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Qui Custodiet Custodes? A Hard Look at International Arbitral Institutions

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Rémy Gerbay, [The Functions of Arbitral Institutions](#) (2016).

Arbitral institutions like to be discreet, and would perhaps be content if it were generally assumed that they perform a merely clerical and administrative function. Such a posture would be untenable. The tasks necessarily allocated to such bodies are central to any assessment of the legitimacy of the arbitral process. Given that commentators those looking for a soapbox seem to find it easy to have categorical opinions about arbitration, with an intensity inversely proportional to their acquaintance with facts, this is a welcome book, dispassionate but critical, which should allow its readers to bring greater discipline to their analysis—whatever may be their ideological predispositions.

Behind a deceptively bland title, Rémy Gerbay provides a conceptual framework which should allow evaluation of the international arbitral mechanism to be conducted with greater seriousness. A French scholar who has particularly cosmopolitan credentials, he holds degrees not only from his native country but also Switzerland, the United States, and the United Kingdom; and practicing licenses in the US and England. Now a lecturer at the School of International Arbitration at Queen Mary University of London, he had previously distinguished himself as a young Deputy Registrar of the London Court of International Arbitration—an experience which allows him to write with authority and meaningful perspectives on this subject.

In the national sphere, consumer arbitration is a salient example of the controversies that arise. Arbitration clauses, some say, is the dark art of unscrupulous corporations seeking to evade responsibility for their products and services by making it nigh on impossible for consumers to seek effective redress. The only thing left to do, in this view, is to treat arbitration clauses as presumptively unconscionable. Yet the school is out on two important questions: is it not possible to police abuse of asymmetrical bargaining power in arbitration clauses, for example by powerful safety valves like the American Arbitration Association's Due Process Protocol? And is it a foregone conclusion that there is no type of arbitration which actually benefits consumers, despite the contrary conclusion of a number of studies?

International arbitration is criticized as a way of neutralizing sovereignty, displacing public courts with private decision-makers who tend to disregard the public interest. In answer, its defenders point out that especially outside the cleanest and institutionally most mature states, it is very much open to doubt that the court do a better job of looking out for the interests of ordinary citizens. Moreover, they point out that countries must provide credible neutral adjudication of legal rights and obligations, lest suffer from having the cost of all their international dealings augmented by a legal risk premium.

Arbitration constitutes the delegation of decision-making authority to persons who do not hold public office. As Gerbay perceives quite clearly, delegation generally implies some measure of residual control, or the thing would not be the delegation of authority but its simple relinquishment. Contrary to a widely-held belief (see below), arbitrants in the international domain are anything but sanguine about the idea of giving arbitrators free reign in the way they run the arbitral process (as opposed to—and no doubt as a counterpart of—according finality to their decision on the merits, without which arbitration would lose its appeal).

So who exercises this control? Who decides if the tribunals will have three members or only one? Who appoints arbitrators when the parties fail to agree? Who decides whether a candidate nominated by a party is unfit? Who considers petitions to remove arbitrators for misconduct? Who decides what their fees should be? What about

selecting the place of arbitration, consolidating claims, joining parties? It would be odd if this had to be national courts, given the asymmetry between *international* arbitration and *national* courts; when the arbitrants are of two different nationalities, the involvement of national courts can only be the product of the agreement or voluntary conduct of the parties, and is therefore functionally just a variant of delegation. Above all, each arbitrator is likely to be wary of its adversary's home courts, and if the parties were attracted by third country courts they might as well have asked them to decide the case as a whole—as some courts in a few countries are willing to do even where they otherwise would not have jurisdiction.

That leaves arbitral institutions. Many of them insist that they fulfill nothing but an administrative function, and vaunt their “hands-off” approach. This is in a sense the fundamental and proper recognition that they have not been chosen by the parties to decide. On the other hand, the appointment and removal of arbitrators may be viewed as a critical function entailing controversial determinations. The modest labelling of the institutional role as “administrative” may seem somewhat like the practice of police detectives using unmarked vehicles in an attempt to blend in with the background, an unremarkable feature of daily routine. The car may be unmarked, but the conduct of the detective, when it affects rights of due process (e.g. the proper gathering of evidence) cannot be so dismissed.

