition.

PS – *Arbitrator Intelligence* has now been launched and has successfully completed its "pilot project". Do you think these developments suggest that *Arbitrator Intelligence* can succeed despite the "push-back" and "nej-sayers"?

CR – In addition to a general change in attitudes toward information, technology, and transparency, the arbitration community is increasingly appreciating the potential benefits for themselves. For arbitrators, it creates opportunities to increase their public profile. For counsel, parties, and arbitral institutions, they can avoid potential surprises or mismatches in arbitral appointments. For regional institutions in particular, which are seeking to expand into new markets, they need information about arbitrators. Smaller, regional institutions, however, are not able to use the same ad hoc inquiry processes as attorneys and parties. These institutions can especially benefit from an accessible clearinghouse of information about international arbitrators.

PS – Given that parties are also interested in confidentiality, how do you see *Arbitrator Intelligence* being a benefit for in-house counsel and parties?

CR – Parties and corporate counsel have the greatest interest in the success of *Arbitrator Intelligence.* They have the most direct stake, and so not surprisingly, they have been the most actively supportive stakeholder group. For example, the Corporate Counsel International Arbitration Group (CCIAG) reached out to me about two years ago to learn more, and organized a conference around the goals of *Arbitrator Intelligence.* At that conference, one in-house counsel held up her cell phone and suggested that one day, there would be an arbitrator selection app. More recently, the Association of Corporate Counsel included in their newsletter an extended discussion of *Arbitrator Intelligence.* I believe in-house counsel intuit that our project would not only improve the process, but enable them to participate more effectively in that process.

PS – What makes you think that the international arbitration community is really ready for greater transparency about information regarding arbitrators?

CR – In recent years there has been a world-wide shift in attitudes about access to information, privacy, and transparency. Discussions around events such as Wikileaks and TripIt have highlighted the importance of information as a democratic force. Many types of information are no longer seen as much of a proprietary right. Of course, this kind of open-source feedback submitted anonymously and by anyone is not a viable model for *Arbitrator Intelligence*. Information about hotels is very different in nature and has very different stakes than information about international arbitrators. *Arbitrator Intelligence* is sensitive to these differences, and aims to increase transparency in a manner that is consistent with the needs of the arbitration community.

PS – Do you think that the debates surrounding transparency and the legitimacy of investment arbitration have affected perspectives on access to information in the commercial arbitration community?

CR – The transparency debate in investment arbitration has undoubtedly also changed the community's perceptions about the need for increased transparency to ensure the legitimacy and fairness of arbitration. The fact that most focus is on investment arbitration leaves commercial arbitration as a black box. Statistically, however, the number of international commercial cases dwarfs the number of investment cases and I would estimate that even leading investment arbitrators sit in more commercial cases than investment cases. Commercial cases raise different sensitivities about confidentiality, but we are also seeing increased interest in a move to voluntary publication of awards that are redacted to protect confidentiality.

PS – *Arbitrator Intelligence* relies on technology. How have technological developments affected the project?

CR – Technology has, of course, developed dramatically in recent years. Particularly in legal practice, technology is revolutionizing certain areas of practice and promises to have even more profound effects. Arbitrator selection has traditionally been exclusively an intuitive process informed by anecdotal information.

Arbitrator Intelligence aims to bolstering the efficacy of these decisions by making related data accessible and subject to more sophisticated analysis through technology. Put simply, the traditional ad hoc method of seeking information about arbitrators relies mostly on 19th Century technology—the telephone. *Arbitrator Intelligence* seeks to bring 21st Century technology to this critical process.

PS – Can you briefly indicate where the project is at now?

CR – During the past year, we have been working on developing the technology and website for the Arbitration Intelligence platform, as well as setting up the organizational structure. We launched the website and incorporated Arbitration Intelligence as a non-profit entity in September of 2014. We went on-line on September 21, 2014. We launched the project with the Pilot Project both to demonstrate the "proof-of-concept" and to build momentum.

PS – What was the "proof-of-concept" and what did you prove?

CR – The Pilot Project aimed to demonstrate that the international arbitration community is ready to help crowd-source information for the project. We started with arbitral awards because, collectively with a large enough data set, they can be analyzed to investigate arbitrators' historical decision-making. We set a goal of getting 100 previously unpublished arbitral awards and we met the goal and also acquired over 400 members by our deadline of January 15, 2015. We proved that people are interested in supporting and contributing to the project. We now have nearly 1,000 uploaded awards and over 1,000 members from 114 countries. The exciting part is that these figures grow daily. PS – What are the essential prerequisites for *Arbitrator Intelligence* to be successful?

CR – There are two primary requirements for *Arbitrator Intelligence* to be successful, and they are inter-related. First, we need widespread "buy-in" by all major stakeholders—the arbitrators, the institutions, the counsel, the institutions, and civil society. The second requirement is assurance that our information is valuable, accurate, reliable, and provided in a responsible manner. We need buy-in because ultimately we are relying on the international arbitration community to provide

information and to facilitate gathering of information. We measure every decision and activity against these two critical goals.

PS – How does *Arbitrator Intelligence* intend to meet these goals?

