PARTY AUTONOMY AND THE MARKET FOR ARBITRATORS: CAN BETTER ACCESS TO INFORMATION ABOUT ARBITRATORS PREVENT MARKET FAILURE?

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Few arbitration users will encounter an arbitrator who openly engages in misconduct. Many, however, will recognise the quieter frustration of dealing with an arbitrator who appears unprepared, unresponsive, or inattentive to the nuances of the case. This article suggests that such experiences are symptoms of a more fundamental structural issue in international arbitration: a lack of effective accountability for the adjudicative services arbitrators provide. It begins by examining whether abolishing or narrowing arbitral immunity could remedy this problem but concludes that such an approach would both unduly threaten arbitrators' independence and fail to offer a realistic path to reform.

The article instead argues that the more promising solution lies in correcting the current imbalance between the first-hand, experience-based knowledge that arbitrators and a small circle of repeat users possess about arbitrator performance, and the vague, largely anecdotal impressions on which the broader pool of users are often forced to rely when making appointments. Drawing on economic analyses of information failures, efficient markets, and adverse selection, it portrays the market for arbitrators' services as one in which parties often lack the concrete, qualitative information needed to distinguish between high- and low-performing arbitrators. In this context, the article calls on arbitral institutions—given their central position in the arbitral ecosystem—to take

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concrete, institutionally feasible steps to improve access to reliable, qualitative information about arbitrator performance, thereby strengthening party autonomy and improving the quality of arbitral adjudication.

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A. Introduction

You may have had the misfortune of encountering one of the following situations. An arbitrator refuses to hear a key witness despite a party's request to present oral evidence from them at a hearing.[1] An arbitrator takes over ten years to issue an award.[2] A state-party's co-arbitrator engages in *ex-parte* communications with that party's representative about the tribunal's confidential deliberations.[3] Yet another instance involves an arbitrator who repeatedly accepts bribes from a party in exchange for a favourable outcome.[4] Each instance of misconduct strikes at the core of confidence in international arbitration.

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1 *See CBS v. CBP* (2021) SGCA 4, para. 71 (Singapore Court of Appeal affirming the High Court's decision to set aside the arbitral award for a breach of natural justice) ('It is clear to us that the arbitrator's directions in excluding the entirety of the Buyer's witness evidence is a material breach of the rules of natural').

2 *See Hong Huat Development Co (Pte) Ltd v. Hiap Hong & Co Pte Ltd* (2000) SGCA 14, para. 56, in which the Singapore Court of Appeal observed that the delay itself was not a sufficient basis for setting aside the award but remained critical of the arbitrator's conduct ('Under s. 18 of the Act, an arbitrator is required, inter alia, to make an award with all reasonable despatch. A delay of the magnitude as in this case is grossly inordinate and cannot be tolerated. … The court would have removed the arbitrator for such a cause if an application had been made to the court pursuant to s. 18. … However … [n]ow that the award had been rendered we do not think the delay per se could be a good ground to set aside the award'.).

3 Such was the conduct of an arbitrator appointed by Slovenia in Slovenia's territorial and maritime dispute with Croatia. *See Croatia v. Slovenia*, Final Award, PCA Case No. 2012-04 (29 Jun. 2017), paras 176–178 ('[T]he Tribunal expressed concerns over the suggestion that one party might have access to confidential information related to the Tribunal's deliberations … On 22 Jul. 2015, Serbian and Croatian newspapers published transcripts and audio files of two telephone conversations reportedly involving the arbitrator appointed by Slovenia, Dr Jernej Sekolec, and Ms. Simona Drenik, then one of two Agents.

4 This was the conduct of an arbitrator appointed by Odebrecht in the Brazilian company's infrastructure project disputes in Peru. Evidence of bribery was not limited to this one arbitrator. *See* Paula Juliana Tellez, *The Salem Trials Redux?*

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However, the problem that most arbitration users are likely to encounter is less conspicuous but potentially just as destabilizing: substandard service by arbitrators who fail to meet the legitimate expectations of the parties who engage them for a fee. This paper asks whether greater access to reliable information about arbitrators could correct the informational failures that weaken party agency and choice (i.e., party autonomy) and arbitrator accountability in arbitration.

Currently, the doctrine of arbitral immunity shields arbitrators from civil liability for, inter alia, certain failures to meet the parties' expectations that comprise civil wrongs. While this doctrine serves to protect arbitral independence, it also creates a vacuum of accountability. In economic terms, this produces a form of deadweight loss – namely, an unrealized potential for arbitrators to be incentivized to strive for high standards of diligence and care.

In this context, section 2 of this paper starts with considering whether narrowing or abolishing arbitral immunity would be an effective way to improve the quality of an arbitrator's performance. It concludes that, while imperfect, arbitral immunity remains essential, but that a more constructive solution must be found elsewhere. Section 3 identifies the underlying cause of poor accountability: a pervasive lack of reliable, qualitative information about arbitrators. It argues that this informational scarcity weakens users' ability to make informed choices, thereby perpetuating the appointment of arbitrators who may have a track record of substandard performance. Section 4 then explores why rectifying this access problem is both necessary and beneficial, before concluding that arbitral institutions are well positioned to lead a reform that enhances transparency and restores balance to the market for arbitrators.

B. Is removing arbitral immunity the answer to improving arbitrators' performance?

The most direct remedy for parties dissatisfied with an arbitrator's performance would be to sue for damages. For example, an award debtor could

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Peru & Arbitrator's Misconduct: A Commentary on the Fernando Cantuarias Case, ITA in Review, 4(1) J. Inst. Transnat'l Arb. 95 (2022) ('Arbitrator Jorge Horacio Cánepa Torre, appointed by Odebrecht in 17 arbitrations and a member of the tribunal in 19 of the cases, admitted to receiving bribes in exchange for obtaining a unanimous decision in favor of Odebrecht … In total, 19 arbitrators were apprehended and sent to provisional detention …'); *see also* Carlos Ríos Pizarro, *Summary of the Odebrecht Corruption Scandal and the Peruvian Jailed Arbitrators* (10 Dec. 2019), available at https://arbitrationblog.kluwerarbitration.com/2019/12/10/mixing-righteous-and-sinners-summary-of-the-odebrecht-corruption-scandal-and-the-peruvian-jailed-arbitrators/ (accessed 26 Mar. 2025).

bring an action (whether under the party's contract with the arbitrator, or in tort for, e.g., negligence[5]) for the arbitrator's failure to exercise due care, such as for lack of preparedness for the hearing, and claim the amount the party would not have been ordered to pay had the arbitrator exercised the due level of care. That, however, is precluded by the doctrine of arbitral immunity.

