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Research Article

Interrogation of Arbitral Discretion, Default Setting and Procedural Autonomy in International Commercial Arbitration

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Abstract

International commercial arbitration has remained the greatest hallmark in legal fraternity in addressing disputes arising from international commercialization. While the principles of neutrality and flexibility are very essential, the interrogation of arbitral discretion, default setting and procedural autonomy has become critical in this disputes crippled world. The study discussed the important of arbitral discretion, default settings and procedural autonomy. Moreover, its tackled institutional rules in recognition of arbitral discretion, default settings and procedural autonomy. Although the study analyzed arbitral discretion and its impact on procedural autonomy, its appraised the arbitral discretion with default settings.

While the study used multi case studies, it deployed systematic empirical literature review on institutional rules for various international arbitration centers in synthesizing the relationships between arbitral discretion, default setting and procedural autonomy. The findings indicate that arbitral discretion and default setting clauses are meant for the pursuit of natural justice in international arbitration. Although they can be abused and arbitrators can turn bias, they are independent clauses and none can replace one another. Nonetheless, they are made successful through strict application of procedural autonomy provided the procedural autonomy is not hijacked.

The study concludes that although the future of arbitral discretion may look bleak due its nature of hijacking procedural autonomy, arbitral discretion continued being applied in its relevant situation. Default setting and procedural autonomy should co-existence as each of them ensures that fairness and justice is rendered in the international commercial arbitration. Further research is recommended to the legal scholars to study the future of default setting on procedural autonomy in complex international commercial arbitration situations.

Keywords: International commercial arbitration, arbitral discretion, default setting, procedural autonomy, institutional rules, arbitrators

1. Introduction

For over the past 40 years, international arbitration has become to the greatest extent the most celebrated mechanism for resolving international commercial disputes in the Sub-Saharan Africa, North Africa & Middle East, Asia, Europe, Oceanic and Americas (Scherer, 2018). Although it has spread across the world today as the best mean of commercial disputes resolution, its origin is associated with the United States and the United Kingdom. International arbitration is remarkably effective because of its neutrality, finality, flexibility and enforceability (Greenberg and Kee, 2011). The neutrality of international arbitration basically relates to segregating the dispute resolution mechanism from any interested parties' countries as well as from any political interference. Although the neutrality principle is a great yardstick for the international arbitration, it has been compromised through realist politics by great powers. Such great powers include the United States of America, the United Kingdom, the France, Russia and China. Nonetheless, the principle of flexibility has remained the style-mark of international arbitration. Flexibility of international arbitration is discerned from the freedom of parties to choose the mean in which their dispute can be resolved (Greg et al, 2011). This freedom include the parties' choice for the place of arbitration (seat), the applicable substantive law, the identity and number of arbitrators, the number of written briefs, oral hearings and whether experts need to be engaged or not. Given that arbitration is final and it is enforceable, no any appeal can be entertained (Hulent and Gould, 1999). This is the cornerstone which has led to both domestic and international courts to view arbitration tribunal decision as sacrosanct. Because of finality and the respect international arbitration enjoys, the study of international arbitration has remained exhilarating, creative, innovative and yet sometimes complicated in legal theory and practice.

Indeed, the success of any arbitration depends so much on arbitrators. Arbitrators are traditionally known as masters of procedures and rules. While arbitrators are required to follow party autonomy and procedures, they often veer off and apply their discretion. Although it is apparent that arbitrator's discretion has its own pedigree niche in international arbitration, it is mostly controlled by default settings in most jurisdictions. Then, are arbitral discretion, default settings and procedural autonomy important in international arbitration? What are the institutional rules that recognize these interesting trio (arbitral discretion, default setting and procedural autonomy)? Has arbitral discretion impacted on procedural autonomy? Can arbitral discretion be replaced by default setting? Or can both of them be kept in the international arbitration process? The above questions shall be attempted in this study. This study is structured as follows: section one introduces the question. Section two discusses the important of arbitral discretion, default setting and procedural autonomy in international arbitration. Section three discusses some of the institutional rules that recognize arbitral discretion, default settings and procedural autonomy. Section four analyzes the extent to which the arbitral discretion has impacted on procedural autonomy. Section five discusses whether arbitral discretion can be replaced by default setting or both of them can be kept together in international arbitration. Section six concludes and section seven gives a direction for further research.

