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The Political Economy of Court Decision-making and International Commercial Arbitration in the Developing World

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Abstract

Governments are important in every economy. Just like the rules economics theorists use to predict the actions of consumers and firms, Anthony Downs is of the view that democratic governments act rationally to maximize political support. When governments engage in business with the private sector, disputes are resolved by the courts, domestic, foreign or international. But do the rules of rational behaviour for vote seeking political office holders explain the means of non-elected but powerful justices of the courts? This enquiry is necessary to put into context recent developments in developing countries such as Ghana. The Supreme Court of Ghana has recently declared several contracts entered into with private multi-nationals as unconstitutional only for such decisions to be rendered nugatory by awards of international arbitral bodies. We rely on the rationality theory to explain the varying outcomes of commercial disputes involving states and private commercial entities. We conclude that the differing results on the same set of questions before the domestic and international adjudicating bodies are not as a result of the differing appreciation of the essential ingredients of the dispute but the reflection of the rationality of the adjudicating institutions. We conclude that the incentive structures for the decisions at the domestic level have to be re-oriented taking cognizance of the interests, powers and incentives of private international parties in such judicial pronouncements.

Keywords: Arbitration, Incentives, Politics, Institutions, Governance.

Introduction

International commercial arbitration is a means by which disputes arising out of international trade could be resolved by voluntary agreement of the parties, through a process other than a regular court of competent jurisdiction.[1] The object of commercial arbitration is to obtain a fair resolution of disputes by an impartial tribunal without an unnecessary delay or expense. The parties are free to agree on how their disputes are resolved, subject only to such safeguards as are necessary in the public interest. International commercial arbitration produces a definitive and binding award which is capable of enforcement through national courts. Arbitration has become the dispute resolution method of choice in international commercial contracts. This is partly as a result of the success of the New York Convention,[2] the development of sophisticated arbitral institutions, and the passage of arbitration-friendly national legislation. These have contributed to making international arbitration an attractive option for commercial dispute resolution. However, tensions, criticisms and difficulties abound regarding international commercial arbitration. Part of these difficulties is around the question – whether arbitrators are political?

Some empirical analysis has shown that arbitrators appear to be influenced, in some cases, by their policy views and do not simply apply the law as it stands when deciding investment cases.[3] Arbitrators repeatedly appointed by a party are more likely to make decision in favour of that party.[4] Some research also shows that arbitrators who share the same legal family as the host country are more deferential to the host state.[5] Unlike arbitrators, it is widely believed that judges only apply the law, irrespective of

[1]See Redfern, Law and Practice of International Commercial Arbitration, at 11.
[2]1958 New York Convention on the Recognition and Enforcement of Arbitral Awards. See www.uncitral.org
[3]*Id.*
[4]*Id.* at 39.
[5]Id.

their policy beliefs and backgrounds.[6] The reality however is that there is always a gap in the legal field, particularly, an evolving one filled by judges and / or arbitrators in specific cases. As human beings, they bring policy preferences to these arbitrations.

African states are rarely claimants in arbitration proceedings. They are usually respondents in arbitrations.[7] Arbitrators have considerable and unchecked discretionary powers, unless limited from exercising it in case of an agreement to the contrary by the parties. An arbitration agreement can be the result of an unequal bargaining power. If this is coupled with a less favourable composition of an arbitration tribunal, the potential for work less charitable to the interest of the developing countries is real. In addition, controversies arising from large-scale international investment agreements are very complicated and therefore require arbitrators sufficiently familiar with technical and commercial background. The reality is that majority of arbitrators and witnesses are lawyers, law professors and judges who do not come from the developing world. The questions for this paper are whether developing countries are responding to the issues around international commercial arbitration through their domestic judges or the judges remain insulated from the potential politics capable of taking place within the arena of international commercial arbitration? The other aspect of the hypothesis is that the factors which predispose arbitrators to politics are not irrelevant when an arbitration involves a developing world host country such as Ghana. Hence, the conclusions of previous studies such as by Michael Waibel et al are apposite to explain the recent arbitral awards involving the Government of Ghana and a number of private investors. This paper is unable to exhaust the second aspect of the hypothesis, thus conflicting decisions of the Supreme Court of Ghana vis-à-vis certain recent arbitral awards are also as a result of rational choices. This aspect of the hypothesis is left for future research.

The Question and Methodology

This paper is an introductory work for a future deeper study. It is therefore exploratory. It relies mainly on desk review and very limited field interviews. Statistical modeling expected to be helpful in analyzing the dataset for future work has not been relied on at this point.

