International Arbitration and the Rule of Law: *The User’s Perspective*

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ICCA Nairobi Roadshow, Fairmont Norfolk Nairobi
16th September 2015

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What is the Rule of Law according to you?

*Brian Tamanaha, On the Rule of Law, 2004

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Everyone is for it, but has contrasting convictions about what it is.

*Judith Shklar, “Political Theory and the rule of Law”, 1987

It may well have become just another one of those self congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians.
The Rule of Law: according to scholars

• In its most basic sense, the Rule of Law means that no one is above the law.

_Aristotle, Greek philosopher, 4th Century BC_
Law should govern

_A.V. Dicey, An Introduction to the Study of the Law of the Constitution, 1885 – Dicey_ propounded 3 meanings of the Rule of Law:

(a) Supremacy of regular law, as opposed to the influence of arbitrary power;
(b) Equality before the law for all classes, as administered by the courts; and
(c) The law of the constitution is not the source, but the consequence of the rights of individuals.

What is synonymous with the rule of Law?
Hamourabi Code, 1760 BC
Magna Carta, 1215
Constitutions of the world – Kenya promulgated a new constitution in 2010
Lord Bingham’s 8 principles of the Rule of Law


1. The law must be accessible and so far as possible, intelligible, clear and predictable.

2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.

3. The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.

4. The law must afford adequate protection of fundamental human rights.
5. Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers.

6. Means must be provided for resolving without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.

7. Adjudicative procedures provided by the state should be fair.

8. The rule of law requires compliance by the state with its obligations in international law as in national law.
The Rule of Law in International Arbitration

Lord Hoffmann, in a December 2014 speech at Hong Kong International Arbitration Centre:

In international arbitration, the Rule of Law means having a system of legal rules at the seat of arbitration which is fair and efficient and which people can understand, and having a judiciary that is independent and competent to lend support to the arbitration.

But should we limit to the seat of arbitration’s rules and courts? What about the arbitration and arbitrators themselves?
The Rule of Law in International Arbitration: A user’s perspective

“Africa rising”, “Africa is the last frontier”

According to the FT: Africa registered 5 per cent GDP growth in 2014, beating the global average by 1.5 percentage points.

Africa enjoyed a 65 per cent increase in capital investment in 2014, to an estimated USD 87bn. The number of FDI projects in the continent rose 6 per cent.

Sub-Saharan Africa saw its investment levels rise from USD 42bn to USD 61bn.

East Africa: Transport, Energy, Mining, Oil & gas

Signing now – champagne!
Give it 3 years… where will the disputes be arbitrated?

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The Rule of Law in International Arbitration: A user’s perspective...cont

The users are:
International investors, Local investors, Governments, State entities, and their legal advisors

What users require in arbitration:
Certainty, predictability and stability
Confidence that disputes can be resolved efficiently and fairly
Assurance that when they receive an award, it will be enforced with ease.

In summary, user’s require that the arbitral process, the support mechanisms in the seat of arbitration and the enforcement mechanisms achieve all the components of the Rule of Law
RoL Strand 1: Accessibility of the Law

Accessibility of law: law reports, access to good lawyers, language once can understand.

Is law in Africa easily accessible?

Case reporting:
In Kenya, we have the National Council for Law Reporting – Kenya Law Reports. Law Africa, East African Law Reports. Many African countries do not have case reporting or easily accessible laws.

Arbitration: does it support RoL in elements of law accessibility?
Party autonomy and confidentiality: Except in ICSID arbitration, awards are not published.

There is no development of jurisprudence, except where there are applications to challenge awards in the courts. We rely on judicial case law, even in arbitration.

Is this a justifiable trade-off in giving parties autonomy and commercial confidentiality?

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RoL Strand 1: Accessibility of the Law…cont

**Adoption of International Conventions in Africa:**
ICSID: In Africa, 44 out of 54 countries have signed and ratified the ICSID Convention. 4 African States signed the Convention but have not ratified it to date. These are: Ethiopia, Guinea-Bissau, Namibia and Sao Tome and Principe. 6 African States have neither signed nor ratified the Convention. These are: Angola, Djibouti, Eritrea, Equatorial Guinea, Libya and South Africa.

NY Convention: In Africa, 32 out of 54 countries in Africa are signatories to the New York Convention, including: Kenya, Mauritius, Mozambique, Rwanda, South Africa, Uganda, and Tanzania. The following countries are not parties to the New York Convention: Angola, DRC, Ethiopia, Somalia, South Sudan and Sudan.

UNCITRAL Model Law: 8 countries in Africa whose law is based on the UNCITRAL Model Law. These are: Egypt; Kenya; Madagascar; Nigeria; Uganda; Zambia; Zimbabwe; and Algeria. Countries which have not adopted UNCITRAL Model Law include: Ethiopia, Somalia, Tanzania and Uganda.
RoL Strand 2: Law, not discretion

Court system:
Most judges are well trained, competent and follow the law. However, there have been issues of:

Corruption and government influence: in Transparency International’s 2014 Corruption Perception Index, majority of African countries had a score of less than 50%, showing endemic corruption.