2. Important of arbitral discretion, default settings and procedural autonomy

Generally, in international commercial arbitration, arbitral discretion, default settings and procedural autonomy are very essential in the discourses of any successful international arbitration. Their importance or necessity is far way critical in seeing the whole engagement of international commercial arbitration successful. Their importance is discussed as below:

2.1. Arbitral discretion

Viewed as the power of an arbitrator to act according to the dictates of his/her own judgement and conscience with a general legal principle, arbitral discretion has today emerged as an action of hijacking the party autonomy in international arbitration (O'Neil, 2003). Believe it or not, arbitrators instead of sticking to their traditional legal niche as the masters of procedures, they have appeared as slaves of procedures by resorting to their discretionary rights in international arbitration. While arbitral discretion is required to be done through gentle persuasion to parties, senior arbitrators with experience, judgement and confidence have often expressed strong views on a matter, which the parties effectually have to accept (Greenberg and Kee, 2011). Arbitrator discretion is divided into two namely: jurisdiction and administrative. Jurisdiction arbitral discretion is argued as follows:

"It is a privilege which enhance an arbitrator a special power in a given jurisdiction within a premise of right and obligation. It provides an opportunity to act in accordance with what is right, fair, equitable and guided by the spirit, principles and analogies of the substantive law in that given jurisdiction" (Copper, 1958).

As practice by many arbitrators, arbitral discretion is done at a given jurisdiction as it has no boundaries and borders. Nonetheless, deciding on a certain procedure unilaterally, arbitrators often carryout their discretion in a given jurisdiction.

On the other hand, there is an administrative arbitral discretion which etymologically emanates from the hijacking of administrative procedures during the international arbitration. Alan Copper further argues it as follows:

"Exercise of discretionary powers in real meaning of the term is known as 'administrative discretion'. It refers that parties' freedom of choice will be limited by established administrative procedures and systems" (Ibid).

While administrative arbitral discretion can be treated locally and taken as mere barriers to effective functioning of the institutions, administrative arbitral discretion has assisted in the running of administrative institutions during arbitration. Administratively under English law, arbitral discretion is exercised in the shadow of party administration and autonomy. Section 33 of the English Arbitration Act, 1996 permits a party to the arbitration to challenge the final arbitration award on the ground of serious administrative irregularities affecting the proceedings (Alexander, 1971). Somber administrative irregularities include amongst others the arbitrator's failure to comply with administrative procedural rules, effectiveness and efficiency.

2.2. Default settings

Understood as a fallback position in international arbitration, default settings are very important and have helped in the resolution of disputes during arbitration (Born, 2021). Default clauses in most rules have been crafted to assist in eliminating delays and ignorance during arbitration. This work in a way that parties agree with the arbitrators to trigger default clauses in the determination of dispute during the arbitration process toward the final award. In circumstances of parties' default, the arbitrators will ensure that the substantive law or lex arbitri applies fairly. The interesting thing about default setting is that majority of parties will always have army of reasons to negotiate it so that it doesn't affect the arbitration process and the final award. While such parties 'negotiations and appeals will always be there, arbitrators will use their discretion to either accept or reject such negotiations. In most instances, arbitrators have rejected lifting of default clauses in international arbitration (Barmann, 2020).

2.3. Procedural autonomy

Known as the foundational stone of international commercial arbitration, procedural autonomy or party autonomy is very critical for the entire arbitration process towards its final award. As one can passionately argue, no party autonomy no international arbitration. Parties' autonomy is very essential since it allows the parties to select the rules according to their specific needs and wishes and with a conviction of no restrictions imposed by traditional and possibly conflicting domestic institutions, thus, avoiding the risk of procedural surprises (Fortese and Hemmi, 2015). A major ingredient of this principle involves the parties' freedom to choose the procedure to be applied in their arbitration (Greenberg and Kee, 2011). This principle further allows parties to choose the seat of arbitration, number of arbitrators, procedure of appointing and disappointing of the arbitrators, the applicable substantive law, etc. The procedure of choosing applicable substantive law or *lex arbitri* has been adopted by national courts and has gained widespread acceptance in the national systems of law (Blackaby et al, 2012).