Today, whether as a matter of general principle of international law, national law, or pursuant to institutional arbitration rules, arbitrators are generally afforded either (1) absolute immunity against civil suits by parties claiming to have incurred costs and damages arising from the arbitrator's conduct in arbitrations or (2) qualified immunity, which provides the same protection but recognizes liability for intentional fraud or misconduct, and sometimes gross negligence, as exceptions to the general rule of immunity.[6]

This broad grant of immunity is generally viewed as an extension of the common-law doctrine of judicial immunity, which protects judicial officers from adjudicating a case defensively out of fear of reprisal by an unsuccessful litigant.[7] When parties began to resolve their disputes through private arbitration, the law soon extended judicial immunity to arbitrators because, as the Supreme Judicial Court of Massachusetts observed in *Hoosac Tunnel Dock & Elevator Co. v. O'Brien* (1884), '[a]n arbitrator is a quasi-judicial officer … exercising judicial functions'.[8] (The question of whether an arbitrator's role should be characterized by reference to his or her judicial function and how this role could still be understood in contractual terms is addressed in section 2.1 below.)

But as we explore in section 2.1 below, fully extending judiciary immunity to arbitrators fails to recognize that arbitrators, unlike judges, operate without the institutionalized tools that promote accountability and transparency in the judicial context. While both judges and arbitrators are remunerated for their services, arbitrators additionally assume a dual role: they perform adjudicatory functions akin to judges, yet do so

5 *See* Julian Lew & Loukas Mistelis et al., *Comparative International Commercial Arbitration* (2003), para 12–37 ('According to principles of professional liability, lawyers, valuers, architects or other experts are liable either on a contractual basis or in tort for negligence, for failing to exercise the necessary degree of care expected in the performance of their duties').

6 *See* Gary Born, *International Commercial Arbitration* (3d ed. 2021), §13.06[C][1] (international law); §13.06[C][2] (national law); §13.06[C][3] (institutional rules).

7 *See* Adedoyin Rhodes-Vivour, *Immunity of Arbitrators*, 83(4) Arb. Int'l J. Arb. Mediation & Disp. Mgmt. (2017).

8 *Hoosac Tunnel Dock & Elevator Co. v. O'Brien*, 137 Mass. 424, 426 (United States Mass. 1884).

in a private, fee-based context as service providers chosen by the parties in a competitive market. This duality of identity gives rise to tension because, as adjudicators afforded a degree of judicial immunity, arbitrators enjoy protections from scrutiny and accountability that are unusual for most providers of services for a fee. While other professionals, such as management or financial consultants, may limit their liability by contract, arbitrators differ in that such immunity arises not only from party agreement but also from applicable national law.

1. *Arbitrators as Service Providers: The Case Against Arbitrator Immunity*

In the authors' view, examining the three major theories of the nature of arbitrators shows that arbitrators, unlike judges, can essentially be understood as service providers.

To summarize the three major theories, the *jurisdictional theory* of arbitrators (also known as the '*status* theory'[9]) focuses on the similarities between the arbitrator and the judge, based on the core position that the arbitrators' power originates from the state's delegation of power to the arbitrator.[10] At the other end of the spectrum is the *contractual theory* of arbitrators, which posits that the arbitrator's power arises from the parties' contract.[11] In the middle there is the *hybrid theory*, which is premised on the idea that arbitration is both jurisdictional and contractual in nature, in that it must be conducted within the bounds of national laws in terms of procedure, but that it still originates from the parties' contract.[12]

The contractual theory appears to have emerged as the dominant analytical framework for understanding the arbitrator's role.[13] Even the hybrid theory appears to start from the premise that the legal underpinning of

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9 *See* e.g., Dario Alessi, *Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators' Liability*, 31(6) J. Int'l Arb. 735, 735–784 (2014), doi: 10.54648/JOIA2014035.

10 *See* Hong-Lin Yu, *A Theoretical Overview of the Foundations of International Commercial Arbitration*, 3(2) Contemp. Asia Arb. J. 255, 258–262 (2008).

11 *See ibid.*, at 255, 266–270.

12 *See ibid.*, at 255, 274.

13 *See* Lew & Mistelis et al., *supra* n. 5, para 12–4 ('It is widely recognised that the relationship between the parties and the arbitrator is primarily based on contract'); Born, *supra* n. 6, §13.06[C][4] ('The most widely-accepted rationale for the arbitrators' relationship with the parties is contractual: under the contractual theory, the arbitrators and the parties to an arbitration agreement enter into a

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arbitrator's role is contractual.[14] Yet regardless of which of these theories one subscribes to, all three theories do not deny that a key difference between arbitrators and judges is that the arbitrators are *chosen* by the parties and the terms of their appointment are agreed through a private agreement. Indeed, the contractual theory holds that arbitrators and judges are 'not viewed as equivalents' because arbitrators, unlike judges, are chosen by the parties through a contract, just as 'all other professionals'.[15] The hybrid theory, too, recognizes that while 'the arbitrator's duty is to judge', 'the power to do so is conferred … by the agreement of the parties', from which 'the parties have the power to choose the arbitrators'.[16] Even those who espouse the jurisdictional theory of arbitrators 'do … not dispute the idea that an arbitration has its origin in the parties' arbitration agreement' and recognize that an arbitrator's nomination 'is a matter for the parties'.[17]

It is therefore difficult to deny that, while arbitrators play a quasi-judicial role, that role is performed in an inherently commercial, consent-driven framework, where arbitrators are engaged by the parties for the services they provide.[18] In this sense, arbitrators are, we argue, essentially service providers no different from other producers of value in a

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separate agreement with one another, pursuant to which the arbitrators undertake to perform specified functions vis-à-vis the parties in return for remuneration, cooperation and defined immunities').

14 It has been noted that many jurisdictions have interpreted the arbitrator's role as a 'hybrid' one, 'recognizing that there is a contract in place [with the parties] but that it is a sui generis contract – a contract which is overlaid with a special adjudicatory function which is public in nature': *see* Matthew Gearing KC, *The Relationship Between Arbitrators and Parties: is the Pure Status Theory Dead and Buried?* (17 Jun. 2011), available at https://arbitrationblog.kluwerarbitration.com/2011/06/17/the-relationship-between-arbitrators-and-parties-is-the-pure-status-theory-dead-and-buried/ (accessed 30 May 2025).

15 *See* Jenny Brown, *Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion*, 1 J. Disp. Resol. 226, 229 (2009).

16 *See* Rhodes-Vivour, *supra* n. 7; Yu, *supra* n. 10, at 255, 274.

17 *See* Yu, *supra* n. 10, at 255, 258, 261–262.

18 As regards arbitrators who are appointed by arbitral institutions, there is no real distinction from those appointed by the parties. First, one could argue that parties' choice of an institution is an indirect exercise of their right to choose an arbitrator through the institution. Second, and perhaps more compelling is the argument that there is an implied agreement between the arbitrator and the parties, even if there is no express contract between them. For the latter point, *see* David Rivkin, *A New Contract Between Arbitrators and Parties* (HKIAC Arbitration Week Keynote Address) (27 Oct. 2015) ('Much has been written on whether arbitrators are hired by the parties or by the institution … There can be no question that ultimately arbitrators owe their duty to the parties who have

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market where value is exchanged for a fee.[19] Indeed, as Professors Lew and Mistelis note, arbitrators are 'professionals who, either as part of their professional activities or on a full time basis, earn significant amounts' for their service as an arbitrator.[20] In contrast, judges are often compensated less than arbitrators,[21] are not reliant on receiving engagements by the parties whose disputes they are adjudicating. As Lord Kilbrandon put it, '[t]he citizen does not select the judges … nor does he remunerate them'.[22]

Recognizing that arbitrators are service providers is important because while arbitration users can generally expect a high standard of performance – encompassing impartiality, diligence, efficiency, and reasoned decision-making[23] – that expectation applies with more force when the users have made a contractual arrangement with the arbitrators to receive such services in return for payment. In the authors' view, a high standard of performance is best incentivized when the service providers (i.e., arbitrators) are held accountable for substandard performance. In this context, the problem with extending judicial immunity to arbitrators is that it

engaged them, whether directly or through an institution. My proposal … would make moot this argument by creating a contract directly between the arbitrators and the parties … I believe that an implied contract … exists').

