The governance of arbitral institutions: how to improve standards through accreditation

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In June 2019, Alexis Mourre, the then President of the ICC Court, called for arbitral institutions to safeguard their legitimacy by agreeing internationally accepted standards of good governance. He admitted that there was a long way to go before the arbitral community reached a consensus on the scope of these standards, "but the world is moving faster than we do, and such an effort would greatly contribute to establish the legitimacy of international arbitration as a global system of justice in the twenty years to come."[1]

The world is indeed moving fast: since President Mourre spoke, the *Club Español del Arbitraje* has approved and published its 2019 "Code of Best Practices in Arbitration,"[2] a compilation of soft law defining standards of conduct for arbitrators, lawyers and experts, and also for arbitral institutions. This is a world premiere: the first time that best practices for arbitral institutions have ever been compiled.[3]

It is indeed surprising that the governance and proper behaviour of arbitral institutions have received so little attention.[4] Historically, institutions arose as simple service providers: collecting fees from users and, in exchange, organizing the arbitration procedure. But nowadays, institutions have become much more than that. Arbitration has morphed into a transnational system of justice. And within this system, institutions perform a (growing) array of public functions, exercising both private and public regulatory powers. Institutions admit or reject claims, designate arbitrators, decide challenges, remove arbitrators, scrutinize awards and publish them. Warwas, who devoted her 2017 doctoral thesis to these issues, concludes that institutions, when exercising these public regulatory powers, suffer a "democratic deficit," which "call[s] for increasing public accountability."[5]

There are two avenues which can be followed to fill this perceived gap in "public accountability" of arbitral institutions. The first is enactment of legislation. The second is voluntary change through soft law.

(i) The UNCITRAL Model Law does not contain any provisions regulating the legal status of arbitration institutions. Neither does the New York Convention. The scarcity of rules is echoed at the domestic level: as a rule, municipal laws do not provide detailed requirements for the structure and operation of arbitration institutions; there are no mandatory characteristics or rules of governance. Most legal regimes also fail to impose a duty to obtain administrative authorization or registration. Finally, the inexistence of a government-

controlled supervisory agency, with inspection and sanctioning powers, is also almost universal.

This "*laissez faire*" situation has been one of the factors which have permitted arbitration to grow into a truly transnational system of justice: international institutions regulated and supervised by the states of incorporation would have hamstrung the development of arbitration. In this largely unregulated area, arbitration consumers have been able to make informed decisions, choosing independent and impartial centres, and rejecting those of dubious reputation. That said, market forces have been unable to totally abolish disorganized and ill-equipped centres, which continue to operate, often at the expense of justice and to the prejudice of users. As Paulsson famously said:

"My observations of the world of arbitration lead me to believe that many if not most arbitral institutions are empty edifices waiting for someone to bother to dismantle them. Others cannot get away from features of cronyism, which were their *raison d´être* in the first place".[6]

But this situation of legislative "*laissez faire*" is changing.

As Galina Zukova has shown, a significant number of jurisdictions in Central and Eastern Europe, in Latin America as well as some countries in Africa and the Middle East, and finally China, are increasingly issuing detailed rules for the establishment, operation, and oversight of arbitral institutions.[7] The rationale for the detailed regulation and strong regulatory control is different across jurisdictions: for some countries, the main reason is to bring order into an otherwise wild market and to suppress abuse. For others, the rationale is diametrically opposite: to promote and encourage alternative dispute resolution services.[8]

(ii) The alternative to hard law is soft law: voluntary rules, codes of best practices not drafted by the legislator, but rather by experts, at the instigation of trade associations, users, or supervisors. In the case of arbitral institutions, associations of arbitration users are probably best placed to prepare meaningful soft law, because users have a heightened interest in improving and developing arbitration and are free of institutional conflicts of interest.

The Code of Best Practices of the Spanish Arbitration Club

The background described above led the association of Spanish-speaking users of arbitration, the *Club Español del Arbitraje*, to take up in 2018 the challenge of preparing the first-ever code of best practices for arbitral institutions.