While it is a very important hallmark in international arbitration, party autonomy is limited by the following key constraints:

I. Parties' failure to agree. Given that party autonomy is built on consensus, parties are expected to agree. However, in many instances, parties may fail to consent and thus specific default provisions in the chosen set of procedural rules or *lex arbitri* may be triggered to make relevant decision.

II. Arbitral tribunal discretion. In hijacking the procedural autonomy, arbitrators can issue their discretion on the arbitration. But this doesn't just surface. Philip Yang observed that if parties don't agree on the procedures on the arbitration, then arbitrators will be left with no option but to decide on their behalf (Yang, 2017). The decision may not be fair and favorable to all the parties.

III. Institutional requirements. Although it is viewed as not a major limitation to party autonomy, institutional agreements may sometimes limit party autonomy. For instance, under some rules, parties are not free to omit the supervision that is part and parcel of institution procedures. But again, it is through parties' autonomy that institutional rules could apply in the first instance, otherwise parties would have not chosen them (Greenberg and Kee, 2011).

IV. The role of domestic courts. While domestic courts often adopt procedures agreed by the parties, this is not always the case. There are instances the role of domestic courts constraint party autonomy. A famous example of domestic court interference with parties' autonomy is found in the Singapore case of Dermajaya Properties Sdb Bhd v Premium Properties Sdn Bhd (Ansari, 2014). In this situation, the parties chose the UNCITRAL Arbitration Rules to apply to their arbitration but the court rejected.

V. Third parties. It is important to note that no matter what the parties to the arbitration consent on, their consent by itself cannot legally bind a third party, Moreover, while procedural rules may enhance arbitral tribunals to implore a third party to perform a given act, this request always doesn't have legal force. This has remained as a key conundrum to the party autonomy.

3. Institutional rules in recognition of arbitral discretion, default settings and procedural autonomy

Various institutional rules have recognized arbitral discretion, default settings and procedural autonomy as follows:

3.1. Arbitral discretion

Known as the bedrock of disputes resolution at the international commercial arbitration, International Chamber of Commerce (ICC) provides rules that recognize the existence of arbitral discretion. Article 20 (1) of ICC Rules stipulates that the arbitrator may establish the facts around the disputes and issue an award by "all appropriate means" during the arbitration (ICC Rules, 2010). "all appropriate means" can be interpreted to include arbitral discretion.

This indeed take place provide that the arbitrators "act impartially and fairly" so as to safeguard the parties positions and to ensure that each party has a "reasonable opportunity" to articulate its case (Park, 2003). On the other hand, the American Arbitration Association (AAA) Rules, Article 16 (1) stipulates in regard to arbitral discretion that the arbitral tribunal may carry out the arbitration in "whatever manner it considers appropriate" (AAA Rules, 2013). This can be interpreted to include arbitral discretion during arbitration proceeding. Indeed, Article 16 (3) further articulates that the arbitral tribunal "may in its discretion direct the bifurcate proceedings, order of proof, exclude cumulative or irrelevant proof or other testimony and also direct the parties to concentrate their submissions on issues the decision of which could dispose of all or part of the case (sic.)" (Ibid).This is the same with Singapore International Arbitration Centre (SIAC) Rules, Article 19.4 which has the same text of Article 16 (1) of AAA Rules. This clearly indicate that arbitral discretion is necessary but not sufficient in shaping arbitration processes. Besides, London Court of International Arbitration (LCIA) Rules, Article 14.2 deeply acknowledges arbitral discretion by arguing that arbitrators should be accorded the widest discretion to discharge their duties during proceedings (LCIA, 2014).This widest discretion should be done in good faith.