19 We recognize that arbitrators are not service providers in the strictest sense. *See Fouchard Gaillard Goldman on International Commercial Arbitration* 607 (Emmanuel Gaillard & John Savage eds 1999) ('Dispute resolution is not, strictly speaking, a "service". The arbitrators are certainly obliged to comply with the arbitration agreement and arbitration rules adopted by the parties, but the parties cannot go so far as to give "instructions" to the arbitrators as to the way in which the proceedings are to be conducted, let alone the content of their award').

20 Lew & Mistelis et al., *supra* n. 5, para 12–41.

21 *See* e.g., David Gaukrodger, *Adjudicator Compensation Systems and Investor-State Dispute Settlement*, OECD Working Papers on International Investment, 2017/05 (2017 OECD Publishing) (comparing the annual salary of an arbitrator being paid the ICSID rate of fees assuming forty-five weeks of work at forty hours a week, which was USD 675,000, to the salaries of Supreme Court judges from affluent jurisdictions such as France (EUR 116,751), Germany (EUR 110,011), United Kingdom – England and Wales (EUR 256,206), and the United States (USD 263,300), and concluding that the hypothetical arbitrator's fees are 'significantly higher than the salaries of the highest paid domestic judges').

22 Lew & Mistelis et al., *supra* n. 5, para 12–40 (quoting Lord Kilbrandon's dissenting opinion in *Arenson v. Casson Beckman Rutley & Co* (1975) 3 All ER 901, 918).

23 Arbitrators have a duty, among other things, to fairly and efficiently resolve the parties' dispute in an adjudicatory manner and conduct the arbitration in accordance with the arbitration agreement. *See* Born, *supra* n. 6, §13.04[A], [B]. Users of arbitration thus reasonably expect arbitrators to uphold these duties (i.e., they expect quality performance from arbitrators). *See* Rivkin, *supra* n. 18.

gives them significant leeway from accountability for their failures to meet the users' expectations, so long as the failures do not rise to the level of misconduct that falls under the limited exceptions to arbitral immunity.

Why should we give arbitrators this protection? Judges – who are not chosen by the parties (save, in a broad sense, those who are elected, such as in certain state courts in the United States) – are held far more accountable. Though judicial immunity protects judges from civil suits, they can be impeached (i.e., removed from the office of a judge, and not just from acting in a particular case),[24] their decisions are subject to a broad right of appeal,[25] their hearings are open to the public,[26] and their decisions are made public and thus subject to public scrutiny.[27] The same level of scrutiny, arguably, does not apply to arbitrators. For example, being removed through a challenge in one case does not preclude arbitrators from continuing to act in other cases. Further, while arbitral institutions have begun the practice of publishing awards where parties have consented to it in commercial arbitrations, the awards are still fully redacted in the interests of confidentiality.[28] While the practice of publishing awards is more common in investment-treaty arbitra-

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24 *See* e.g., Constitution of the Republic of Singapore (Revised ed. 2020), Art. 98; US Constitution (1787), Art. II, s. 4; Constitution of the Republic of Korea (1987), Art. 65; Constitutional Reform Act 2005, s. 33 (United Kingdom); Senior Courts Act 1981, Part I, s. 11 (United Kingdom).

25 *See* e.g., Supreme Court of Judicature Act 1969, s. 29 (Revised ed. 2020) (Singapore); 27 US Code, s. 1291; Court Organization Act, Art. 8 (2020) (Korea); Constitutional Reform Act 2005, s. 33 (United Kingdom); Senior Courts Act 1981, Part II, s. 15 (United Kingdom).

26 *See* e.g., Supreme Court of Judicature Act, Rules of Court (2021), Ord. 15, Rule 6 (Singapore); United States Courts, *Access to Court Proceedings*, available at https://www.uscourts.gov/court-records/access-court-proceedings (accessed 27 May 2025); Constitution of the Republic of Korea (1987), Art. 109; Ministry of Justice, Civil Procedure Rules & Practice Directions, Part 39, Rule 39.2 (United Kingdom).

27 *See* e.g., Singapore Courts, *Judgments*, available at https://www.judiciary.gov.sg/judgments (accessed 27 May 2025); Supreme Court of the United States, *Opinions*, available at https://www.supremecourt.gov/opinions/opinions.aspx (accessed 27 May 2025); Supreme Court of Korea, *Decisions – Guide*, available at https://eng.scourt.go.kr/eng/supreme/decisions/guide.jsp (accessed 27 May 2025); Courts and Tribunals Judiciary, *Judgments (United Kingdom)*, available at https://www.judiciary.uk/judgments/ (accessed 27 May 2025).

28 *See* e.g., *Singapore International Arbitration Centre Arbitration Rules* (7th ed. 2025), Rule 60.1 ('SIAC may, with the agreement in writing of all parties, publish any decision, ruling, order, or award of a Tribunal with the names of the parties and other identifying information redacted').

tions, disclosure is not the default rule in all cases.[29] On balance, arbitrators are not subject to an equivalent system of accountability as judges.

True, arbitrators *are* subject to some measure of accountability on the basis that repeat arbitration users can decide not to appoint them again. Users can also share with their peers their candid reviews of the arbitrator's performance in private. Sophisticated users keep a database of arbitrators with details sourced from their own experience as well as multiple counsel. But ultimately these are anecdotal measures that fail to address the root cause of the problem in any meaningful way.

It is sometimes also argued that arbitrators remain accountable through the possibility of annulment or non-enforcement of their awards. Arbitrators, quite rightly, may be concerned about reputational damage if their awards are set aside.[30] While this potential scrutiny exerts some discipline, the annulment mechanism remains an inadequate form of accountability for several reasons.[31] *First*, the threshold for setting aside an award is deliberately high, and the grounds are limited to procedural or jurisdictional defects rather than how an arbitrator adjudicated the merits of a case.[32] As a result, annulment proceedings do little to address substandard performance such as negligence in the application of the law to the facts or a misappreciation of the evidence. *Second*, from the parties' perspective, by the time they seek to

29 *See* UNCTAD, *Facts and Figures on Investor – State Dispute Settlement Cases*, IIA Issues Note No. 3 (2024), at 2 ('As some arbitrations can be kept confidential, the actual number of arbitrations filed in 2023 (and previous years) is likely to be higher').

