

ARBITRATOR “INTELLIGENCE” AND THE MYSTERIOUS BROWN M&M

*By: Dr. Katherine Simpson, FCI Arb.**

AN ERROR HERE SIGNALS AN ERROR THERE.

Little errors can point to bigger problems – just ask Van Halen.¹ In 1982, Van Halen had the largest and most dangerous music production in history. The special effects and lights meant that stages needed to be larger and electrical capacity greater than normal. Failure to observe the novel safety protocols contained in the contract rider could mean stage collapse, fire, or death. Van Halen needed a way to determine – quickly – whether it could rely on its partners having read and understood all the safety specifications for their production. But, forget the pop quiz or the spontaneous electrical check – Van Halen engaged an unlikely suspect to help it assess whether it could rely on its partners: a contract rider² that no brown-colored M&Ms be allowed backstage, “or the promoter will forfeit the show at full price.”³

“What was the point?” David Lee Roth explained in an interview, “If I came backstage – having been one of the architects of this lighting and staging design – and I saw brown M&Ms on the catering table, then guaranteed the promoter had not read the contract rider, and we had to do a serious line check.”⁴

Like the brown M&M backstage at a Van Halen concert, the spelling errors, obvious photo misattribution, and the citizenship and residency errors scattered across numerous Arbitrator Intelligence Reports signal that more serious errors or

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1. Jacob Ganz, *The Truth About Van Halen and Those Brown M&Ms*, NPR, The Record (Feb. 14, 2012), <https://www.npr.org/sections/therecord/2012/02/14/146880432/the-truth-about-van-halen-and-those-brown-m-ms>; David Lee Roth, David Lee Roth tells the story behind the “no brown M&Ms” legend, YOUTUBE (Feb. 13, 2012), <https://www.youtube.com/watch?v=IxqdAgNJck> (“What is the real story about the brown M&Ms? . . . Frequently, the promoters did not read the contract riders, and we would have structural, physical issues because there wasn’t the proper electricity, or load-bearing stress, etc. So, in the middle of a huge contract rider . . . was a clause that ‘there will be 12 amper’ high voltage sockets placed at 15-foot intervals not to exceed the load bearing . . . and there will be no brown M&Ms in the backstage area or the promoter will forfeit the show at full price.”).

2. *Van Halen’s Legendary M&M’s Rider – The Most Famous Backstage Demand of Them All*, THE SMOKING GUN <http://www.thesmokinggun.com/file/van-halens-legendary-mms-rider?page=8> (last accessed Mar. 27, 2021) (“Munchies . . . M&M’s (WARNING: ABSOLUTELY NO BROWN ONES)”).

3. See Roth, *supra* note 1.

4. *Id.*

problems are contained within. They signal that Arbitrator Intelligence's Reports cannot be relied upon.

When Arbitrator Intelligence promised to increase transparency, accountability, and diversity in arbitrator selection, it was celebrated as a welcome innovation. Now separated from its academic backing, however, it might accomplish the opposite. Rather than engage with the scientific evaluation of arbitrators and their awards, Arbitrator Intelligence's Reports appear personally rather than factually motivated. Arbitrator Intelligence could even facilitate the manufacture of deceptive arbitrator images – and it is already stifling diversity.

This article begins with a brief summary of Arbitrator Intelligence's history, from its early days as an academically-affiliated non-profit to its current status as a for-profit shareholder corporation. With this change in status, Arbitrator Intelligence also changed its treatment of arbitrators, who are no longer given the opportunity to review or consent in advance to the reports that Arbitrator Intelligence prepares about them. Its Reports threaten the legitimacy of arbitration as the world's preferred method of private dispute resolution by incentivizing Arbitrators to behave in ways that reflect positively in Arbitrator Intelligence's valuation metric – a metric that favors Claimant parties in particular. This article next discusses how Arbitrator Intelligence Reports are not an improvement over other network-based means of finding an arbitrator, but instead adds an assumed scientific base to what is purely anonymized speculation.

Since Arbitrator Intelligence's Reports exist, counsel may feel obligated to consider them as part of counsel's due diligence. Simply reading these error-laden Reports, however, sends counsel on a possibly wasteful errand to establish whether the arbitrator is really even accepting appointments. Arbitrator Intelligence offers reports on retired or unavailable arbitrators, as if they are accepting appointments. If Arbitrator Intelligence is willing to misrepresent the appoint-ability of the arbitrators for whom it offers Reports, what other misrepresentations, errors, or omissions can buyers expect? Counsel's time is better spent independently researching potential arbitrators, including by viewing their prior awards.

ARBITRATOR INTELLIGENCE – FROM ACADEMIC NON-PROFIT TO TODAY'S PRIVATE ENTITY

In September 2014, Arbitrator Intelligence launched⁵ as an academically affiliated non-profit that was expressly dedicated to increasing transparency, accountability, and diversity in arbitrator selection. Although arbitrators are contractually and ethically prohibited from disclosing confidential awards to third parties for personal gain,⁶ Arbitrator Intelligence nonetheless invited arbitrators to

5. Catherine A. Rogers, 'Arbitrator Intelligence' Is Here!, KLUWER ARB. BLOG (Sept. 21, 2014), <http://arbitrationblog.kluwerarbitration.com/2014/09/21/arbitrator-intelligence-is-here/>.

6. David A. Singer, *Arbitration Privacy and Confidentiality in the Age of (Coronavirus) Technology*, 38(7) ALTERNATIVES TO THE HIGH COST OF LITIGATION 107 (Jul-Aug 2020), <https://onlinelibrary.wiley.com/doi/full/10.1002/alt.21849> (reminding further that the parties, but not the arbitrator, may choose to disclose an award); see also American Arbitration Association, *The Code of Ethics for Arbitrators in Commercial Disputes* (effective Mar. 1, 2004), https://adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf

demonstrate their commitment toward ethics and improvement of the arbitration profession by disclosing “any”⁷ of their awards to Arbitrator Intelligence and becoming Members.⁸ In return, Arbitrator Intelligence would create publicly available Member Profiles on them.⁹ With Arbitrator Intelligence, in return for disclosing their awards, arbitrators could create their own, backed-by-science “‘MY-LAST-NAME-HERE’-Arbitration”-brand.¹⁰

Unsurprisingly, few arbitrators participated. For many, being a “Member of Arbitrator Intelligence” was likely synonymous with being “An Unethical Arbitrator” – one who would violate his or her ethical and contractual duties of confidentiality by disclosing the contents of an award, for personal gain (here, a marketing advantage).¹¹ Even those who agreed with the academic study of decision-making had a reasonable discomfort with being the subject of an Arbitrator Intelligence Report. As the saying goes, “there are lies, damned lies, and statistics,” and the risk of professional harm owing to negligent errors, unexplained outcomes,¹² or outright bias¹³ in these Reports cannot be understated.

