

ARE LATIN AMERICAN INSTITUTIONS INNOVATING?

RESULTS OF A SURVEY ON TRANSPARENCY, DIVERSITY, AND THE USE OF TECHNOLOGY

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I. INTRODUCTION

Innovation means moving ahead of one's time, anticipating future needs and creating solutions for those needs. Applied to international arbitration, innovation usually comes by offering new services to the users that will benefit them in terms of predictability, efficiency and effectiveness.¹ Also, the increased competition of arbitration services in the world pushes for improvements by the service-providers, accountability on the part of arbitrators and counsel, and in general solutions to buttress the legitimacy of the system as a whole.²

Our panel during the International Law Weekend in Fordham University assessed the status of international arbitration in Latin America in both the commercial and the investment arenas. One of the interesting subjects discussed was the Peruvian law on commercial arbitration, probably the most innovative in the region (together with Panama's law).

* Principal, DJ Arbitraje, www.djarbitraje.com. Taken from the presentation on the panel "International Arbitration in Latin America, Are we Innovating or Catching Up?", during the International Law Weekend, on 27-29 October 2016 at Fordham University, New York City. The author thanks the invaluable work carried out by Valeria Garro, of DJ Arbitraje.

1. Kimberley Chen Nobles, *Emerging Issues and Trends in International Arbitration*, 43 CAL. W. INT'L L.J. 77, 82 (2012).

2. *Id.* at 84-85.

In regards to investment arbitration, the current tensions between the regulatory power of the State and the rights of foreign investors were addressed, among other issues.

My contribution turned on the local institutions in charge of handling usually mid-size international/regional cases and how they are faring in terms of the publication of statistics, diversity in their panels, and the use of technology, issues that have also been tackled by global institutions. For that purpose, I conducted a survey among directors of regional arbitration institutions, using a simple questionnaire. The questionnaire (see annex 1) was sent to eighteen arbitration institutions (see annex 2) from various jurisdictions in Latin America in October 2016.³ It was a user-friendly online survey comprised of a few straightforward questions. All but one of the directors of the institutions completed the questionnaire.

The purpose of the survey was to get an idea of how institutions generally perform on three main issues but not to delve into the topics in depth.⁴ For example, although sixteen institutions indicated that they administered international cases, it is not clear whether they can do so per their rules or whether they are actually handling international cases in practice. If they are, the question that is begged is whether “international” includes cases between local companies that are subsidiaries or concerns of foreign companies.

As will be shown, the results do provide a general overview of the institutional development in the three covered areas.

II. RESULTS

As mentioned, all institutions but one participated in the survey. The results were presented at the International Law Weekend in a PowerPoint format (see Annex 3). What follows is a description of the findings.

A. Transparency

The legitimacy of international arbitration as “private justice” is being constantly challenged. To counter this concern arbitral institutions around the world have made efforts to include more transparency in their work, by making more information publicly available.⁵ This is the case with global institutions, such as the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA). The survey of national

3. The original questions were in Spanish. A free translation into English is attached as Annex 1; A list of institutions is attached as Annex 2.

4. Time was an additional factor, as the panel was designed to be dynamic, with only 10 minutes per panelist in order to incite dialogue among the panelists.

5. See Nobles, *supra* note 1, at 82.

institutions in Latin America strived to find the ways in which national institutions are measuring up to this challenge, by asking a) whether they publish statistical information and if so, b) what type of information, c) in what format, and d) with what frequency.

Only six respondents indicated that they publicized statistics at all. In regards to the type of information, respondents were given a non-exhaustive list, to which they could add other types of information. Of the institutions that do publicize data, one institution in particular publishes the number of cases, the origin of both the parties and arbitrators, the amount and nature of the dispute, and the duration of the arbitral proceedings.

All but one of the remaining five indicated that they make public the number of cases, with three of those publishing also the amounts in dispute and in some cases, other data such as origin of the parties and arbitrators. The remaining institution publishes the origin of the parties, the constitution of the arbitral tribunal, and the amount in dispute. The only item that none of the respondents indicated publicizing is the costs of the arbitration.

Five of the six positive respondents stated that they make data known at conferences, while four of those make the information available on their website.⁶ While two responded that they provide information upon request, one of them replied that they do so through e-mailings to subscribers and another one replied that they do so at meetings. One institution replied that they belong to the Dispute Resolution Data (DRD).⁷

About the frequency of the publications, while three institutions stated that they provided the information on an ongoing basis, one stated that they do so twice a year and one, once a year.⁸

6. Some of the participating institutions have additional statistical information on their websites, although they did not state so.