30 Awards are rarely set aside, but the few that are often make headlines. *See* e.g., *DJP and others v. DJO* (2025) SGCA(I) 2 (the Singapore Court of Appeal upholding the High Court's decision to set aside an arbitral award after finding that the arbitral tribunal extensively copied portions of its award from other arbitral awards).

31 There may be a technical objection (which we view as immaterial) that a party bringing a set-aside proceeding is asserting a right against the award-creditor, not the arbitrator(s) that penned the award: *see* Emmanual Gaillard & John Savage eds, *supra* n, 19, para. 1135.

32 Though different legal systems vary, the grounds for setting aside or annulling an arbitral award is similar in 'most jurisdictions'; in broad terms, they are that (1) there was no valid arbitration agreement; (2) the award-debtor was denied an adequate opportunity to present its case; (3) the arbitration was not conducted in accordance with the parties' agreement or the law of the arbitral seat; (4) the award deals with matters not submitted by the parties; (5) the award deals with a dispute that is not arbitrable; (6) the award is contrary to public policy; and (7) the tribunal lacked independence or impartiality; (8) the award was procured by fraud. A few jurisdictions also allow annulment when the arbitrators' decision was seriously wrong on the merits. *See* Born, *supra* n. 6, § 25.01.

set aside an award, they have already received less than the quality of adjudicatory service they bargained for, and any recourse entails additional time, cost, and uncertainty. *Third*, although losing parties frequently consider annulment, the prevalence of such applications may paradoxically dull their disciplinary effect. Well-established arbitrators with a steady flow of appointments may perceive annulment risk as a routine occupational hazard rather than a meaningful form of accountability.

To be clear, this discussion does not suggest that parties should be entitled to sue arbitrators for negligence. Rather, it highlights that existing safeguards – whether through immunity or annulment – do not adequately incentivize the level of professional diligence and responsiveness that arbitration users are entitled to expect.

Considering what the parties paid for and the value they reasonably expect in return, there ought to be a more systematic way for heightening accountability and thereby improving quality control over arbitrator performance.

2. *Independence and Impartiality of Arbitrators: The Case for Arbitral Immunity and where that Leaves us*

While arbitral immunity may shield arbitrators from scrutiny, its removal could endanger their independence and impartiality.

If arbitrators fear incurring costs to defend, and possibly lose, a claim against them based on what and how they decide, that fear could have a chilling effect on the arbitrator's decision making. Shielding arbitrators from fear of reprisals by unsuccessful parties through arbitral immunity is therefore necessary 'primarily in order to guarantee their independence and impartiality'.[33] This echoes the rationales of various courts that extended judicial immunity to arbitrators[34] – a rationale that has eventually

33 *Ibid.*, § 13.06[C][4].

34 *See* e.g., *Babylon Milk & Cream Co. v. Horvitz*, 151 N.Y.S. 2d 221, 224 (N.Y. Sup. Ct. 1956) (United States) ('Considerations of public policy are the reasons for the rule and like other judicial officers, arbitrators must be free from the fear of reprisals by an unsuccessful litigant. They must of necessity be uninfluenced by any fear of consequences for their acts'); *Sutcliffe v. Thackrah* (1974) 1 All ER 859, 881 (United Kingdom) ('Since arbitrators are in much the same position as judges, in that they carry out more or less the same functions, the law has for generations recognized that public policy requires that they too shall be accorded the immunity to which I have referred'); *Attorney General v. Dtt Services & 3 Ors* (CAD/

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led to the adoption of arbitral immunity under '[a]lmost all contemporary national arbitration regimes'[35] and '[m]ost institutional arbitration rules'.[36]

There are indeed commentators who have suggested alternative ways to protect arbitral independence and impartiality. Some have suggested widespread adoption of professional liability insurance for arbitrators. For example, Loretta Malintoppi observes that many arbitrators face the risk of legal claims against them despite the widespread adoption of arbitrator immunity, and suggest that 'an effective way to manage' such risk is taking out professional indemnity insurance (which 'comes with its own problems', but which she suggests could be dealt with by having arbitral institutions obtain insurance coverage for arbitrators under their rules and for the institutions themselves).[37] On the other hand, Dario Alessi argues that it is theoretically right that arbitrator immunity should be abolished in favour of a full-liability scheme. He explains that the 'severity of consequences' that might arise from completely abandoning immunity may make it desirable to conceive some form of contractual limitation on liability, as well as insurance solutions.[38]

On balance, despite its limitations, we argue that arbitral immunity serves an important role in protecting arbitrators' independence and impartiality and should therefore be maintained. It recognizes the unique adjudicative role arbitrators play, the nature of which is not altered simply because that role is played out in a private setting. And the alternatives suggested as a substitute for arbitral immunity do not seem to provide a net benefit over the cost of implementing them in reality.

That brings us to the next question. Might there be a way to address the problem of substandard performance by arbitrators without reducing the scope of or abolishing arbitral immunity (or other alternatives that may be costlier than maintaining the status quo)? In section 3 below, we first identify the cause of the problem and then explore the reasons why that problem needs a meaningful solution.

AMA/01/2013) (2013) UGCADER 1 (10 Apr. 2013) (Uganda); *Bompard v. Consorts C and others*, Paris Court of Appeal (1Ch A) (22 May 1991) (France); *Flock v. Beattie* (2010) ABQB 193 (Canada).

35 Born, *supra* n. 6, § 13.06[C][3].

36 *Ibid.*, § 13.06[C][2].

37 *See* Loretta Malintoppi, *Don't Shoot the Sheriff: The Threat of Legal Claims Against Arbitrators and Arbitral Institutions*, in *Arbitration International* 487–501 (William W. Park ed. 2021).

38 *See* Alessi, *supra* n. 9, at 735, 735–784 (arguing that, at least from a theoretical perspective, a full-liability based scheme is superior to the current immunity or qualified immunity-based schemes).

C. Increasing the effectiveness of users' choices by addressing the informational imbalance concerning arbitrators' performance

1. *Identifying the Cause: Parties' Lack of Access to Information about Arbitrators*

If one subscribes to the view that arbitrators are essentially service providers, then user dissatisfaction with their services should, in theory, trigger a market correction. Dissatisfied users would reduce their demand for substandard arbitrators, thereby creating incentives for arbitrators to improve the quality of their adjudicatory services.

However, we question whether the arbitration market effectively self-corrects in this way. In fact, it is difficult to accept that premise because, as explained below, transparency around arbitrator performance is limited, which inhibits users' ability to make informed choices. While it is true that certain institutions and professional networks have improved transparency in recent years, such efforts remain fragmented and largely informal, leaving most users without systematic or reliable data on arbitrator performance. As a result, it appears that users are struggling to send clear market signals, weakening the feedback loop that would otherwise optimize the supply and quality of arbitrators. And the lack of robust feedback from users limits the market incentives for arbitrators to properly perform their duties. In our view, therefore, the root cause of the problem lies in informational asymmetry about arbitrator performance.

Simply put, in our experience and according to research, information about arbitrators seems scarce, and information that is available tends to be vague and subjective. And typically, information about arbitrators' performance is either shared in anecdotal form with other users in the market or not shared at all. Without access to the information that allows parties to make fully informed choices, oftentimes they must rely on false, incomplete, and/or inaccurate expectations when nominating arbitrators and end up disappointed when those expectations are unmet.