Arbitrator Intelligence tried to assuage these fears by arguing that its academic backing “uniquely positioned it to meet...complex challenges”¹⁴ related

(Canon VI “A. An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage...”).

7. Arbitrator Intelligence, *Contribute an Award* (Sept. 24, 2014 – Dec. 31, 2018), <https://web.archive.org/web/20170709220343/http://www.arbitratorintelligence.org/contribute-award/> (last accessed Mar. 27, 2021). While this may be comparable to the practice of many arbitrator-ranking organizations that create profiles on arbitrators once the arbitrator discloses past awards or the names of parties to disputes, there is no recognized ethical or contractual exception that allows an arbitrator to distribute confidential awards or even party names to a third company, regardless of that company’s commitment to hold the information in secret.

8. *Id.*

9. Catherine A. Rogers, *The Key to Unlocking the Arbitrator Diversity Paradox?: Arbitrator Intelligence*, KLUWER ARB. BLOG (Dec. 27, 2017), <http://arbitrationblog.kluwerarbitration.com/2017/12/27/on-arbitrators/> (last accessed Mar. 27, 2021).

10. This is exactly how Arbitration Intelligence describes an arbitrator’s arbitrations in its Reports. Prof. Fernando Cantuarias Salaverry’s cases are referred to as “Cantuarias Arbitrations” in bold lettering. Arbitrator Intelligence, *Report on Fernando Cantuarias Salaverry*, <https://arbitratorintelligence.com> (last accessed Apr. 2, 2021).

11. *Compare* American Arbitration Association, *supra* note 6.

12. Gabriela Sánchez, *Guest Post: The risks of the use of Artificial Intelligence in International Arbitration*, INTERNATIONAL ECONOMIC LAW AND POLICY BLOG, (Nov. 15, 2019, 7:14 AM), <https://ielp.worldtradelaw.net/2019/11/guest-post-the-risks-of-the-use-of-artificial-intelligence-in-international-arbitration.html> (last accessed Mar. 27, 2021).

13. Eric Chang, *A Roundup of Tech and Dispute Resolution News*, KLUWER ARB. BLOG, (Mar. 9, 2021) <http://arbitrationblog.kluwerarbitration.com/2021/03/09/a-roundup-of-tech-and-dispute-resolution-news/> (last accessed Mar. 27, 2021) (“The Monster Lurking Within: Embedded Bias in AI...The issues...have obvious implication for international arbitration and other forms of dispute resolution as AI is increasingly integrated into these processes.”).

14. Catherine A. Rogers, *Arbitrator Intelligence: From Intuition to Data in Arbitrator Appointments*, 11 N.Y. DISP. RESOL. LAW. 41 (2018), <https://nysba.org/NYSBA/Publications/Section%20Publications/Dispute%20Resolution/PastIssues/PastIssues/Spring%202018/DisputeResolutionLawyerSpring18.pdf> (last accessed Mar. 27, 2021) (“AI Reports will identify the limitations of the data, particularly in production of early AI Reports. More generally, there are a number of challenges in analyzing data from phenomena as complex as arbitral disputes. Such challenges including accounting for different institutional rules, differences in appointment of the arbitrator (was the

to moral hazards and data inaccuracy. Its academic backing and non-profit status enabled it “to commit to larger goals... (transparency, accountability, and increased diversity in arbitrator selection), rather than focus on primarily on earning profits.”¹⁵

In 2020, however, Arbitrator Intelligence cut its ties with its academic backer, dropped its non-profit status¹⁶ and transformed into a for-profit entity. While its express goals remain the same, its treatment of arbitrators has changed.¹⁷ Arbitrator Intelligence appears to sell “Arbitrator Intelligence Reports” not about “Members” but instead about any arbitrator, regardless of their consent or even knowledge. This is one of many problems that reflects the quality of their reporting, on both ethical and substantive levels.

ARBITRATOR INTELLIGENCE PUBLISHES REPORTS WITHOUT ARBITRATOR KNOWLEDGE OR CONSENT

To believe that Member and Immediate Past President of the International Court of Justice, H.E. Mr. Abdulqawi Ahmed Yusuf, consented to Arbitrator Intelligence’s publication and sale of a Report about him, one would need to willfully suspend all disbelief that he would consent to Arbitrator Intelligence’s misspelling and mis-ordering of his name, the misrepresentation of his residence, the omission of his nationality, and to the use of his image (and to being displayed as the only Member of the International Court of Justice not featured wearing the traditional robes). One would also have to further believe that he, as the architect of the current International Court of Justice policy that Members of the Court will not participate in investor-State or commercial arbitrations,¹⁸ would be advertising

arbitrator party-appointed, or sitting as a chair or sole arbitrator?), and changes in data and to arbitration practice over time. As an academically affiliated entity, however, Arbitrator Intelligence is uniquely positioned to meet these complex challenges.”) (emphasis added).

15. Catherine A. Rogers, *Arbitrator Intelligence: The Basics*, KLUWER ARB. BLOG, (Feb. 27, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/02/27/ai-3/> (“Arbitrator Intelligence’s status as a non-profit permits it to commit to the larger goals in its Mission Statement (transparency, accountability, and increased diversity in arbitrator selection), rather than focus primarily on earning profits. As an academically affiliated entity, Arbitrator Intelligence is able to benefit from the expertise of leading scholars...”).