Turf wars and court attitude towards arbitration: Redfern and Hunter – although the aim of international commercial arbitration as a neutral and private dispute resolution mechanism is to be fully autonomous, the reality is that it will continue to depend on the underlying support of the courts (interim measures and enforcement)

Misuse of public policy ground: Under local arbitration laws (Section 36 of Kenyan Arbitration Act) and under Article V of the New York Convention. Dowans vs Tanesco in Tanzania: The judge dismissed an application for extension of an injunction over assets for lack of merit, but still extended the interim injunction “in the public interest” even though this was not claimed by the parties.
RoL Strand 2: Law, not discretion…cont

Court system:
How can this be improved in Africa?

Training: In Kenya, a Judiciary Training Institute was established in 2008. Judicial Service Commission prepares and implements training programmes. In Ivory Coast, a Rule of Law Institute for Africa is being set up.

System improvement: Vetting of judges and magistrates under Kenya Constitution

Corruption: investigation and prosecution. Is there political will?
RoL Strand 2: Law, not discretion…cont

In Arbitration:
Party autonomy: Parties can choose their own rules of procedure Does this go against elements of RoL? No, as parties have agreed. It is not an individual’s.

Arbitrators: ex aequo et bono (what is just and equitable) – Are these in line with RoL?

Why follow the law, not discretion:
(a) It is commercial – based on reputation
(b) Grounds for setting aside under New York Convention and national laws: Article V of NY Convention; Section 36 of Kenya Arbitration Act.
(c) A higher professional duty for arbitrators, due to the high threshold for award challenge in some jurisdictions e.g. permission to appeal under Sections 68 (procedural irregularity) and section 69 (error of law) of the UK Arbitration Act, 1996

I had a commodities arbitration where arbitrators mis-applied the law. But no appeal allowed in the UK Court as arbitrators identified the legal principle, even though their application was completely contrary to what the court would have decided.
Two main attractions to arbitration is that:

(a) parties can select arbitrators who they consider to be fair and impartial
(b) Parties can select what they consider to be a neutral seat.

LCIA – MIAC Art 14; ICC Rules Art 22 – arbitrators to be fair and impartial. New York Convention Article V (1) (b) – improper notice or inability to present your case is a ground for challenge.

Under most Institutional Rules, unless agreed by the parties, sole arbitrator should not be the same nationality as one of the parties. IBA Guidelines on conflict of interest in international arbitration.

In court proceedings, is there equality before the law when it comes to interim measures and enforcement? Impartiality of judges; enforcement of awards against the government.
Rol Strand 3 – Equality before the law…cont

*Strand 3 is related to:*

*Strand 4* - adequate protection of fundamental human rights.

*Strand 7* - Adjudicative procedures provided by the state should be fair.
Rol Strand 5 – Exercise of power in good faith, without exceeding the limits of such powers

Arbitrators derive their powers from:

(a) Arbitration agreement;
(b) Terms of reference; and
(c) Additional powers provided for in institutional rules.

Article V (1) (c) of the New York Convention: it is a ground for setting aside if the Award deals with a difference not falling within the submission to arbitration or it contains decisions on matters beyond the scope of the submission to arbitration.
Another one of the main attractions to arbitration:
In most African countries, although court filing fees are relatively reasonable, the amount of time it takes to finalise a case is prohibitive. In most countries, a minimum of 2 years. Could go on for even 10 years.

But courts affect arbitration: in Kenya, there is digitisation (e-filing) and reforms to make the processes faster and more efficient.

Arbitration Timelines:
Most arbitration rules set out timelines for responses to request for arbitration, appointment of tribunal and parties and arbitrators can come up with Terms of References setting out procedural steps and timelines. Article 30 of ICC Rules – time limit for final award is 6 months from entry into the terms of reference (certainty).
RoL Strand 6 – Mode of resolving disputes without prohibitive costs or inordinate delay…cont

Arbitration costs: *This is a tricky one.*
There has been criticism that costs are prohibitive, and counter to the purpose of arbitration.

**ICC Rules:** USD 3,000 for filing a request for arbitration. Thereafter ICC admin and arbitrator costs are based on value of the dispute – USD 300,000 for a dispute of USD 5 million under cost calculator

**LCIA Rules:** GBP 1,750 for filing a request for arbitration. Thereafter, fees on a time spent basis. GBP 250/hr for registrar. Arbitrator fees not exceeding GBP 450/hr

**LCIA – MIAC Rules:** MUR 50,000 for filing request for arbitration. Thereafter, administration and arbitrator costs are at an hourly basis e.g. MUR 6,000/hr for the Registrar and for arbitrators, hourly rates not exceeding MUR 20,000/hr

**NCIA Draft Rules:** filing fees of USD 100. Admin and arbitrator costs based on value of dispute. For a dispute of USD 5 Million: USD 112,000 according to calculations under Annex 3 of Schedule 2

Most Rules require deposits to be made.

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RoL Strand 8 – State should comply with obligations in international law as well as national law

*Sovereign immunity in commercial arbitration*

It is now well established that States cannot invoke sovereign immunity in international commercial arbitration as it relates to commercial transactions. But consider 2 types of immunity:

(a) Immunity from process; and

Waiver of immunity does not mean that you can attach all government assets.

Under NY Convention, enforcement would be in accordance with laws of country of enforcement.
RoL Strand 8 – State should comply with obligations in international law as well as national law…cont

State obligations in ICSID Arbitration

Under Article 54 of the ICSID Convention, each Contracting state is required to recognise an award as binding and enforce the pecuniary obligations imposed as if it were a binding judgment of a court in that State. ICSID is a World Bank body, and States are less likely to ignore an ICSID award.
Questions?

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