The International Arbitration Survey conducted in 2018 by Queen Mary University of London and White & Case LLP is informative in this regard.[39]

First, on the type of information the respondents desired the most, the survey found that their top two choices were details about (1) the arbitrator's previous awards and decisions and (around 40% of respondents) (2) the

39 Though outdated, as far as we are aware, it is the most recent survey conducted on the topic. For example, Queen Mary University of London's 2019, 2020, 2021, and 2022 surveys, as well as the most recent 2025 International Arbitration Survey, did not address the topic of information about arbitrators.

arbitrator's approach to the merits of disputes (around 37%).[40] These findings are consistent with Professor Rogers' research. She found that users and observers of international arbitration are 'insisting … on something more concrete', such as 'particularized information' about arbitrators that is not readily and publicly available.[41] However, there is a 'shocking paucity of [such] information'.[42]

Second, the survey asked a yes-or-no question on whether the respondents felt they had sufficient information to make an informed choice about arbitrators. A merely 57% of in-house counsel sub-group (and 70% of all respondents, but most of whom were counsel), answered in the affirmative.[43] In other words, around half of the actual users of arbitration reported that they were making *uninformed* choices of arbitrators. The survey concluded that this scarcity of information about arbitrators, particularly in the in-house counsel subgroup, will 'only be combatted by more information on arbitrators becoming publicly available'.[44] In contrast, more than 80% of the respondents in the full-time arbitrator sub-group answered that they have enough information about their peers, indicating a stark asymmetry in the information available.[45]

Third, a significant number of respondents who said that they had limited information in making informed arbitrator appointments, reported their top two sources of information as 'word of mouth' (77%) and 'from internal colleagues' (68%).[46] In the authors' view, such sources cannot reliably sustain a healthy market. According to Professor Rogers, information that can be

40 *See* Queen Mary University of London School of International Arbitration and White & Case LLP, *2018 International Arbitration Survey: The Evolution of International Arbitration* 21–22 (2018) (Chart 21: What other information do users want?).

41 Catherine Rogers, *Chapter II: The Arbitrator and the Arbitration Procedure, Transparency in Arbitrator Selection*, in *Austrian Yearbook on International Arbitration*, vol. 2016 (Christian Klausegger & Peter Klein et al. eds 2016).

42 Catherine A. Rogers & José María de la Jara, *Generating Needed Information about Arbitrators, One Arbitration at a Time* (Kluwer Arbitration Blog 15 Sep. 2018), available at https://arbitrationblog.kluwerarbitration.com/2018/09/15/generating-needed-information-about-arbitrators-one-arbitration-at-a-time/ (accessed 28 Mar. 2025).

43 *See* Queen Mary University of London School of International Arbitration and White & Case LLP, *2018 International Arbitration Survey: The Evolution of International Arbitration* 20–21 (2018) (Chart 20: Do you have access to enough information to make an informed choice about the appointment of arbitrators?).

44 *Ibid.*, at 21.

45 *See ibid.*, at 21 (Chart 20: Do you have access to enough information to make an informed choice about the appointment of arbitrators?).

46 *See ibid.*, at 20–21 (Chart 19: Where do you find your information about arbitrators?).

gleaned from *ad-hoc* discussions from those who have interacted with a particular arbitrator are 'often made in aggregated, vague and value-laden terms, such as 'experienced' or 'effective'; these methods of collecting information 'function more like a game of telephone than a means of rational, objective evaluation'.[47]

The ad hoc and informal nature of information about arbitrators is difficult to reconcile with the recognized importance of arbitrator selection. As arbitrator Lucy Greenwood puts it, '[i]t is unarguable that the single most important thing you do as counsel in a case is appoint an arbitrator, and yet it is the thing you do with the least available tangible information'.[48]

At a micro level, the implications for parties are troubling, as some may make less-than-fully-informed choices when selecting an arbitrator to decide their case. While the most well-funded and well-resourced parties may be less affected by this problem, the notion that such parties are better equipped to make informed choices about arbitrator selection than the majority of arbitration users is difficult to reconcile with the arbitration community's aim of preserving the integrity of the system as a whole. Meanwhile, as we explain in section 3.2 below, viewed through the lens of economics, it is the macro-level implications for arbitration as a dispute resolution system that are far more disconcerting.

2. *Addressing Informational Imbalance to Sustain Arbitration as a Viable Dispute Resolution System*

a. *Prevention of Adverse Selection and Market Failure*

From an economic perspective, the information imbalance in arbitration demonstrates that the market for arbitrators is inefficient. In his Nobel Prize-winning work, Professor Eugene Fama defines an *efficient market* as follows[49]:

> In general terms, the ideal is a market in which prices provide accurate signals for resource allocation: that is, a market in which firms can make production-investment decisions, and investors can choose among the securities that represent ownership of firms' activities under the assumption that security

47 Catherine Rogers, *Opinion: A New Intel Tool Will Drive Diversity Forward*, 2019(3) Resolver 7 (2019).

48 *Appointment Angst* (6 Sep. 2018) (regarding the GAR Live Istanbul event held on 21 Jun. 2018), available at https://globalarbitrationreview.com/gallery/appointment-angst (accessed 28 Mar. 2025).

49 Eugene Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 (2) J. Fin. 383, 383 (1970), doi: 10.2307/2325486.

> prices at any time 'fully reflect' all available information. A market in which prices always 'fully reflect' available information is called 'efficient'.

Applying this framework, the market for arbitrators appears inefficient because the prices paid for arbitral adjudicatory services do not convey information that enables parties to make informed choices. It is true that major arbitral institutions maintain fee scales for arbitrator remuneration, typically based on the amount in dispute. Once an arbitrator accepts an appointment, they are deemed to have accepted the corresponding fee range. However, this concerns *how* arbitrator fees are calculated – whether they should be proportionate to the amount in dispute or determined otherwise – rather than *what* information, if any, such pricing communicates to users about the quality or diligence of the arbitrator's services.

One might argue that fee scales convey some indirect information: for instance, that lower fees for low-value disputes signal that arbitrators will give the matter less attention. Yet this is not how fee scales operate in practice. Rather, they reflect assumptions about the relative complexity and volume of material typically associated with high-value disputes, which may justify a particular range of remuneration.[50] These scales do not reflect the actual level of attention the parties expect from arbitrators in any particular case; the expectation that arbitrators act attentively and efficiently applies regardless of dispute value or complexity.

Accordingly, fee scales are neither a reliable nor a complete barometer by which parties can make informed selections. As a result, parties as consumers are required to pay prices that do not reliably correspond to the value of the services they receive. Under Professor Eugene Fama's efficient-market framework, this constitutes an inefficient market: the 'price' of arbitrator services does not 'fully reflect all available information', with which a party could make an informed choice.[51]

When information asymmetry leads to market inefficiency,[52] the market in question risks dysfunction or even collapse. Where information about arbitrators' services is not adequately reflected in the price for their services, the

50 *See* e.g., *Singapore International Arbitration Centre Schedule of Fees* 2 (2025) (showing that the scale of arbitrators' fees is determined based on the sum in dispute); International Chamber of Commerce Rules of Arbitration (2021), Appendix III, Art. 3 (showing the same).