16. Arbitrator Intelligence, *FAQS*, <https://arbitratorintelligence.com/faqs/> (last accessed Mar. 27, 2021) (“Arbitrator Intelligence was originally a research project developed at Penn State University. It transitioned from research idea and non-profit into a legal tech startup with the assistance and support of Invent Penn State.”).

17. *Compare* Arbitrator Intelligence, *Your Face In Arbitrator Intelligence* (Mar. 26, 2015) [<http://web.archive.org/web/20150601012726/http://www.arbitratorintelligence.org/your-face-in-arbitrator-intelligence/>] (last accessed Mar. 27, 2021) (“Your privacy is important to us, and we will not use any Member photos without your express consent...”); *compare* Daniel Schimmel, John A. Shope, Amanda Hainsworth, and Diana Tsutieva, *Transparency in Arbitration*, PRACTICAL L. ARB. (March 2018), https://foleyhoag.com/media/files/foley%20hoag/publications/articles/2018/transparency%20in%20arbitration_practical%20law_mar2018.ashx (“Before any [Arbitrator Intelligence] report about an arbitrator is published, that arbitrator’s consent must be secured. The arbitrator is also to have an option to withdraw consent.”).

18. H.E. Mr. Abdulqawi A. Yusuf, President of the International Court of Justice, Speech on the Occasion of the Seventy-Third Session of the United Nations General Assembly (Oct. 25, 2018),

for arbitrator roles on this public platform while in office. For the avoidance of doubt: Judge Yusuf did not consent to Arbitrator Intelligence's publication of any report about him, or to the use of his name on its website.¹⁹

By publishing Reports without prior consent or notification by the arbitrators, Arbitrator Intelligence disrespects at least two concepts that are key to arbitration: consent and the distinction between public and private. Consent is the cornerstone of arbitral jurisdiction.²⁰ Arbitration is distinguished from "public" dispute resolution, which is provided by the state. Unless otherwise agreed, arbitration is private and, unlike judges, arbitrators are private actors – in "alternative" dispute resolution, they are an "alternative" to public judges.²¹ Privacy and the ability to agree to confidentiality are often cited as one of the key benefits of arbitration.²² Curiosity about an arbitrator's activities or a buyer's willingness to pay up to \$75,000 for an Arbitrator Intelligence Report about an arbitrator, is not sufficient to transform a private arbitrator into a public figure.²³

Arbitrator Intelligence recognizes the market value of consent and notification. In its sample Report for Mirjana Radović, Arbitrator Intelligence states "Arbitration (sic) Intelligence produces (Arbitrator Intelligence) Reports with consent."²⁴ In its Frequently Asked Questions, Arbitrator Intelligence promises that "before (Arbitrator Intelligence) publishes a Report about an arbitrator, it notifies the arbitrator who is the subject of the Report and gives them the opportunity to review it."²⁵ Prior versions of the Arbitrator Intelligence website similarly stated "Arbitrator Intelligence produces (Arbitrator Intelligence) Reports with arbitrator notice."²⁶ Nonetheless, many individuals have not been informed

<https://www.icj-cij.org/public/files/press-releases/0/000-20181025-PRE-02-00-EN.pdf>; *see also* Callum Musto, *New Restrictions on Arbitral Appointments for Sitting ICJ Judges*, EJIL:TALK! (Nov. 5, 2018) <https://www.ejiltalk.org/new-restrictions-on-arbitral-appointments-for-sitting-icj-judges/>.

19. Email from H.E. Mr. Abdulqawi A. Yusuf to Dr. Katherine Simpson (May 2, 2021) (on file with author).

20. Natalia Chaeva, *Consent to Arbitration*, JUS MUNDI, <https://jusmundi.com/en/document/wiki/en-consent-to-arbitration> (last accessed May 3, 2021).

21. Ralf Michaels, *International Arbitration as Private and Public Good*, THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION (Thomas Schultz and Federico Ortino, eds) (Sept. 2020), <https://www.oxfordhandbooks.com/view/10.1093/law/9780198796190.001.0001/law-9780198796190-chapter-16>.

22. Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211 (2006).

23. Compare Gary Bugh, *Public Figures and Officials*, THE FIRST AMENDMENT ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/1010/public-figures-and-officials>.

24. Arbitrator Intelligence, *Preview AI Reports – Mirjana Radović*, YOUTUBE (July 22, 2020), <https://youtu.be/VtbxUrXdMvU> (last accessed May 3, 2021).

25. Arbitrator Intelligence, *supra* note 16 ("The AIQ has a number of features designed to ensure not only the accuracy, but also the fairness, of the information in the Reports. First and foremost, before AI publishes a Report about an arbitrator, it notifies the arbitrator who is the subject of the Report and gives them the opportunity to review it.").

26. Arbitrator Intelligence, *Homepage* (Feb. 3, 2018 – Jan. 24, 2021), <https://web.archive.org/web/20201113065723/https://arbitratorintelligence.com/> (last accessed Mar. 27, 2021) ("Arbitrator Intelligence produces AI Reports with arbitrator notice"); Daniel Schimmel, John A. Shope, Amanda Hainsworth, and Diana Tsutieva, *Transparency in Arbitration*, PRACTICAL LAW ARBITRATION (Mar. 2018), [https://foleyhoag.com/-/media/files/foley%20hoag/publications/articles/2018/transparency%](https://foleyhoag.com/-/media/files/foley%20hoag/publications/articles/2018/transparency%20in%20arbitration.pdf)

that Arbitrator Intelligence has prepared Reports on them or that Arbitrator Intelligence and Wolters Kluwer²⁷ are already distributing them. This is reflective of an interesting selection bias – it is unclear why Arbitrator Intelligence chooses to create Reports about some individuals and not others. Arbitrator Intelligence has avoided preparing Reports on arbitrators who publicly support Arbitrator Intelligence, yet it prepares Reports on individuals who have never even heard of Arbitrator Intelligence.