The Code is a lengthy instrument, with seven chapters divided into 156 Recommendations, which cover institutions, arbitrators, lawyers, experts, and financing. The first chapter, comprising Recommendations (Rec.)

1 through 64, is devoted to arbitral institutions. It is divided into five sections.

Section 1 defines the two overarching principles, to which institutions are subject:

- institutions must be independent ("no third party shall participate in, or exercise any influence over, the taking of decisions," says Rec. 1), and
- institutions must be rule-based, with bylaws governing their internal structure, and procedural rules for the arbitrations which they administer.

Nothing innovative so far. What is new is Rec. 4, with an added requirement for "integrated institutions," i.e., for those centres which lack legal personality and form part of larger organizations (normally Chambers of Commerce). These institutions must not only enjoy functional independence (they must have "bodies that are independent of the parent organization" and the right to "freely designate and remove" officers and employees) but also financial independence (they must have their own budget and annual accounts, "to be approved by its bodies"). Money is king: without financial independence, functional independence is merely a façade.

Section 2 is much more prescriptive. It requires institutions to create four bodies and provides detailed regulation on how such bodies must operate. The four bodies are:

- The Board, responsible for overall governance and for all financial matters, to be chaired by its own President;
- The Court, which adopts all technical decisions regarding specific arbitration procedures, headed by a separate President;
- The Secretariat, entrusted with the day-to-day administration of procedures and
- Finally, the Appointments Committee, with the task of proposing candidates to fill vacancies in the other bodies.

The Code establishes a sophisticated system of checks and balances between these four bodies:

- Vacancies can only be filled upon a proposal of the Appointments Committee, a small group of up to five independent outside experts, "with a very lengthy career in arbitration," designated by the Board for a

single term of six years, and which cannot be dismissed save in exceptional circumstances;

- The Board defines the overall policy of the Centre, approves the budget and designates the Secretary General and the members of the Court (always at the proposal of the Appointments Committee);
- The Court takes all relevant decisions regarding specific arbitrations procedures; its members cannot be dismissed save for good cause and (again) upon proposal of the Appointments Committee;
- The Secretary General heads the Secretariat, administers procedures under the supervision of the Court, and in administrative or financial matters reports to the Board.

Section 3 requires that each institution approve and publish a mandatory Code of Ethics, to be applied to the members of its bodies and to all employees. The Code of Best Practices sets a minimum floor, with institutions being authorized to adopt stronger requirements:

- All members of bodies and all employees must disclose conflicts of interest regarding individual arbitration procedures, withdrawing from discussions and abstaining in decisions affected by such conflicts;
- There is a general prohibition of receiving gifts or any other form of compensations from parties, lawyers, experts, arbitrators;
- Staff is prohibited from providing legal advice or from making recommendations;
- Members and employees are not authorized to act as arbitrators (except if both parties agree once the dispute has arisen);
- Various “Chinese walls” must be created to thwart improper access to confidential information.

The next section is devoted to the administration of arbitration procedures.

The designation of arbitrators is one of the key functions of any arbitral institution.

As a general rule, the Code discourages the use of a list of arbitrators – but if the institution opts for a list, the Code provides detailed criteria (Rec. 54 and 55).

Instead, the Code opts for a dual approach:

- Designations of candidates made by the parties will be respected (subject to the candidates meeting the tests of availability, independence, and impartiality);
- Subsidiarily, the designation will be made by the Court, using an enhanced list procedure: candidates will be proposed by both parties, the list will be topped up by the institution, parties are then entitled to veto one third of the proposed names, and to rank the rest in order of preference; the preferred candidate will be chosen.

The aim of this (complex) list procedure is to create a system of checks and balances: the power to propose candidates is shared between the parties and the institution; parties additionally enjoy the right to veto certain names proposed by others; and, the ranking creates an objective system for selecting the most acceptable candidate.