51 Eugene Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25(2) J. Fin. 383, 383 (1970), doi: 10.2307/2325486.

52 *See* George A. Akerlof, *The Market for 'Lemons': Quality Uncertainty and the Market Mechanism*, 84(3) Q. J. Econ. 488, 489 (1970), doi: 10.2307/1879431 ('An asymmetry in available information has developed: for the sellers now have more knowledge about the quality of a car than the buyers'.).

information gap between (1) what the arbitrator and, to a limited extent, parties who have previously engaged them know about their competence and quality, and (2) what the wider pool of arbitration users knows, remains uncorrected.

This asymmetry gives rise to a process of *adverse selection* and, ultimately, *market failure.* Adapting Professor George Akerlof's well-known model of adverse selection to the arbitration context, the process may be understood as follows[53]:

(1) In Professor Akerlof's model, sellers possess more information about the quality of their products than buyers do. In the arbitration context, this information asymmetry can be analogized to the disparity between arbitrators and arbitration users: arbitrators (and to a lesser extent, repeat users who have engaged them or users with the best access to information about arbitrators) have greater insight into their own competence, approach, and diligence than new users do.

(2) Because of this informational imbalance, users cannot easily distinguish between high- and low-'performing' arbitrators. Consequently, they are likely to pay the 'market rate' that are set by institutions in the case of institutional arbitration or parties in the case of ad hoc arbitrations, which, as noted above, do not reliably correspond to the quality of the arbitrators' services.

(3) Under these conditions, Akerlof suggests that sellers of higher-quality goods are less willing to sell at the prevailing market price, since they know their products are undervalued. Conversely, sellers of lower-quality goods are more willing to participate, as they benefit from being 'overvalued' at the same average rate.

(4) In this way, the hypothesis is that the proportion of good products and bad products in the market shifts slightly towards the latter kind in Professor Akerlof's model. This is called the process of *adverse selection.* Applied to arbitration, this dynamic would suggest that highly competent arbitrators – those whose true value exceeds the market's average rate – may become less willing to accept appointments at that rate, while less competent arbitrators would remain willing or even eager to do so.

(5) Over time, this adverse-selection process can skew the composition of the market, with the risk that inferior quality will become more prevalent and that the users will grow less confident that the arbitrators they appoint are worth the fees they pay. This, in turn, would reduce their willingness to pay, lowering average market rates and further disincentivizing high-quality arbitrators from accepting appointments.

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53 *See ibid.*, at 488, 488–490.

(6) Left unchecked, this self-reinforcing cycle can lead to a gradual and continuous decline in overall market quality. As Professor Akerlof puts it, the bad products will 'drive out' the good.[54]

While the analogy may be imperfect, it serves as a useful framework to illustrate the potential systemic, macro-level effects of user dissatisfaction that may be occurring at the micro level. To the extent that Professor Akerlof's model of market behaviour can be analogically applied to the market for arbitrators, it suggests a risk that, over time, competent and diligent arbitrators – whose true value may not be fully recognized by the market – could have diminished incentives to continue accepting appointments at prevailing rates, whereas less competent or less diligent arbitrators may be more inclined to do so.[55] This possible dynamic is unlikely to be easily rectified, given the structural inefficiencies of the arbitrator market. If left unaddressed, informational asymmetry could theoretically lead to the

54 *See ibid.*, at 488, 489–490.

55 While no single source frames the arbitrator market exactly in Professor Akerlof's terms, commentators have long recognized analogous structural pressures. For example, as empirical support for the analogy, Sergio Puig's network-analysis of ICSID appointments demonstrates that structural features of the appointment process and cognitive biases produce 'preferential attachment' effects, whereby a small cluster of repeat arbitrators continues to dominate appointments despite informational imperfections: *see* Sergio Puig, *Social Capital in the Arbitration Market*, 25 EJIL 387 403, 407, 420–421 and 423 (2014), 10.1093/ejil/chu045. This dynamic suggests that, over time, the market rewards visibility rather than quality, leading to concentration and limited entry of new or potentially more competent arbitrators. Similar structural pressures have been observed in domestic arbitration systems. For example, in her study of arbitrator selection within the Financial Industry Regulatory Authority (FINRA) framework, Iannarone identifies informational opacity and network-driven selection practices that concentrate appointments among a small pool of repeat arbitrators: *see* Nicole G. Iannarone, *Structural Barriers to Inclusion in Arbitrator Pools*, 96 Wash. L. Rev. 1389, 1403–08, 1426–36 (2021). Although her focus is domestic, the dynamics she describes – informational barriers that entrench market incumbents and inhibit new entrants – mirror concerns that also arise in international arbitration and are consistent with the adverse-selection mechanism discussed above. Lastly, similar concerns have been expressed in the literature on repeat appointments. Repeated selection of the same arbitrators can create structural dependence and rational incentives for arbitrators to behave strategically in order to secure future appointments: *see* Houchih Kuo, *The Issue of Repeat Arbitrators: Is It a Problem and How Should the Arbitration Institutions Respond?* 4 (2) Contemp. Asia Arb. J. 247, 252–53 (2011). This dynamic, while framed in ethical rather than economic terms, illustrates how market forces may reward behaviour driven by visibility and patronage rather than quality – an outcome broadly consistent with the adverse-selection process identified by Professor Akerlof.

gradual exodus of high-performing arbitrators and the proliferation of substandard performance. As overvalued and less capable arbitrators continue to crowd out those who are competent yet undervalued, users could become increasingly reluctant to pay prevailing rates for arbitral services. Taken to its logical extreme, a point could be reached where users are unwilling to pay at all – at which stage arbitration would cease to function as a credible alternative to litigation and the market for arbitrators would experience *market failure.*

b. *Promotion of Efficacy and Diversity*

In addition to correcting informational asymmetry, there are at least two other reasons why greater access to high-quality information about arbitrators is desirable.

The *first* reason is the most fundamental – improved informational access will increase the efficacy of parties' choice for arbitrators. That is, rather than taking a leap of faith based on 'a collection of informational impressions and industry gossip', parties could rely on 'concrete data, research, and analysis' in making this critical decision.[56] This increased efficacy matters because the appointment of an arbitrator is the ultimate expression of party autonomy.[57]

Here, there is a mismatch between the ideal of party autonomy and the practical realities of information asymmetry in arbitrator selection. While party autonomy is a foundational principle in arbitration, it rests on the assumption that parties can make informed and rational choices. In practice, however, that assumption breaks down when parties lack access to meaningful information about arbitrators. As Catherine Rogers and Fahira Brodlija observe, '[a]rbitrator appointment is the ultimate exercise of party autonomy in international arbitration, but the lack of substantive and accessible data on arbitrators and their decisional track record seriously limits the choices for the parties and their counsel'.[58] This illustrates that autonomy without information is autonomy in name only. Indeed, the principle that autonomy presupposes informed choice is widely recognized in other disciplines, such as clinical ethics, where physicians are required to disclose the

56 *See* Catherine Rogers & Fahira Brodlija, *Chapter 3: Arbitrator Appointments in the Age of COVID-19*, in *International Arbitration and the COVID-19 Revolution* (Maxi Scherer & Niuscha Bassiri et al. eds, Wolters Kluwer 2020).