Arbitrator consent serves a qualitative, substantive purpose: it gives arbitrators the chance to correct errors. The obvious errors in photo attribution, citizenship, residency, and employment errors contained in many of the nearly four hundred Reports offered for sale with Arbitrator Intelligence could have been avoided if the subject arbitrators, who have an economic interest in the accurate reporting of citizenship and residency information, had reviewed them. Inaccurate reporting of citizenship and residency information could impair an arbitrator's ability to be appointed because some cases require that the arbitrator have (or lack) a particular citizenship. Having inaccurate information published about one's citizenship or residence could generate distrust and create bases for appointment delay and missed opportunities. Arbitrator Intelligence misreports the citizenship and residency data of nearly all of their arbitrators who are dual nationals or live outside of their country of citizenship, including for example David J.A. Cairns (who is a citizen of New Zealand) and Bruno Simma (who is Austrian and German).²⁸ Arbitrator intelligence needs reliable internal practices and predictable methodology to ensure that the information reported is accurate. The failure to accurately report the (easily and often publicly verifiable²⁹) citizenship or residence data of its subject arbitrators may indicate an absence of such essential procedures. It puts the reliability of Arbitrator Intelligence's reporting into question.

ARBITRATOR INTELLIGENCE REPORTS LACK FACTUAL FOUNDATION

Arbitrator Intelligence promises to deliver “critical information about arbitrators and their decision-making,”³⁰ and states that their Reports are based on

20in%20arbitration_practical%20law_mar2018.ashx (“Before any [Arbitrator Intelligence] report about an arbitrator is published, that arbitrator's consent must be secured. The arbitrator is also to have an option to withdraw consent.”).

27. Wolters Kluwer, *Arbitrator Intelligence Reports State-of-the-art analytics about International Arbitrators*, <https://www.kluwerarbitration.com/arbitrator-intelligence> (last accessed Mar. 27, 2021).

28. Compare Arbitrator Intelligence, *Order Reports*, <https://arbitratorintelligence.com/order-reports/> (follow “>“ hyperlink until page featuring David J.A. Cairns as a Spanish Arbitrator living in New Zealand and the United Kingdom, rather than as a citizen of New Zealand with a significant Spanish practice; follow “>“ hyperlink until page featuring Bruno Simma as a U.S. citizen residing in Germany).

29. See e.g., International Centre for Settlement of Investment Disputes, *Arbitrators, Conciliators and Ad Hoc Committee Members*, <https://icsid.worldbank.org/resources/databases/arbitrators-conciliators-ad-hoc-committee-members> (last accessed Mar. 27, 2021) (one of many online resources where arbitrators consensually provide personal data about themselves).

30. Arbitrator Intelligence, *supra* note 26.

submitted awards and a survey called the Arbitrator Intelligence Questionnaire ("AIQ"),³¹ which is prepared anonymously by parties, counsel, and third-party funders sometimes years after an arbitration proceeding.³² Subject to one important caveat, none of the people who are invited to complete the AIQ have any "information about arbitrators and their decision making" because none of these individuals were present during the tribunal's private and confidential deliberative process. Any "information" that these individuals can provide is "speculation" and cannot be relied on as a factual assessment.

In the case of the caveat (the double-hatting arbitrators who, as "counsel" or "third party funders," submit AIQs on their arbitrator-competitors),³³ responses to the AIQs are "biased" at best. There is no separation between the legal bar and the arbitration bar, and many attorneys act as counsel and as arbitrator. When an arbitrator wearing his or her "counsel"-hat and completes an AIQ on any arbitrator, he or she is preparing an AIQ on his or her own competitor and future co-arbitrator.³⁴ Senior arbitrators who serve as both arbitrator and counsel, including Mr. Gary Born, have publicly committed to completing AIQs for all past cases where counsel services were provided, despite the natural conflict of interests that arises from being available as arbitrator.³⁵ Counsel or arbitral institutions should hesitate to rely on Arbitrator Intelligence's Reports any more than a "somebody told me, but I can't tell you who"-recommendation, possibly given by the arbitrator's competitor.

Even in the best-case scenario (where the AIQs are honest and the awards are real), the research that Arbitrator Intelligence wishes to undertake requires a high degree of skill – not just in question design,³⁶ but also in the physical attribution of information to the correct arbitrator's Report. Arbitrator Intelligence would need a

31. Arbitrator Intelligence, *supra* note 16 ("Through its unique AIQ and its extensive relationships with arbitral institutions, law firms, and users of arbitration, Arbitrator Intelligence is able to collect crucial data and feedback about arbitration proceedings that are not publicly available. It collects this data while still maintaining the confidentiality of the underlying cases and the anonymity of those who provide such information. Only Arbitrator Intelligence has and can provide access to this information and the valuable strategic advantages and insights that it offers to arbitration users.").

32. *Compare* International Chamber of Commerce Commission on Arbitration in ADR, *ICC Commission Report The Accuracy of Fact Witness Memory in International Arbitration* (2020), <https://iccwbo.org/content/uploads/sites/3/2020/11/icc-arbitration-adr-commission-report-on-accuracy-fact-witness-memory-international-arbitration-english-version.pdf> ("The memory of an honest witness. . . can easily become distorted and may therefore be less reliable than the witness, counsel or the tribunal expects. . . . Where the accuracy of witness memory is not relevant, neither are concerns regarding memory corruption.").

33. Catherine A. Rogers, *supra* note 15 ("To date, Gary Born and Wilmer, Cutler, Pickering, Hale & Door have committed to provide such retrospective AIQ responses.").

34. Arbitrator Intelligence, *supra* note 16.

35. *Id.*

36. *See e.g.*, Bernard C.K. Choi & Anita W.P. Pak, *A Catalog of Biases in Questionnaires*, 2(1) PREVENTING CHRONIC DISEASE, PUB. HEALTH RSCH, PRAC., AND POL'Y A13 (Jan. 2005), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1323316/#:~:text=Questionnaire%20bias%20is%20a%20result,questionnaire%20is%20administered%20or%20completed> (identifying 48 types of bias in questionnaires and explaining three sources of bias: the way a question is designed, the way the questionnaire as a whole is designed, and how the questionnaire is administered).

reliable way to match a party, counsel, or third-party funder's AIQ to the correct subject arbitrator every time. The Arbitrator Intelligence Reports offered for "Alvaro Castellanos" and separately for his apparent clone "Alvaro Rodrigo Castellanos Howell" prove that such quality control is absent. Each Report contains different information but has the same price and uses the same photo.³⁷ Further, each Report fails to deliver the "aggregated" data that Arbitrator Intelligence promises its readers.