As an exception, in expedited and small amount disputes, the Code permits that arbitrators be directly appointed by the Board of the institutions – without resorting to the list procedure. The underlying reason is to streamline the process, and to permit the incorporation into the system of younger, less well-known arbitrators: the enhanced list procedure tends to favour designations from a small pool of arbitrators with a long track record.

The Code also devotes a sub-section (Rec. 56 through 59) to the financial management of the proceedings, providing that fee schedules must be public, that institutions are prohibited from charging fees to arbitrators (a commonplace malpractice in certain jurisdictions), and that advances of funds made by parties must be held in separate bank accounts (to minimize insolvency risk).

The last section is devoted to transparency.

Here the Code breaks with one of the most negative, but at the same time most resilient, traditions of arbitration: secrecy. The insistence on secrecy in arbitration was instilled into the system by the founding fathers. In 2009 Serge Lazareff still said: “If, as Ihering wrote, form is the twin sister of freedom, then confidentiality is the twin sister of arbitration.” [9]

In the present times, this position is untenable: we – thankfully – live in a world where citizens are not cowed by authority, but demand knowledge, as an instrument for increased assertiveness. The quest extends to all walks of life and all areas of society: patients require to be fairly informed about their illness and their chance of recovery; investors demand to be provided with all relevant information affecting listed companies; “Freedom

of Information" Acts grant citizens the right to inspect government records. In all jurisdictions, judgements are public – there is no rule of law if justice is not publicly administered; and in the most progressive countries, the entire judicial records are open to inspection by citizens.[10]

The Code, aware of these changes in perception, requires institutions to adopt a policy of full transparency (set forth in Rec. 60 through 64):

First, institutions must operate a corporate webpage, providing full information regarding their governance system; indicating the names and CVs of the members of the various corporate bodies; identifying sponsors, and the amounts received. The page must also include a calculator of fees and costs. Additionally, institutions are required to publish their annual accounts, as well as detailed statistics on arbitrator appointments, broken down by age, gender, and geographic origin.

Second, institutions must publish on their webpage a list of all cases administered; the names of the parties can be anonymised, but those of arbitrators and counsel must be identified; the webpage must also identify the dates when the arbitration was commenced and when the award was rendered – permitting parties to judge the relationships between parties and arbitrators and the efficiency of the procedure.

Third, the Code establishes, as a general rule, that institutions must publish awards within a brief period following their approval, anonymising the names of the parties but keeping the names of the arbitrators and counsel.[11] The Code only permits an exception if a party expressly objects (or the institution considers that there are relevant grounds justifying confidentiality). But even in those cases, a summary or redacted extract, with the names of arbitrators and lawyers, may (and should) be published.

The general rule of publicity also applies to the Court's decisions on arbitrator challenges and replacements.

Enforcement of the Code

The great advantage, and at the same time, the greatest weakness of soft law is its voluntary character. The Code is not legislation; it simply reflects the opinion of the *Club Español del Arbitraje*. The Club's opinions may carry certain weight, because the Club is the main association of Spanish-speaking arbitration users, and the rules were developed through a careful process of research and consultation, weighing various alternatives and selecting the best for fostering the use of arbitration. But institutions are, of course, free to comply with the Code in part or in full, or even to totally disregard it (hopefully not!).

Does this mean that the Code is useless? That it will never achieve its aim of improving the governance of arbitral institutions?

An answer to this question may be found in a parallel area, the reform of governance in listed companies. The movement to improve corporate governance started in the last decades of the 20th Century, and soft law proved a valuable tool in fostering improvement in an area traditionally reluctant to change. The UK was the first jurisdiction to advocate the use of a voluntary corporate governance code (the so-called *Cadbury Code*), and the idea then spread to many other jurisdictions, including Spain (where the *Código Olivencia* was the first step in a succession of soft-law regulations).[12] These codes were voluntary, and listed companies were free to comply or not with their recommendations. But securities regulators developed the "comply or explain" principle: listed companies were obliged to publicly explain the reasons justifying non-compliance. The expectation was that markets would punish those companies which failed to adapt their governance structure to the recommended best practices, and that eventually, compliance would become universal – as in fact it did.