7. Dyalá Jiménez Figueres, *Are Arbitration Institutions in Latin America Innovating? A survey on Transparency, Diversity, and Use of Technology*, app. 3, slide 3 (2017) [hereinafter Annex 3]; see DISPUTE RESOLUTION DATA, http://www.disputeresolutiondata.com/about_dc (last visited Feb. 2, 2017) [hereinafter DRD] (DRD is a global database that provides information from more than 130 institutions around the world on an aggregate basis to members, which enables them to assess risk management and strategy when presented with cases of arbitration or mediation.); (reasoning it is noteworthy that out of the seventeen institutions that replied, seven are contributors to DRD, but only one arbitral center included DRD in its response.); compare DRD, Annex 3, *supra* note 7, at slide 2, with slide 4 (the institution that indicated its alliance with DRD provides the information on a quarterly basis, presumably the other DRD members do so as well.).

8. Annex 3, *supra* note 7, at slide 4 (reasoning the institution that indicated its alliance with DRD provides the information on a quarterly basis, presumably the other DRD members do so as well.).

B. Diversity of Arbitrators

The more diverse the supply of arbitrators is, the higher the opportunities are to appoint more fitting professionals as arbitrators in international cases. Non-nationals, women and arbitrators from younger generations can bring new perspectives and practice in the field of arbitration in Latin America, and this is what this segment of the questionnaire aimed at assessing.

The first question in this segment was whether the centers have rosters. Fifteen replied that they do. Out of those, only fourteen provided additional information.

Three institutions indicated that more than 20% of arbitrators are from outside the list, with one as much as 25%.

In regards to the questions on diversity, they were focused on foreign arbitrators, women, and arbitrators of ages 30 to 50. As to foreign arbitrators, one institution stated that 65% of the arbitrators on their list are foreign, while four indicated that there were no foreign nationals on their lists at all. The remaining responses (eight) ranged from 10% to 39%, along with one institution stating that 5% of their panel members are foreign.

On the aspect of gender diversity, the replies ranged from 8% to 40% of women on their panels. Only one respondent replied that essentially there are no women (1%) on that institution's list. Twelve institutions indicated that they are aware of the Equal Representation in Arbitration (ERA) Pledge, but only six of those had signed it.

Finally, regarding the age factor, the questions were divided in two: arbitrators aged 30 to 40 and arbitrators aged 40 to 50. As to the former, most answers ranged from 7% to 25% of the arbitrators on the list, with one institution stating that 60% fall within that age group; one responded 0.5% and another, 2%. As to ages 40 to 50, most replied that between 25% and 65% of their members were of that age group, while one replied that 90% of the arbitrators on their list corresponded to that age range. On the other end of the spectrum, one institution responded that only 12% of the arbitrators belonged to that age group.⁹

C. Use of Technology

This segment is particularly relevant in the region, because institutional rules in Latin America have evolved from a quasi-judicial

9. See Annex 3, *supra* note 7, at slide 5 (that same institution replied that only 0.5% are aged 30–40, so presumably most arbitrators are more than 50 years old).

procedure to a more flexible system. The answers to how much electronic communications are being used to help gauge how far that evolution is.

Out of the seventeen respondent institutions, four replied that they still work solely with physical files, and the remaining thirteen hold a physical file in addition to an electronic version. Six institutions do not allow an electronic signature of the arbitrators. Of the remaining eleven that do, six require the agreement among the arbitrators, three between the parties, and two require both the arbitrators and the parties to agree.

All institutions send out electronic communications/service to the parties, out of which only five do so exclusively, without the physical backup.¹⁰

Five centers have their arbitrators communicate solely by electronic means with the parties.¹¹ Two institutions replied that they allow the arbitrators to communicate electronically save for the award, which is served in the physical version. Three centers provide that the parties must agree on the electronic communication by the arbitrators. The remaining seven centers encourage arbitrators to communicate through electronic means but do not impose it.

Finally, it is interesting that only one institution replied that it does not provide facilities for videoconferencing.

III. CONCLUSIONS

In the process of modernization of arbitration in Latin America, there are still aspects where certain arbitral centers are lagging behind, while other centers are remarkably modern. With some exceptions, institutions in the region are up to date with the use of technology. This is commendable, since only a few years ago service was still carried out in person in most countries, and the arbitrators and parties had to visit the centers to study the files.

In terms of diversity on the panels, institutions have relatively diverse panels in terms of gender and age, with a bit less in terms of foreign arbitrators. Regarding the former, the average percentage of women in the rosters is 18%, which is probably higher than the statistics globally, with exception of the ICC.¹² Unfortunately, there was no question on how many

10. See Annex 3, *supra* note 7, at slide 8 (explaining that there appears to be a slight inconsistency, since all centers indicated that they hold a physical file; unless their understanding of “physical file” excludes communications from the institution).

11. See Annex 3, *supra* note 7, at slide 8 (reasoning three of those answered that they work solely with electronic files, which means they are virtually paper-free).