57 *See* Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* 182 (4th ed. 2004).

58 *See* Rogers & Brodlija, *supra* n. 56.

information necessary for patients to exercise self-determination,[59] or contract law in general, which assumes that 'parties possess the capacities necessary for informed and voluntary choice' and where various detractors from such an informed choice are grounds for rescission of the relevant contract.[60] The same logic applies to arbitration: when information about arbitrators is opaque, the parties' autonomy is structurally impaired, and the legitimacy derived from that autonomy correspondingly weakened.

In our view, the concept of party autonomy has subtly been subverted. As discussed above,[61] information asymmetry in the arbitrator selection process often leaves users with little genuine choice but to make decisions on incomplete or unreliable information. Nevertheless, the prevailing discourse continues to rely on consent in the abstract, without adequate consideration of the conditions that determine whether such consent is grounded in full agency – it says that parties, having selected their arbitrators, must accept the tribunal's decision 'with serenity' and 'bear its consequences because of their special trust in chosen decision-makers'.[62] In effect, party autonomy has at times been invoked not as a mechanism for empowering users but as a means of legitimizing outcomes, even where the users' ability to make an informed choice was structurally limited from the outset.

However, in our view, party autonomy should not be invoked to place the entire burden of arbitrator selection on the parties alone. The principle must be re-framed to recognize that arbitrators and arbitral institutions also play a constitutive role in shaping the legitimacy of the process. Arbitrators, as repeat participants in a professional market, are better positioned than most users to understand the expectations of fairness, diligence, and efficiency that underpin their appointments. Likewise, arbitral institutions, which control the appointment process, maintain rosters, and collect user feedback, are uniquely situated to mitigate the information asymmetry that impairs informed party choice. It follows that both actors owe users a corresponding duty of transparency and responsibility particularly where they are engaged, often at considerable cost, through a system that claims to empower party choice.

The *second* reason why greater access to high-quality information about arbitrators is desirable is that restoring informational balance would lower the barriers to entry into the arbitrator market and contribute to a more diverse

59 *See* Basil Varkey, *Principles of Clinical Ethics and Their Application to Practice*, 30 Medical Princ. & Prac. 17, 19 (2021), doi: 10.1159/000509119 ('Respecting the principle of autonomy obliges the physician to disclose medical information and treatment options that are necessary for the patient to exercise self determination').

60 Daniel Markovits & Emad Atiq, *Philosophy of Contract Law*, in *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., Winter ed. 2021), s. 2.2.

61 *See* s. 2.1 above.

62 *See* generally Jan Paulsson, *Idea of Arbitration* 1 (Oxford University Press 2013).

pool of arbitrators. As several scholars have observed, it remains difficult for new arbitrators to break into what continues to be a relatively small, interconnected, and cohesive market.[63] Even 'highly skilled' candidates can, as one commentator put it, 'labor in obscurity for what seems like a professional eternity' before receiving meaningful appointments.[64] This barrier to entry is not merely cultural; it is structural, and stems in large part from how parties source information about arbitrators – primarily through word-of-mouth within a limited circle of repeat and well-connected practitioners.[65]

This reliance on anecdotal and informal information networks creates what is, in effect, an informational bottleneck. A small circle of well-connected practitioners acts as gatekeepers of reputational knowledge, shaping who is perceived as 'appointable'. The result is a self-reinforcing cycle: parties draw from the same limited roster of familiar names, while equally capable but less visible candidates remain excluded.[66] Over time, this concentration of informational power not only limits diversity within arbitral appointments but also risks entrenching subjective biases and personal preferences as de facto market criteria for selection.[67] If informational access were improved, more users will make informed decisions based on concrete data about the arbitrators' performance, which will then trigger a feedback loop that provides the right incentives for arbitrators to prioritize quality control.[68] Those who do not prioritize

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63 *See* e.g., Emmanuel Gaillard, *Sociology of International Arbitration*, 31(1) Arb. Int'l 1–17 (2017), doi: 10.1093/arbint/aiv021; Catherine Rogers, *Transparency in Arbitrator Selection*, (6) Korean Arb. Rev. 36, 46 (2015), doi: 10.26686/vuwlr.v46i4.4888; Puig, *supra* n. 55, at 403, 407, 420–421 and 423; Iannarone, *supra* n. 55, at 1389, 1403–08, 1426–36; Kuo, *supra* n. 55, at 247, 252–53.

64 Rogers, *supra* n. 63, at 36, 46.

65 Empirical studies and doctrinal analyses have shown that this dynamic entrenches the visibility and dominance of established arbitrators while constraining diversity and innovation within the pool of available neutrals: *see* Sergio Puig, *Social Capital in the Arbitration Market*, 25 EJIL 387 (2014), doi: 10.1093/ejil/chu045 403 (reporting that 10% of arbitrators account for half of all appointments), 407 (noting that 'a small number of key arbitrators seems to control most of the appointments, suggesting deep entry barriers that benefit insiders'), 420–21 (heavy-tailed / power-law degree distribution and preferential-attachment dynamics), and 423 (heuristic bias and the disproportionate impact of a small group).

66 Rogers & de la Jara, *supra* n. 42. *See also* Queen Mary University of London School of International Arbitration and White & Case LLP, *supra* n. 43, at 15–16 (finding that less than a third of respondents believe there has been progress in respect of geographic, age, cultural and, particularly, ethnic diversity).

67 Rogers, *supra* n. 47, at7.

68 Rivkin, *supra* n. 18, at 5 ('Most importantly, arbitrators have to commit that they have sufficient time in their schedule to conduct the case efficiently and – here is a key point – that they will not in the future schedule themselves so fully that they do not have time for the work to be done on the case'.).

quality will be more visible in the market, demand for their services will decline, and the space created by their decline will provide a greater opportunity for newer and more diverse arbitrators to be recognized for their talents.

Taking in all the reasons to improve informational access,[69] in our view, the arbitration community should actively pursue this improvement. The only question is *how* we should achieve it.