Matching a photo to the correct arbitrator is the same process that one would use to match an AIQ to the correct arbitrator, and errors in one activity might signal errors in the other. This is why Arbitrator Intelligence's mistaking Veijo Heiskanen for David R. Haigh is not just comical, but substantive. Granted, both are kind and highly intelligent French-speaking Caucasian men whose last names start with "H" – but they are hardly interchangeable! They are literally an Ocean apart, as surely those completing an AIQ would agree. Likewise, while it is entertaining to see Bruno W. Boesch's photo working overtime selling Grant Hanessian's Report, one must wonder whether the awards or AIQs that were destined for one arbitrator have, likewise, been misattributed to the other. Without transparency in the awards and AIQs on which the Reports are based, and without arbitrator review and consent to publication of Reports (as promised), the Reports produced cannot be relied upon.

ARBITRATOR INTELLIGENCE REPORTS COULD FACILITATE DECEPTION AND MANIPULATION

Experience is often difficult to measure and case experience is difficult to verify. Because parties comply with an estimated 85% of awards without the assistance of courts, most awards are kept out of public view. When it comes to validating experience, arbitrators with significant "*ad hoc*" experience are at a particular disadvantage.

Arbitrator Intelligence has created an avenue where arbitrators can validate their otherwise unverifiable *ad hoc* arbitration experience. Arbitrator Intelligence will accept and hold confidential awards from "any" source, and those creating their own "'MY-LAST-NAME-HERE'-Arbitration"-brand may find Arbitrator Intelligence to be a receptive audience for "any"³⁸ awards. A private sector company like Arbitrator Intelligence, however, does not face the same consequences that a university might for the inclusion of false data in its scientific research. What appears to be missing, now that Arbitrator Intelligence is separated from its academic backing, are safeguards to prevent the submission of manipulated awards to Arbitrator Intelligence for the generation of Arbitrator

37. Arbitrator Intelligence, *Reports*, <https://arbitratorintelligence.com/order-reports/> (follow link to "Reports", which are organized alphabetically by first name, showing arbitrators "Alvaro Castellanos" and "Alvaro Rodrigo Castellanos Howell" on separate lines of the first page where one can order Reports); *see also id.* (follow hyperlink to letter "C", to list arbitrators in alphabetical order by last name) (showing arbitrators "Alvaro Castellanos" and "Alvaro Rodrigo Castellanos Howell" next to one another).

38. Arbitrator Intelligence, *supra* note 7.

Intelligence Reports. Without such safeguards, actors could use Arbitrator Intelligence as a venue to validate a deceptive, false, or manipulated arbitral record.

The Report that Arbitrator Intelligence has provided on Roque J. Caivano³⁹ as a free sample shows both (1) the ease with which case experience can be manufactured and (2) the harm that can come to arbitrators who, because of that ease, might face added difficulty credibly demonstrating their interesting experiences.

Preview AI Reports - Caivano

Roque J. Caivano

Nationality: Argentina Languages: Spanish & English
 Domicile: Buenos Aires Firm/Organization: Roque J. Caivano
 Education: Doctorate of Law, Universidad de Morón (also fulfilled coursework for Doctorate in Law in the University of Salvador (2003) Position: Professor, University of Buenos Aires Faculty of Law
 Additional Profiles: www.cids.ch/mids/the-program/the-faculty/490-roque-caivano

OVERVIEW OF DISPUTES

	[Arbitration 1] Energy \$11,000,000 Lima Chamber of Commerce	[Arbitration 2] Shipping & Transportation \$198,425,909 Quito Chamber of Commerce	[Arbitration 3] Energy \$10,000,000 Ad Hoc	[Arbitration 4] Construction \$50,000,000 ICC
OVERVIEW OF DISPUTES				
Institution/Arbitral Rules	Lima Chamber of Commerce/ Lima Chamber of Commerce	Center for Arbitration and Mediation of Quito's Chamber of Commerce/Ecuador's Arbitration and Mediation Law	Ad hoc/ICSID	ICDR/ICC
Seat of Arbitration	Lima, Peru	Panama	Washington D.C., USA	Madrid, Spain
Nature of the Arbitration & Dispute	Commercial/Energy	Commercial/Construction, Shipping & Transportation	Commercial/Energy	Commercial (Shareholder Conflict)/ Construction
Language	Spanish	English/Spanish	Spanish	Spanish
Appointment of the Tribunal	<ul style="list-style-type: none"> Caivano appointed as co-arbitrator by Claimant Chair appointed by co-arbitrators Other co-arbitrator appointed by Respondent 	<ul style="list-style-type: none"> Caivano appointed as co-arbitrator by the institution, appointing authority, or list method Chair appointed by co-arbitrators Other co-arbitrator appointed by Claimant 	<ul style="list-style-type: none"> Caivano appointed as co-arbitrator by Respondent Chair appointed by co-arbitrators Other co-arbitrator appointed by Claimant 	<ul style="list-style-type: none"> Caivano appointed as presiding arbitrator by the institution, appointing authority, or list method Co-arbitrator appointed by Claimant Other co-arbitrator appointed by Respondent
Final Disposition	Resolved by a final award on the merits	Resolved by a final award on the merits. Subsequently reversed on appeal. Arbitration is now pending.	Resolved by a final award on the merits	Settlement - after the initial procedural order and before an award on jurisdiction
Tribunal Secretary	No	Tribunal appointed a Secretary and Secretary Ad-Hoc	No	N/A

ARBITRATOR INTELLIGENCE

0:36 / 2:20

Scroll for details

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Image taken from the video available at Arbitrator Intelligence, <https://arbitratorintelligence.com/product/roque-caivano/> *Preview AI Report Roque J. Caivano*, by following the link to the video, at <https://youtu.be/8RMe6BZcfTk?t=139> (second 36), *see also id.* second 51 (showing that Arbitration 3 was a “fast track” arbitration), 1:38 (showing amounts in dispute). Although the file states that these are confidential draft reports that are not for distribution, Arbitrator Intelligence is using them in its advertising.