12. Lucy Greenwood & Michael A. Fitts, *Getting a Better Balance on International Arbitration Tribunals*, 28 J. LONDON CT. INT’L ARB. 651, 656 (2012) (“in 2012, it was estimated that the percentage of women appointed to international commercial arbitration tribunals is around 6%”); INT’L CENTRE FOR SETTLEMENT INV. DISPUTES, ICSID ANNUAL REPORT 35 (2016) (the latest ICSID

women are actually appointed in the cases.¹³ Usually, the higher the chances of appointing arbitrators who are involved in international arbitration, the higher the chances are that the international culture, which tends to be more flexible, permeates into national institutional proceedings.

Finally, in what respects the publication of statistics, this is where institutions in Latin America are frankly weak. Keeping statistics is something generally done to a lesser extent in Latin America when compared to other regions, and it is a shame. The more information that is publicly available, the more transparent—and therefore more accountable—the institution is. Also, if institutions were to gather statistics, they can become more efficient, more effective and gain competitiveness, as they can address concerns and respond to market trends.

report shows that approximately “10% of the appointees of fiscal year 2016 were women”); INT’L CHAMBER OF COM., ICC ARBITRAL TRIBUNALS, <http://www.iccwbo.org/Products-andServices/Arbitration-and-ADR/ICC-Arbitral-Tribunals/> (last visited Feb. 12, 2017).

13. From information gathered outside the survey, the author knows that one arbitration center in Perú has 8% of women in the roster but in practice, 13% of the appointees are women.

ANNEX 1

The following are the survey questions (translated from the original survey questions, which were in Spanish).

1. Does your institution handle international cases, i.e., cases between parties/interests from different jurisdictions?
2. Does your institution publish statistics on the cases it handles, i.e., number of cases, origin of the parties, costs, nationalities of arbitrators, amounts in dispute, etc.?
3. Please specify the type of statistics that your Institution publishes.
4. How is the information about your institution's statistics made publicly available?
5. How often is information about your institution's statistics published?
6. Does your institution have a list of arbitrators?
7. What percentage of the arbitrators in your institution's list are foreign individuals?
8. What percentage of the arbitrators in your institution's list are female?
9. What percentage of the arbitrators in your institution's list are 30–40 years old?
10. What percentage of the arbitrators in your institution's list are 40–50 years old?
11. May parties appoint arbitrators outside the list?
12. What percentage of the arbitrators are appointed outside the list?
13. Are you aware of the Equal Representation in Arbitration (ERA) Pledge?
14. Has your institution signed the ERA Pledge?
15. Does your institution work only with paper documents of the cases it handles?
16. Does your institution provide an electronic file to the parties and counsel?
17. Does your institution allow arbitrators to use electronic signature in their orders, decisions, awards?
18. Does your institution use electronic service of institutional communications?
19. Does your institution allow arbitrators to use electronic service of its communications, orders, decisions, awards?

20. Does your institution provide users with videoconferencing facilities?
21. Question in regards to being included in the list of institutions that participated in the survey that would be revealed in the International Law Weekend 2016 or remain anonymous.

ANNEX 2

The following are the institutions that participated in this survey, carried out via website in October 2016.

1. Centro de Mediación y Arbitraje Comercial de la Cámara Argentina de Comercio, CEMARC (Argentina)
2. Centro de Arbitraje de la Cámara Boliviana de Hidrocarburos y Energía (Bolivia)
3. Centro de Arbitraje y Mediación de la Cámara de Comercio Brasil-Canadá (Brazil)
4. Centro de Arbitraje y Conciliación de la Cámara de Comercio de Bogotá (Colombia)
5. Centro Internacional de Conciliación y Arbitraje (Costa Rica)
6. CAM Santiago (Chile)
7. Centro de Resolución Alternativa de Controversias de la Cámara de Comercio y Producción de Santo Domingo (Dominican Republic)
8. Centro de Arbitraje y Mediación AmCham Quito (Ecuador)
9. Centro de Mediación y Arbitraje de la Cámara de Comercio e Industria de El Salvador (El Salvador)
10. Comisión de Resolución de Conflictos de la Cámara de Industria de Guatemala (Guatemala)
11. Centro de Mediación y Arbitraje Comercial de la Cámara Nacional de Comercio de la Ciudad de México, CANACO (Mexico)
12. Centro de Arbitraje de México (Mexico)
13. Centro de Conciliación y Arbitraje de Panamá (Panama)
14. Centro de Arbitraje - Cámara de Comercio de Lima (Peru)
15. Centro de Arbitraje de AmCham (Peru)
16. Centro de Arbitraje de la Cámara de Caracas (Venezuela)
17. Anonymous