Like it or not, the permanent institutions that administer arbitrations cannot hide behind the fiction that they are providing merely managerial functions; they are to some degree answerable for deficits in the legitimacy of the process. Have they done what they can? More than that one cannot ask, but that much yes.

Moreover, the seemingly unrecognized fact is that users *want* international arbitral institutions to be hands-on. Gerbay reports that a survey of in-house counsel in 2013 found that more than 70% of the respondents wanted a “hands-on” rather than “hands-off” approach to case management *by institutions*. Less than 5% wanted the opposite. (One quarter were undecided, perhaps because they would have said “that depends on the institution.”) *More hands-on means more accountable*. Gerbay quotes the Olympian personage of Pierre Lalive, the Swiss *maître-penseur* of international arbitration whose seminal publications dominated the field in the 1970s and 1980s; he once wrote of the “legal schizophrenia” of arbitral institutions who claim to exercise “simultaneously a quasi-judicial mission” so as to justify their immunity and a “purely administrative mission” so as to avoid being held to the duty to ensure due process. (P. 191.)

Challenges to institutional decision-making have led to a number of judicial pronouncements, especially by the courts of France where the best-known international institute is located, namely the International Court of Arbitration of the International Chamber of Commerce. The very first in the digest provided by Gerbay is instructive. It is known by the name of the losing (and objecting) party, *Appareils Dragon*. It wound its way up to the Court of Cassation in 1983. The question was simple: given that the default rule of the French arbitration statute required awards to be rendered within six months, and that the ICC Rules provided that the institution could extend that deadline, was an award rendered by arbitrators following such an extension subject to annulment because *the institution* had not given reasons for its “administrative” decision? Surely a losing argument, we might immediately say—and the highest French Court agreed. But one can hardly be satisfied by the essential passage of its judgment (in Gerbay's translation), referring to the ICC in the following terms: “lacking the quality of arbitrator, [it] was not bound to provide reasons for its decision of prolongation, which did not have a jurisdictional character.” (P. 127.)

The nature of a decision implying the exercise of a “jurisdictional” function is hardly self-defining. Imagine a case pending before an unknown arbitration institute in a country far down on the Transparency International corruption index. After the commencement of arbitration, the institute takes no steps to constitute the tribunal but periodically extends the limit for proceedings. Years pass. This may suit the respondent just fine, as arbitral litispendence on the face of it prevents alternative pursuits of remedies. Justice is denied to the claimant, who suspects collusion. Surely there comes a point when courts elsewhere will no longer accept that the institution is merely administering the case, but consider that conduct is equivalent to depriving the claimant of the right of legal redress.

Gerbay does not propose detailed prescriptions; nor could he produce a formula, given the infinite variety of situations

in which the legitimacy of the process may be tested. His important conclusion is an overarching one: arbitral institutions are not mere managers; they are what he calls “ancillary participants in the adjudicative process.” (P.185.) Will this conception bring about a dangerous blurring of the line between the arbitral and institutional functions, and subject institutions to costly and endless disputation initiated by unscrupulous respondents? Gerbay’s study, admirably well-documented with respect both to practice and commentary, answers this question in the negative. The fact that some dispositions made by institutions are difficult to distinguish from substantive adjudication is no excuse for seeking to hide the fact that they may materially affect the outcome — and will ultimately fool no one. In the long run, institutions must attend to the fundamental and well-known criteria of institutional legitimacy: striving *for* transparency, and striving *against* capture, cronyism, and entrenchment. If they do so, and fully assimilate the importance of observable fairness as they make indispensable determinations on the periphery of the core decision-making function reserved to arbitrators, they need not fear accountability, but may comfortably embrace it.

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