D. A proposal: A call to action for arbitral institutions

A fitting starting point may be to heed the collective voice of the arbitration community. In the 2018 International Arbitration Survey,[70] when the 80% of the total pool of respondents that answered 'Yes' to the question 'Would you like to be able to provide an assessment of arbitrators at the end of a dispute?' were then asked how they would like to do so, 88% of the respondents preferred to report their assessment to the institution that administered the arbitration.[71] Specifically, the respondents responded that they expect the roles and duties of arbitral institutions to 'evolve in accordance with changing … user needs … such as the desire for more transparency on arbitrator performance, based on both measurable and intangible metrics'.[72]

As explained above, arbitral institutions have an important role to play in improving informational access to arbitrator performance. They are deeply rooted in the ecosystem of arbitration. They serve as both regulators and facilitators, shaping procedural frameworks, managing appointments, and ensuring the integrity of arbitral processes; in doing so, they shape best practices and standards. They also serve as forums for engagement, bridging multiple constituencies, such as the arbitrators, practitioners, and users, in community-centred panels, seminars, events, and initiatives. Thus, as pillars of the arbitration community, they meaningfully contribute to the legitimacy and cohesion of the arbitration system. Further, major arbitral institutions, as

69 Beyond the two reasons highlighted here, there will doubtless be other benefits to better informational access, such as that it may facilitate procedural applications concerning the arbitrators (such as a challenge of an arbitrator) or that it may help prevent cases of arbitrator corruption. *See* Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U. Kansas L. Rev. 1301, 1335 (2006); Rogers & de la Jara, *supra* n. 42.

70 To our knowledge, Queen Mary University of London's 2018 International Arbitration Survey is still the most recent survey conducted on the topic information about arbitrators, and its 2019, 2020, 2021, 2022, and 2025 surveys did not address the topic.

71 *See* Queen Mary University of London School of International Arbitration and White & Case LLP, *supra* n. 43, at 22–23.

72 *See ibid.*, at 23.

anchor institutions in a particular region, have an extensive repository of accumulated data about arbitrators, and have the infrastructure capable of enriching the dataset with a constant inflow of new data gathered through channels of communications with end-users of arbitration. Users tend to agree: the respondents in the 2018 International Arbitration Survey viewed institutions as 'occupy[ing] a central position' in the arbitration framework.[73]

Indeed, arbitral institutions have recognized the lack of quality arbitrator information as a problem and have launched various initiatives to improve users' access to information about arbitrators. While earlier efforts were primarily aimed at increasing transparency,[74] institutions have been more intentional of late in gathering concrete data about arbitrators. For instance, in 2015 the Hong Kong International Arbitration Centre (HKIAC) launched an option for parties or arbitrators to complete short evaluations of HKIAC's and the arbitrators' services, which HKIAC considers in its arbitrator appointments.[75] In 2016 the International Court of Arbitration of the International Chamber of Commerce (ICC) announced that it has agreed to contribute its arbitrator data to the Dispute Resolution Data, which collects and publishes data about arbitration on an anonymous basis.[76]

Notably, the Singapore International Arbitration Centre (SIAC) had entered into a cooperation agreement with Arbitrator Intelligence in 2017, a platform that enables parties and counsel to share information about arbitrators. Arbitration Intelligence eventually ceased its operations.[77] Arbitrator Intelligence's objectives, however, represent to date one of the most innovative measures aimed at increasing access to information about arbitrators

73 *See* Queen Mary University of London School of International Arbitration and White & Case LLP, *supra* n. 43, at 23.

74 For example, the London Court of International Arbitration (LCIA) has published in 2011 abstracts of LCIA decisions on arbitrator challenges between 1996 and 2010 and has since kept an updated list of such decisions on challenges. *See* LCIA, 27(3) Arbitration International (2011); *see also* LCIA, *Challenge Decision Database*, available at https://www.lcia.org/challenge-decision-database.aspx (accessed 28 Mar. 2025).

75 *See* HKIAC, *Rate Your Experience – HKIAC Launches Arbitration Evaluation System* (23 Jul. 2015), available at https://www.hkiac.org/news/rate-your-experience-hkiac-launches-arbitration-evaluation-system (accessed 28 Mar. 2025).

76 *See* ICC, *ICC and Dispute Resolution Data Enter into Agreement to Shed Light on Arbitration* (2 Dec. 2016), available at https://iccwbo.org/news-publications/news/icc-dispute-resolution-data-enter-agreement-shed-light-arbitration/ (accessed 28 Mar. 2025).

77 Catherine Rogers, *Arbitrator Intelligence is Dead! Long Live Arbitrator Intelligence!* (Kluwer Arbitration Blog 28 Jul. 2024), available at https://arbitrationblog.kluwerarbitration.com/2024/07/28/arbitrator-intelligence-is-dead-long-live-arbitrator-intelligence/ (accessed 31 Mar. 2025).

because it sought to operationalize transparency by systematically gathering post-award user feedback, transforming anecdotal experience into aggregated data.

Private services, too, are hard at work. For example, Global Arbitration Review offers its Arbitrator Research Tool, which aggregates publicly available data on arbitrators' appointments, CVs, awards, and procedural preferences,[78] while Jus Mundi's Jus Connect platform[79] provides a data-backed profiles summarizing arbitrators' caseloads, background, and professional affiliations. These data-driven tools that allow subscribers to search and compare arbitrators using structured information drawn from a range of published sources. However, such services remain limited: they lack the structured party feedback and case-specific insights that arbitral institutions are uniquely positioned to collect. They also lack the political capital institutions enjoy by virtue of their central role in administering arbitrations and appointing arbitrators – and more broadly, in 'shap[ing] the future of arbitration'.[80] It may therefore be that a more sustainable model lies in arbitral institutions continuing to lead the charge for improving access to information about arbitrators, collaborating with private services where necessary.

E. Conclusion

Party autonomy in arbitrator selection may be more theoretical than real. Safeguarding that autonomy requires that parties be genuinely empowered to make informed and reasoned choices. Yet in practice, many are not: there remains a surprising lack of reliable information about arbitrators. Despite this, parties are expected to bear the full consequences of their selections and accept arbitral awards, even where arbitrators may not have fully upheld their duties. This information deficit not only undermines individual users but also threatens, from a market perspective, the long-term viability of arbitration as a system of dispute resolution.

78 *See* GAR, *Arbitrator Research Tool*, available at https://globalarbitrationreview.com/tools/arbitrator-research-tool (accessed 28 Mar. 2025).

79 *See* Jus Mundi, Jus Connect, available at https://jusconnect.com/en/directory/arbitrators/all (accessed 28 Mar. 2025).

80 The Honourable Chief Justice Sundaresh Menon, SIAC Congress 2018 Keynote Address 'The Special Role and Responsibility of Arbitral Institutions in Charting the Future of International Arbitration' ('[A]rbitral institutions now play a crucial role in upholding due process and shaping the rights of the parties in potentially far-reaching ways. I suggest that they have not only a special role, but a duty, to shape the future of arbitration'.).

Narrowing or abolishing arbitral immunity might appear to offer a remedy by increasing accountability. However, such a move would only address the symptoms, not the cause.[81] The more fundamental issue lies in the scarcity of information available to parties. Until such informational imbalance is corrected, accountability gaps will persist.

In our view, arbitral institutions are uniquely positioned to spearhead this reform. They possess both the access to data and the legitimacy to operationalize transparency without compromising independence. What is needed now is institutional will – and the collective commitment of the arbitration community – to build mechanisms that restore informational balance and, with it, the substance of party autonomy itself. Meaningful reform will not come from litigation against arbitrators but from institutions and users committing to transparent feedback systems that transform anecdotes about arbitrators into data.

81 Because arbitral immunity plays an all-too-important role in safeguarding arbitrator independence. *See* s. 2.2 above.