Arbitrator Intelligence states that Roque J. Caivano, served as Respondent’s nominated arbitrator in an *ad hoc*, fast-track ICSID arbitration valued at US\$10,676,500 (US\$34,698,600 sought after final submissions) seated in Washington, D.C., where the Tribunal awarded US\$1,084,580, after applying Peruvian law.⁴⁰ This is the kind of case that must be seen to be believed: every element of the case’s description calls its credibility into question. The award –

39. Arbitrator Intelligence, *Preview AI Reports - Caivano*, YOUTUBE (July 22, 2020), <https://youtu.be/8RMe6BZcfTk?t=139> (last accessed Mar. 29, 2021).

40. *Id.*

even redacted – could assuage skepticism about whether, given the role that ICSID plays in cases conducted pursuant to its Rules, an ICSID case conducted in ICSID’s absence could produce an enforceable award. It might describe “fast track” ICSID arbitration. The award might explain what compelled the parties to have the legal seat of their dispute be Washington D.C., and what compelled the Claimant to give up the valuable right to a non-national award based on procedures seated in the Washington Convention.⁴¹ The award might even reference the relevant acts of state that would have enabled the Respondent to consent to an *ad hoc*, fast-track ICSID arbitration seated in a foreign jurisdiction!

Interesting cases like his invite the question of whether Arbitrator Intelligence has any mechanism to ensure that only validly issued awards are accepted and that other awards are rejected. If Arbitrator Intelligence were to provide copies of the referenced awards, Arbitrator Intelligence Report purchasers could better judge whether to find the experience credible and the resulting Report reliable.

The submission of AIQs is another avenue where Arbitrator Intelligence Reports can be manipulated. The effect of sampling bias (only asking a certain group of people), response bias (whether someone answers all or just some of the questions), and survivorship bias (getting samples from only long-term, repeat customers), is that the Report is based on incomplete and one-sided data. The sample Arbitrator Intelligence Report on Prof. Fernando Cantuarias Salaverry further demonstrates the ease with which information can be manipulated through simple selection bias in respect of who completes the AIQ, and for which cases. Prof. Cantuarias’s Report provides analytics for nineteen “Cantuarias-Arbitrations,” based on AIQs completed by nineteen individuals.⁴² This means that only one non-contested AIQ was provided for each case, which suggests that specific individuals may have been encouraged to provide analysis for specific cases – a form of data manipulation called “cherry picking,” whereby only certain information is presented, against the fallacy that it represents the whole. Disclosure of the AIQs and their authorship would make the Report more credible because it would let the reader see whether the same person, the same party, or the same type of AIQ Respondent (party, counsel, third party funder) completed each lengthy AIQ.

What is striking about the Report is not what it contains, but what it lacks: any reference to Prof. Cantuarias’s implication in the ongoing international corruption investigation concerning Odebrecht.⁴³ For \$75,000 (or even the

41. See e.g., Annalise Nelson, *Between a Sovereign and a Hard Place: Enforcing Arbitral Awards Against “Independent” State Entities in the U.S. Courts*, KLUWER ARB. BLOG (June 14, 2012), <http://arbitrationblog.kluwerarbitration.com/2012/06/14/between-a-sovereign-and-a-hard-place-enforcing-arbitral-awards-against-independent-state-entities-in-the-u-s-courts/> (discussing legal issues related to the enforcement of arbitral awards against sovereign entities in the U.S.).

42. Arbitrator Intelligence, *Report on Fernando Cantuarias Salaverry*, <https://arbitratorintelligence.com/product/fernando-cantuarias-salaverry/> (stating that report is based on 25 AIQs, while the same Report itself states that only 19 were prepared. See https://www.youtube.com/watch?time_continue=23&v=8X2WahnYSNc&feature=emb_title).

43. Cosmo Sanderson, *Peruvian Arbitrators Released on Appeal*, GLOB. ARB. REV. (Nov. 29, 2019), <https://globalarbitrationreview.com/peruvian-arbitrators-released-appeal>.

discounted price of \$15,000), a purchaser of a fact-based, scientifically-backed Arbitrator Intelligence Report might expect to learn that Prof. Cantuarias is one of fourteen arbitrators who is under investigation in an arbitration bribery scandal that is so large it has implicated four prior Presidents of Peru.⁴⁴ Arbitrator Intelligence is aware of the scandal. Its founder, Prof. Catherine Rogers, is one of many who publicly supported Prof. Cantuarias's successful appeal of an eighteen-month pre-trial detention order related to that ongoing bribery investigation.⁴⁵ The fact that his Report contains no indication of this scandal reflects perhaps personal, rather than factual, motivation of the Report.

The errors in arbitrator citizenship, domicile, and employment contained in many Reports indicate that Arbitrator Intelligence is not successfully verifying the correctness of statements made through the AIQs. These two candid sample reports demonstrate the ease with which Arbitrator Intelligence Reports can be manipulated. The open risk of manipulation harms the arbitrators who are subject of the Reports, as well as end users who, keenly interested in an arbitrator with a true record of arbitral decision-making, might appoint an arbitrator who in truth does not have the experience that Arbitrator Intelligence validated in its Reports. In addition to cross-referencing, the disclosure of the awards and AIQs on which Reports are based would be important steps toward preparing accurate and reliable reports, while preventing deception and manipulation.

ARBITRATOR INTELLIGENCE UNDERMINES DIVERSITY EFFORTS.

One of Arbitrator Intelligence's express goals is to increase diversity in arbitration.⁴⁶ But, Arbitrator Intelligence was never designed to improve diversity,⁴⁷ and even in the best circumstances could not. Its pricing practices alone undermine quality and skills-based appointments and, likewise, diversity.

44. Elina Mereminskaya & Claudio Inostroza, *Corruption in State Arbitration in the Republic of Peru: Cases, Lessons, and Possible Solutions*, ARB. J. (Mar. 14, 2020), <https://journal.arbitration.ru/analytics/corruption-in-state-arbitration-in-the-republic-of-peru-cases-lessons-and-possible-solutions/>.