ANNEX 3



DJ ARBITRAJE

Are Arbitral Institutions in Latin America Innovating? A survey on transparency, diversity, and use of technology

Dyalá Jiménez

INTERNATIONAL LAW WEEKEND

New York

27-29 October 2016



DJ ARBITRAJE

17 participating institutions

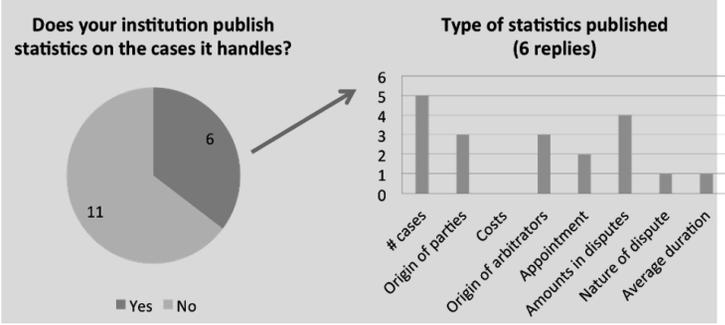
- Centro de Arbitraje de la Cámara Boliviana de Hidrocarburos y Energía (**Bolivia**)
- Centro de Arbitraje y Mediación de la Cámara de Comercio Brasil-Canadá (**Brazil**)
- Centro de Arbitraje y Conciliación de la Cámara de Comercio de Bogotá (**Colombia**)
- Centro Internacional de Conciliación y Arbitraje (**Costa Rica**)
- CAM Santiago (**Chile**)
- CRC, Cámara de Comercio y Producción de SD (**Dominican Republic**)
- Centro de Arbitraje y Mediación AmCham Quito (**Ecuador**)
- Centro de Mediación y Arbitraje de la Cámara de Comercio e Industria (**El Salvador**)
- Comisión de Resolución de Conflictos de la Cámara de Industria de Guatemala (**Guatemala**)
- CANACO (**Mexico**)
- Centro de Arbitraje de México (**Mexico**)
- Centro de Conciliación y Arbitraje de Panamá (**Panama**)
- Centro de Arbitraje - Cámara de Comercio de Lima (**Peru**)
- Centro de Arbitraje de AmCham (**Peru**)
- Centro de Arbitraje de la Cámara de Caracas (**Venezuela**)
- Anonymous





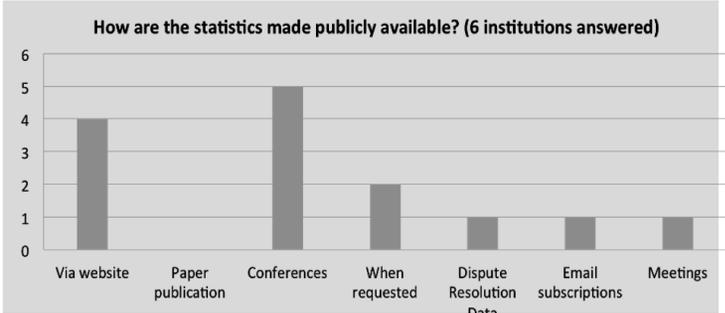
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Publication of statistics (cont.)



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Publication of statistics (cont.)





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Arbitrator diversity

15 institutions have lists of arbitrators. 14 replied the following:

Question	Yes	%	N/A	NO
Foreign arbitrators	9	5- 65	1	4
Female arbitrators	13	8-40		1 (1%)
Arbitrators aged 30-40	12	2-60	1	1(.5%)
Arbitrators aged 40-50	13	12-90	1	



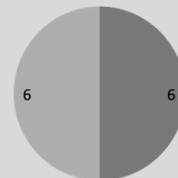
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Arbitrator diversity (cont.)

Are you aware of the ERA Pledge?
(17 answers)



Has your institution signed the
ERA Pledge? (12 answers)

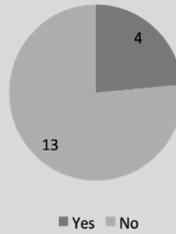




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Use of technology

Does your institution work with paper documents only in the cases it handles? (17 answers)



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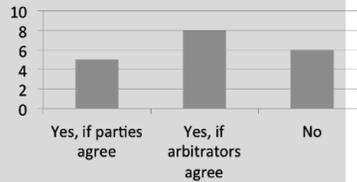
Use of technology (cont.)

Does your institution use electronic means of institutional communications? (17 answers)



- Yes, we use electronic notification only
- Yes, additional to a paper version
- No

Does your institution allow arbitrators to use electronic signature in their orders, decisions, awards? (17 institutions answered)





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Use of technology (cont.)

Does your institution provide users with videoconferencing facilities?
(17 answers)



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Conclusion

Meet expectations: technology

Exceeds expectations: diversity

Not yet: transparency/statistics