CR – We are concentrating on two main sources of information— past awards and, in the future, end-of-case standardized questionnaires. With awards, we are working to code them for specific data, and to employ machine learning technologies to analyze text. The questionnaires will collect information about things such as whether interim measures that were requested were granted and if so, what were the criteria. Were documents requested and how was production managed? The questionnaires will be formulated around uniform questions and administered in a structured manner to ensure reliability and quality .

PS – How can *Arbitrator Intelligence* ensure that it is getting the quantity and quality of information that is needed to make the system actually work?

CR – For *Arbitrator Intelligence*, the means and ends are inextricably intertwined. Actual users of arbitration will provide the information and assist in constructing the system. As we already discussed, we will be counting on the international arbitration community to contribute awards and complete feedback questionnaires at the end of cases. But we will also be seeking the community's input about what information should be distilled from awards, and we will be posting the questionnaire on our website and inviting the community to comment on and suggest changes.

PS – Why is *Arbitrator Intelligence* a non-profit entity?

CR – Going back to the need for buy-in, we believe that interest in *Arbitrator Intelligence* and our Members' willingness to contribute time and arbitral awards derives directly from their commitment to our overall goals. Making a profit is not one of those goals. Commercial incentives, we believe, would undermine our ability to function as a neutral clearinghouse for valuable, but highly sensitive, information. In addition, we benefit from association with other non-profit entities that are essential to create such a large-scale data project—academic institutions.

Currently, we are funded primarily by support from Penn State University (the law school, the School of International Affairs and the College of Liberal Arts), other academic institutions (Queen Mary and Kansas University Law School). We have also benefitted from pro bono support from lawyers and law firms (Alston & Bird and Gleiss Lutz) and I have myself made considerable personal contributions. We are also now working to secure grant funding.

PS – Does its non-profit status mean *Arbitrator Intelligence* will be free?

CR – Ultimately, however, *Arbitration Intelligence* will need to be self-sustaining. For that reason, *Arbitrator Intelligence* will ultimately be a fee-paid service, likely with a sliding scale to accommodate smaller cases and parties from developing countries.

PS – What are some of the other challenges that the project is facing?

CR – In addition to meeting the goals we have already discussed, we face sensitive challenges about making information available, while respecting confidentiality, and providing detailed information while respecting personal data protection and protecting against defamation.

PS – Have you approached arbitral institutions to enlist their assistance in gathering awards and information?

CR – Some arbitral institutes have already started publishing redacted awards in an effort to increase transparency. Most published awards, however, delete the arbitrators' names. We are discussing this with some arbitral institutes the possibility of "backfilling" into these redacted awards the arbitrators' names. We will also be seeking to establish partnerships for arbitral institutions so that they can assist in administering the Feedback Questionnaires in actual cases.

PS – What makes you think that arbitral institutions will be willing to enter into that kind of relationship?

Arbitral Institutions, particularly newer and regional institutions, need information when they have to appoint arbitrators, especially when they reach out beyond their regional hubs to expand their caseloads. *Arbitrator Intelligence* has the

potential to be valuable to arbitral institutes. Perhaps some exchange of information could be arranged with the institutes gaining free access to the *Arbitrator Intelligence* information in exchange for contributions of information.

PS – Is there a risk that *Arbitrator Intelligence* will increase the already difficult barriers to entry for new upcoming arbitrators as they will not be well represented in the historical data contained in the system?

CR – We believe that *Arbitrator Intelligence* can promote diversity and expand the pool of arbitrators. It will help newer arbitrators establish positive reputations. Today, to come to the attention of parties, in addition to a track record, a new arbitrator needs someone who is well-connected and "on the inside" to vouch for her. It is especially difficult to get this "vouching" from insiders when typically newer arbitrators may begin their careers as arbitrators in smaller cases where the "insiders" might not be involved. *Arbitrator Intelligence* has the potential to reduce the importance of "insider vouching" by facilitating direct access to information about the performance of newer arbitrators even in smaller cases.

PS – What is on the immediate horizons for *Arbitrator Intelligence*?

CR – Currently the members tend to be younger members of the arbitration community, such as associates from law firms and attorneys from smaller firms. We will work hard to expand our community to a more diverse group of lawyers and users, including senior members of the arbitration community. I have been speaking about the project in a number of countries and forums. As I meet with students and lawyers, I am excited to learn that in classes, at conferences and by coffee machines, people are talking about *Arbitrator Intelligence*. As we grow our community, we also need to grow our support and financing. We will be looking into various grant opportunities and ways of securing stability while maintaining independence and neutrality.

PS – Why are you putting so much time, effort, and energy into this project?

CR – *Arbitrator Intelligence* really is something of a passion for me. Arbitration plays a critical role in global justice, the rule of law, and protection of economic opportunities around the world. To me it is exciting to be involved in an innovative way to promote fairness, legitimacy, and transparency in one of international arbitration's most critical processes.

PS – These are important goals and I will end our interview in order to let you get back to work on realizing your vision. On behalf of the JTIA, many thanks for taking the time to share your information about and plans for *Arbitrator Intelligence* with our readers.