45. Cosmo Sanderson, *Peruvian Arbitrators Released on Appeal*, GLOB. ARB. REV. (Nov. 29, 2019), <https://globalarbitrationreview.com/peruvian-arbitrators-released-appeal>; See also CIAR Global, *Cantuarias Suma Más Apoyos: La IBA, El CEA Y Catherine Rogers Condenan El Trato Recibido Por El Árbitro Peruano* (Nov. 16, 2019), <https://ciarglobal.com/cantuarias-suma-mas-apoyos-la-iba-el-cea-y-catherine-rogers-condenan-el-trato-recibido-por-el-arbitro-peruano/> (Prof. Catherine Rogers of AI wrote to the Presidency of the Council of Ministers of Peru and explained that she had been able to work with Prof. Cantuarias on projects connected with AI. Prof. Rogers explained that, in the records on her platform, Prof. Cantuarias is shown to be an excellent, highly efficient, and effective arbitrator." (emphasis added) (Spanish original: "Concretamente en los registros de esta plataforma figura el árbitro peruano, y Rogers hace referencia a la información que sobre él se almacena y que demuestra que es: 'generalmente considerado por partes y abogados como un excelente, altamente eficiente y efectivo árbitro'." It is not stated whether Prof. Cantuarias also pre-approved Prof. Rogers's statement.)

46. Rogers, *supra* note 9.

47. Arbitrator Intelligence, *IBA Panel in Toronto Briefed about Arbitrator Intelligence* (May 30, 2014), <http://web.archive.org/web/20140924102223/http://www.arbitratorintelligence.org/professor-rogers-presents-arbitrator-intelligence-to-iba-audience-in-toronto/> (last accessed May 3, 2021) ("Paul Friedland, leading arbitration practitioner, inquired during Q&A why large law firms that

Pricing is psychological.⁴⁸ Consumers often associate higher quality with higher prices. Thus, businesses and service providers using a “prestige” or “premium”-pricing model will sell goods or services at a higher price because lower prices inhibit sales and discourage buyers.⁴⁹

Arbitrator Intelligence states that “the price of each Report is based on...the amount of data available on the arbitrator who is the subject of the Report.”⁵⁰ A review of the Reports offered for sale indicates that the number of completed AIQs, however, may also be influential. Use of the AIQ to price Reports is an invalid measure of arbitrator quality because it would discount cases with fewer people available to complete AIQs. One of modern arbitration’s ironies is that lower value cases are often procedurally more complicated than the higher value ones. Perhaps it is because parties appear without counsel or feel that they have nothing to lose by distracting the arbitrator with ancillary procedural battles. Or there might be no procedural battles at all – one party might not even participate! All three scenarios demand the highest quality arbitrators – yet all three arbitrations would be discounted by a valuation metric that would depend on the availability of parties, counsel, and funders to complete AIQs. For arbitrators who serve on cases where parties are unrepresented or parties refused to participate, or where the case did not require outside financing, there are fewer people to complete the AIQ, and the arbitrator’s value in the eyes of Arbitrator Intelligence would suffer. In this way, if the Report price is based on AIQ responses, Arbitrator Intelligence would prejudice case experience that should be celebrated.

A brief review of the Reports offered shows that the amount of data or case information has no bearing on Report price, at least as far as Black Arbitrators are concerned. As of late April 2021, Arbitrator Intelligence priced the reports of each individual of African Descent at the lowest possible rate of \$500, regardless of case experience. Among the people of African Descent who are featured on Arbitrator Intelligence’s website are ICSID arbitrators, Members of the Court of the International Chamber of Commerce, a Member of the World Bank IFC and MIGA Sanctions Board, and a Member of the International Court of Justice. It is unclear what Arbitrator Intelligence’s valuation metric favors, but it appears to be something other than the amount of data available on an individual. Perhaps this is what Arbitrator Intelligence meant when it promised to “promote a holistic

enjoy an information advantage should be interested in Arbitrator Intelligence. Prof. Rogers ... speculated that as arbitration practice becomes more diffuse and diverse, large law firms and parties may not always be, or may not in every case be, on the winning side of informational asymmetries.”).

48. Roger L. Martin, *Pricing Needs to Reflect Who People Want to Be, Not Just What They Want*, HARV. BUS. REV. (Jan. 25, 2019), <https://hbr.org/2019/01/pricing-needs-to-reflect-who-people-want-to-be-not-just-what-they-want>; Sandeep Heda, Stephen Mewborn, and Stephen Caine, *How Customers Perceive a Price Is as Important as the Price Itself*, HARV. BUS. REV. (Jan. 3, 2017), <https://hbr.org/2017/01/how-customers-perceive-a-price-is-as-important-as-the-price-itself> (explaining that, with the exception of luxury providers, companies want to be perceived as having lower prices than their competitors).

49. Monash University, *Prestige Pricing*, <https://www.monash.edu/business/marketing/market-ing-dictionary/p/prestigepricing#:~:text=a%20pricing%20strategy%20in%20which,quality%3B%20also%20called%20Image%20Pricing> (last accessed May 3, 2021).

50. Arbitrator Intelligence, *supra* note 16.

approach to supporting African arbitrators and the market in which they exist.”⁵¹ This language is perhaps based on the long history of exclusion of people of African Descent from international law outlets and international arbitration. Unfortunately, Arbitrator Intelligence reproduces and reinforces that exclusionary thinking by pricing all Black individuals at the same, lowest rate, regardless of their experience or the amount of data available about them – something that Arbitrator Intelligence has not done to any other ethnic group. And by now, Arbitrator Intelligence should have learned that this “market in which they exist” includes the International Chamber of Commerce, ICSID, and the International Court of Justice.