Discussions

Legal Regime for Commercial Arbitration in Ghana

The 1992 Constitution of Ghana enjoins the Government of Ghana in its dealings with other nations to endeavour to promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means.[8] The Government of Ghana is empowered under the Constitution[9] to conduct its affairs in consonance with the accepted principles of public international law and diplomacy consistent with the national interest of Ghana.[10] The Constitution permits the executive to execute or cause to be executed treaties, agreements or conventions in the name of Ghana, subject to ratification by Parliament. These provisions mandate the Government of Ghana, in its dealings with other nations and arguably investors to ensure total compliance with the terms and intendment of those agreements, treaties and conventions ratified by Ghana, subject to the national interest and the laws of Ghana.

There is a Commercial High Court in Accra, to be replicated in other Regions in Ghana for the purpose of resolving disputes of commercial nature. As part of the procedure at the Commercial Court, parties go through a compulsory mediation processes for the resolution of the dispute before the trial is reached if need be.[11] In addition, the Alternative Dispute Resolution (ADR) Act, 2010 (Act 798) encourages settlement of disputes through alternative dispute resolution (ADR). There are some limited exceptions to the cases resolvable through ADR in Ghana. The exceptional matters include the national or public interest, the environment and interpretation of the Constitution.[12] In effect, every dispute can

[6]Michael Waibel & Yanhui Wu, Are arbitrators Political at 38.
[7]Available at http://www.worldbank.org/icsid/basicdoc/basicdoc.htm (accessed on 14th March 2015).
[8]Article 40(c) of the 1992 Constitution of the Republic of Ghana.
[9]Article 73. Emphasis mine.
[10]Article 75 (1) and (2).
[11]Order 58 High Court of Ghana Civil Procedure Rules CI 47.
[12]See S. 1 of Act 798.

be settled by ADR to achieve justice for all concerned.[13] It is the concern of the non-amenability of the constitutional matters which have brought to the fore questions regarding the disposition of the Supreme Court of Ghana vis-à-vis adjudication of commercial matters by an international arbitral panel.

Constitutional Requirement for Ratification of International Commercial Agreements

There is peculiar problem with the compliance with constitutional provisions affecting international business transactions in Ghana. This situation occurs with respect to is the non-compliance with article 181 (5) of the 1992 Constitution of Ghana requiring that international business or economic transactions with the Government of Ghana must be authorized by Parliament in order for it to be an effective contract. In the last couple of years, the Supreme Court has declared a number of international economic transactions unconstitutional.[14] A case in point is Attorney General v Balkan Energy Co. Ltd.[15] In that case, the Attorney General of Ghana sued Balkan Energy in the High Court of Ghana pursuant to an earlier decision obtained by the Attorney General to refer a constitutional matter which formed part of the matter before the arbitration body to the Supreme Court of Ghana. The Supreme Court held that a Power Purchase Agreement (PPA) signed between the Government of Ghana and the Balkan Energy Ghana and Balkan International PLC in July, 2007 for the rehabilitation of the "Osagyefo Barge", was illegal as it did not receive Ghana's parliamentary approval.

Ouster Clauses and Constitutional Issues

There are other legal issues of concern regarding international economic transactions Ghana enters into with investors. Many, if not all of these agreements contain clauses which permit either party to the agreement to initiate international commercial arbitration even without invocation of the jurisdiction of the domestics. This is in accordance with the New York. The question is whether these contracts can legitimately oust constitutional provisions taking advantage of the severability principle in international commercial arbitration? The issues become even more tasking when it is considered that in some instances, it may the Attorney General acting on behalf of government who may advise the investor to go ahead with the execution of the contract without the necessary approval from Parliament. This is the case as it is not always clear what amounts to an international economic or business transaction. The Supreme Court has had occasion to implore parliament to enact the appropriate legislation to bring clarity to bear on this issue.[16] In these circumstances, can the Supreme Court legitimately say payment cannot be done to the investors who may have committed so much resources into providing goods and services to Ghana? Should an investor be paid on the principles of quantum meruit in-spite of the unconstitutional nature of the contracts? In this context, equity and fair-play may compel Arbitral Panel to be sympathetic to the plight of investors. But should arbitral panels ignore such constitutional injunctions to make such contracts valid in the country of the contract?

Previous Work on the Disposition of Judges to Politics

Research in the United States on judicial voting patterns to determine whether judges are "political" suggest that federal judges are not nearly as bad as politicians. Sunstein reveals that Judges are far from mere politicians.[17] However, judicial predispositions matter, and they help explain why judges are divided on some of important issues. The research also indicates that even judges are subject to a phenomenon called "group polarization." Judicial voting becomes a lot more ideological when judges sit on panels with two others appointed by presidents of the same political party.