In his recent key-note address, Alexis Mourre proposed a similar approach for international arbitration: he advocates an accreditation procedure for institutions, "based on internationally accepted standards of independence, good governance and transparency."[13] He further proposes that ICCA (the International Council for Commercial Arbitration) and IFCAI (the International Federation of Commercial Arbitration Institutions) join forces to perform this task.

I wholeheartedly support his approach. Arbitral institutions require reform. Their governance structure must be updated. Users demand additional information. Transparency must become the norm. The Code of the *Club Español del Arbitraje* is a bold step in the right direction. It will not be the last: it is likely that other players within the arbitration community will embark on similar projects. I would hope that these new codes, if and when they arrive, result in standards being watered-up, not watered-down.

In any case, the enforcement impasse will remain. The way forward is the principle "comply or explain," borrowed from the area of corporate governance of listed companies. An independent third party – be it the *Club Español del Arbitraje* or ICCA – should assume the task of assessing whether individual arbitral institutions are or not applying best practices in their internal governance – as reflected in the Club's Code or a future alternative regulation. Non-compliant institutions must be given the opportunity to explain their choice. Users will have full information. And in the end, they will dictate judgement, by taking their cases to those institutions which offer the best mix of efficiency and legitimacy.

Periculum est in mora. Up to now, arbitral institutions have been – to a very large extent – outside the scope of domestic legislation. This has proved a bonus: under this "*laissez faire*" approach, institutions have thrived, and arbitration has developed into a global system of justice. A reform of the institutions' governance has now become urgent. Soft law and the principle of "comply or explain" offer a way ahead. The arbitration community should follow it. If not, domestic legislators will fill the vacuum.

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[1] Alexis Mourre, Keynote Address, GAR Live Istanbul, 20 June 2019, available for download at https://globalarbitrationreview.com/mourre-warns-against-nationalisation-of-arbitration (last accessed 12 December 2021).

[2] Available in Spanish, English, and Portuguese at www.clubarbitraje.com.

[3] The drafting committee included 21 experts, chaired by José Ricardo Feris, and advised by an expert committee with representatives of arbitration institutions.

[4] An exception is Weber-Stecher's essay "Principles of Good Governance and Organisation of Arbitral Institutions", in "Arbitral Institutions under Scrutiny" (edited by Philipp Habegger, Daniel Hochstrasser, Gabrielle Nater-Bass and Urs Weber-Stecher), ASA Special Series No. 40, Juris, 2013.

[5] Barbara Alicja Warwas: "The Liability of Arbitral Institutions: Legitimacy Challenges and Functional Responses", T.M.C. Asser Press, 2017, p. 68.

[6] Jan Paulsson: "Moral Hazard in International Dispute Resolution", ICSID Review - Foreign Investment Law Journal, Volume 25, Issue 2, Fall 2010, Pages 339–355 (Article based on the author's Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair, University of Miami School of Law, 29 April 2010).

[7] Galina Zukova: "Arbitration Institutions: Establishment, Attributes, Regulatory Supervision", in IntALR, 2016/4, p. 102.

[8] *Ibidem*, p. 111.

[9] Serge Lazareff: "Confidentiality and Arbitration" in "Confidentiality in Arbitration 2009 Special Supplement ICC Bulletin", p. 81

[10] For a full discussion of secrecy and transparency in arbitration, see Juan Fernández-Armesto: "The time has come: a plea for abandoning secrecy in arbitration", in CAPJA2012-3-002 Cahiers de l'Arbitrage, 1 July 2012 No. 3, p. 583.

[11] The advantages of publishing awards are set forth in Juan Fernández-Armesto, note 11, p. 585-587.

[12] For an analysis of the early developments in Spain, *see* Fernández-Armesto/Hernández: "El gobierno de las sociedades cotizadas: situación actual y reformas pendientes", Papeles de la Fundación FAES núm 56, 2000.

[13] Alexis Mourre, note 2 *supra*, p. 18.