CONCLUSION

Arbitrator Intelligence states that it will support arbitrator accountability and promotes the idea that, when arbitrators believe that a party, counsel, or third party financier might complete an AIQ about an arbitrator, this will make the arbitrator more accountable and possibly change that arbitrator’s behavior.⁵² Taken to its full extreme, if Arbitrator Intelligence’s assumptions are accurate, the AIQ would likely change behavior in favor of Claimant parties, because they are the only side that can have AIQs completed by all three potential authors – parties, counsel, and third-party funders. This is a threat to arbitral legitimacy. With its potential widespread use by governments⁵³ and arbitral institutions,⁵⁴ Arbitrator Intelligence threatens accountability, transparency, and diversity in international arbitration. If arbitrators begin deciding awards out of fear of anonymous disparaging AIQ-comments published in an Arbitrator Intelligence Report, arbitration’s legitimacy will be threatened.

51. Catherine Rogers & Amanda Lee, *Ready for your Close Up? Arbitrator Intelligence Reports Shine a Spotlight on Decision-Making by More Than 300 Arbitrators*, THOMSON REUTERS PRAC. L. ARB. BLOG (Nov. 3, 2020), <http://arbitrationblog.practicallaw.com/ready-for-your-close-up-arbitrator-intelligence-reports-shine-a-spotlight-on-decision-making-by-more-than-300-arbitrators/>.

52. Arbitrator Intelligence, *supra* note 16 (“What are Arbitrator Intelligence’s values and how does it promote them? . . . Accountability: The potential for feedback and greater availability of information about arbitrators’ track records provides a positive and non-invasive incentive for arbitrators to adhere to the highest professional standards.”).

53. Arbitrator Intelligence, *The Department of Foreign Affairs, Trade and Development of the Government of Canada Has Become a Member of Arbitrator Intelligence* (Feb. 2, 2021), <https://arbitratorintelligence.com/the-department-of-foreign-affairs-trade-and-development-of-the-government-of-canada-has-become-a-member-of-arbitrator-intelligence/>.

54. UNCITRAL Working Group III, *Possible Reform of Investor-State Dispute Settlement (ISDS) Selection and Appointment of ISDS Tribunal Members Note by the Secretariat (Investor-State Dispute Settlement Reform)* (Feb. 8-12, 2021), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/acn9_wg.iii_wp.203.pdf; Singapore International Arbitration Centre, *SIAC Signs Cooperation Agreement with Arbitrator Intelligence* (June 1, 2017), <https://www.siac.org.sg/our-rules/69-siac-news/535-siac-signs-cooperation-agreement-with-arbitrator-intelligence>; Singapore International Arbitration Centre, *SIAC Americas New York Office Launch Day 1 – East Coast Perspectives* (Dec. 2, 2020), <https://www.youtube.com/watch?v=xahgLzmvsWc>; International Council for Commercial Arbitration, *Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings*, ICCA REPORTS No. 8 (2020), https://www.arbitration-icca.org/publications/ICCA_Report_N8.html.

Since Arbitrator Intelligence's Reports exist, counsel may feel obligated to consider them as part of counsel's due diligence. Simply reading these error-laden Reports, however, sends counsel on a possibly wasteful errand to establish whether the arbitrator really is who Arbitrator Intelligence says – an errand that could ultimately be for nothing. By selling these reports and stating that arbitrators have reviewed them and consented to them, Arbitrator Intelligence is representing that those for whom Reports are available are accepting appointments as arbitrator. Arbitrator Intelligence features a number of retired arbitrators who held public retirements and are eagerly, actively, no longer accepting cases. In addition, there are several individuals who, owing to their current professional employment (which is often misstated by Arbitrator Intelligence), are unable to accept arbitrator appointments: among them are several Members of the International Court of Justice. The unreliable manner in which many Reports have been prepared is readily apparent on the Arbitrator Intelligence website. Even when one moves past the obvious errors, one is left with reporting that appears personally, rather than factually directed.

Accurate information about prospective arbitrators is not difficult to find, and it is rarely behind a paywall. Global Arbitration Review's Arbitrator Research Tool,⁵⁵ the Arbitrators of African Descent List,⁵⁶ the Jus Mundi Arbitrator Directory,⁵⁷ the ArbitralWomen Directory,⁵⁸ and the Membership Directories at the International Council for Commercial Arbitration ("ICCA"),⁵⁹ the American Society for International Law,⁶⁰ the Chartered Institute of Arbitrators,⁶¹ and the London Court of International Arbitration⁶² are all excellent places to start. And, just as Arbitrator Intelligence has repeatedly recognized, the best information about how an arbitrator renders awards is still contained in those awards.⁶³ Counsel's energy is best spent there.

55. Global Arbitration Review, *The GAR Arbitrator Research Tool*, <https://globalarbitrationreview.com/tools/arbitrator-research-tool>.

56. Nancy M. Thevenin and Katherine Simpson, *Arbitrators of African Descent with a U.S. Nexus* (Aug. 2020), <https://www.simpsonadr.net/files/ArbitratorsofAfricanDescentAugust2020-Final.pdf>.

57. Jus Mundi, *Directory of Arbitrators*, <https://jusmundi.com/en/directory/arbitrators/all>.

58. ArbitralWomen, *Member Directory*, <https://www.arbitralwomen.org/members-directory/>.

59. International Council for Commercial Arbitration, *ICCA Membership Directory*, <https://www.arbitration-icca.org/members>.

60. American Society for International Law, *Member Directory*, <https://www.asil.org/community/member-directory>.

61. Chartered Institute of Arbitrators, *Member Directory*, <https://www.ciarb.org/membership/member-directory/>.

62. London Court of International Arbitration, *Directory of Members*, <https://www.lcia.org/Membership/directory-of-members.aspx>.

63. Catherine A. Rogers & Alex Wiker, *Arbitrator Intelligence: The Pilot Project and Beyond*, KLUWER ARB. BLOG, (Jan. 20, 2015), <http://arbitrationblog.kluwerarbitration.com/2015/01/20/arbitrator-intelligence-the-pilot-project-and-beyond/> ("awards are historical documents not only about cases, but about arbitrators. An award deals with a completely different dispute, but it is nevertheless rich in detail about an arbitrator's actual past experience, decision-making, and work product... the information in arbitral awards is unfiltered by subjective interpretation and personal memory. In this respect, awards can provide interesting, and otherwise unavailable, bits of information to enhance the mosaic that counsel and parties create about prospective arbitrators during the selection process.").