The Politics of Adjudication

Arbitrators derive their authority from the parties who appoint them, and they are called up only to resolve the dispute between those parties. They are able to exercise that authority because of strong support by States who have committed to enforce their decisions and to ensure that parties fulfill their

[13]Ghana's Alternative Dispute Resolution Act, 2010 (Act 798).
[14]These contracts include the Balkan Case, Isofoton contract, and Waterville contracts.
[15]Suit No. J/1/2012 dated 16th May 2012.
[16]Felix Klomega v. Attorney General, Ghana Ports and Harbours Authority and 2 ors. Unreported Case No. J1/10/ 2012 dated 16/01/2013 (Supreme Court).
[17]Available at http://freakonomics.com/2013/01/10/how-political-are-judges/ (accessed on 15th March 2015).

agreements to arbitrate. Both the investors and the host states expend a great deal of resources to influence the arbitration outcomes, raising an important question: is an arbitrator's decision biased toward his or her appointing party? Studies carried out by Michael Waibel & Yanhui Wu[18] on cases before the International Centre for the Settlement of Investment Disputes (ICSID) provide evidence on how the appointment of arbitrators and personal background influence arbitration outcomes. Michael Waibel & Wu found that arbitrators routinely appointed by the investor scrutinize the actions of host states more closely, as compared to arbitrators typically appointed by host states. Arbitrators are more lenient to host countries from their own legal family. Other aspects of the arbitrator's experience and training, such as the development status of their country of origin and full-time private practice, also play an important role in arbitration decisions. To some extent, these factors and resultant decisions of arbitrators may be supported with Anthony Down's rationale choice theory. Is the finding of legal family, host country appointment and nationality bias explain the decisions of the Supreme Court of Ghana? In other words, could the Supreme Court be interested in protecting the normative order and respect for the domestic law irrespective of international obligations undertaken by the Ghana in its relationship with foreign investors?

Van Harten focused on career incentives for arbitrators.[19] In his view, their interest to be re-appointed in future cases provides incentives to decide investment disputes in a way that enhances the overall attractiveness of investment arbitration as a forum for settling investment disputes. Arbitrators, "as merchants of adjudicative services, "have a financial stake in furthering [arbitration's] appeal to claimants", resulting in actual or potential bias against the host country. His thesis is that arbitrators apply investment treaties to ensure the future growth of the "investment arbitration industry. His argument shares some similarity with Stigler's regulatory capture theory, where an industry over time comes capture the interests of the regulator.[20] A possible counterweight is a reputational mechanism. Arbitrators‟ concern about their reputation of neutrality could outweigh other incentives. A third possibility is that law's normative pull encourages arbitrators to apply law in a neutral fashion. Their commitment to apply the law without fear or favor outweighs incentives to vote strategically in order to secure appointments to future arbitral panels.[21]

The results of the work of Michael Waibel reveal that ICSID investment arbitration outcomes are partly driven by non-legal factors, especially the personal characteristics of arbitrators.[22] What drives judicial outcomes is judicial politics or ideology, not (just) the law.[23] In the more controversial areas of international investment law, the views of arbitrators may diverge, depending on their background, life experience and ideology. It is expected that "conservative" arbitrators will tend to favor the protection of property rights without much reservation, whereas "progressive" arbitrators would tend to give greater weight to other societal values such as protection of the environment or public service delivery. The balancing may differ depending on the arbitrator's view of the world. The double role of arbitrator and counsel is said to bias, consciously or unconsciously, arbitrators one way or the other, without necessarily rising to the level of a challengeable conflict of interest. Arbitrators may need to decide an issue that they – in their persona as counsel – are arguing in another case for the benefit of their client. Such role confusion could potentially undermine the integrity and neutrality of the arbitral process.

Conclusion

International Commercial Arbitration has come to stay. Where the host State negotiators find it appropriate to consider arbitration mechanism instead of litigation in the domestic Court, then they ought to ensure that domestic instead of international arbitration is provided for in the agreement. Where

[18]Michael Waibel & Yanhui Wu, Are arbitrators biased at 6.

[19]GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2007), 152-153.

[20]George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. OF ECON. 3 (1971).

[21]Michael Waibel & Yanhui Wu, Are arbitrators political at 4.

[22]Michael Waibel & Yanhui Wu, Are arbitrators political at 6.

[23]JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL, 65 (1993) ("The Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices"); ibid., 86 ("Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal."); DAVID ROHDE & HAROLD SPAETH, SUPREME COURT DECISIONS MAKING 72 (1976) (judges "base their decisions solely upon personal policy preferences);

arbitration ought to be resorted to as the most favourable mechanism, domestic arbitration tribunal ought to be the preferred seat of the arbitration in view of the empirical findings of arbitrators being political.

The differing results on the same set of questions before the domestic and international adjudicating bodies are not as a result of the differing appreciation of the essential ingredients of the dispute but the reflection of the rationality of the adjudicating institutions. We conclude that the incentive structures for the decisions at the domestic level have to be re-oriented taking cognizance of the interests, powers and incentives of private international parties in such judicial pronouncements.

Developing countries need to develop local international commercial arbitration expertise. Developing countries could do is to take steps to educate its business community the essential pitfalls in the international commercial arbitration. The international system has to consciously work towards a convergence of the rules regarding the alternative dispute resolution of commercial contracts whether such contracts are resolved in the domestic arena or in an international forum.