3.2. Default settings

Like arbitral discretion, various rules recognize the existence and application of default settings. This begins with UNCITRAL Model Law, 1985, Article 25 that stipulates that any party that fail to communicate his/her statement or fail to appear for hearing or produce documentary evidence, the arbitral tribunal shall terminate the case and proceed with other arbitration processes (UNICTRAL Model Law, 1985). This indicates that arbitrators are empowered to ensure that parties comply with the default clauses. The fair part of Article 25 is that the arbitrators can proceed with hearing and render award based on the evidence presented before the arbitral tribunal. Besides, International Centre for Dispute Resolution (ICDR), Rules, Article 29 stipulates default setting. It stresses that if a party fail to make submission of the disputes as well as fail to appear for hearing before the arbitral tribunal, the tribunal may proceed with arbitration (ICDR Rules, 2021). This makes it easier for the arbitrators to avoid lengthen negotiations and persuasions with the parties given that the default is clearly stipulated in these various rules. What is more, Japan Commercial Arbitration Association (JCAA), Rules, Article 30 recognizes the importance of default during the arbitration. It stipulates "If a party, which has been duly informed under these rules, fails to show up during hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration" (JCAA Rules, 2021). This is same with China International Economic and Trade Arbitration Commission (CIETAC), Rules, Article 39 , like JCAA Rules, emphasizes the default setting when parties fail to follow up their indicated responsibilities during arbitration (CIETAC Rules, 2015). These clauses like other clauses mentioned in other rules extremely enhance freedom to arbitrators to trigger default setting and proceed with the arbitration process.

3.3. Procedural autonomy

Widely praised as the foundational stone of international arbitration, procedural autonomy also known as party autonomy is highly recognized by the UNCITRAL Arbitration Rules. The Model Law makes the first recognition under it Article 19 (1) which has been referred as 'the Magna Carta' for party autonomy in all the contemporary laws on international commercial arbitration. The watershed provision stipulates that "subject to the provisions of this model law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings" (UNICTRAL Model Law, 1985). Further validation of the party autonomy principle is also engraved in Article V (1) (d) of the New York Convention and Article 34 (2) (a) (IV) of the Model Law, that authorize a competent court to defile execution or set aside an award if the party resisting execution establishes that "the arbitral procedure was not in accordance with the agreement of the parties" (Veeder, 2008).

All other international arbitration centers that have adopted UNCITRAL Arbitration Rules or Model Law have the same Articles of the necessity of party autonomy in the international arbitration as well as in the domestic laws. For Example. Uganda Arbitration and Conciliation Act, 2008, Chapter 4, Article 19 (1) stresses that subject to this Act, the parties are free to agree on the procedure to be followed by rules of the arbitral tribunal in the conduct of the proceedings (Uganda Arbitration and Conciliation Act, 2008). These rules have clearly demonstrated without any iota of doubt that procedural autonomy is not only essential but also mandatory for any individual or groups seeking arbitration.

4. Analysis on the extent in which arbitral discretion has impacted on procedural autonomy

While arbitral discretion is importance and recognized by rules as discussed earlier, it has impacted on the procedural autonomy. These impacts are analyzed in both positive and negative ways. To begin with, the important positive impact is the pursuit of natural justice. As the hallmark of either arbitration or litigation, natural justice is everyone desire and whatever way it is rendered, parties would always need fairness (Dunsford, 1989). Given many awards rendered by arbitrators, arbitral discretion has served natural justice principle. Whether the procedures are neglected or wrong, the evidence provided stand as the legal yardstick in serving the natural justice through arbitral discretion.

In addition, arbitral discretion epitomizes flexibility of international arbitration. Although flexibility is a cornerstone virtue of procedural autonomy, it is a positive impact of arbitral discretion on party autonomy. Given that international arbitration is nerves-arching and stressful, arbitral discretion has enhanced flexibility on the action of the arbitrators. As they exercise their discretion on substantive matters and decisions on the arbitral proceedings, arbitrators do what they think best within their powers and such flexibility has aided the entire arbitration processes.

Besides, arbitral discretion saves time and this has positively impacted on the procedural autonomy. While many view international arbitration to be timeless, this is not true. Both the parties and the arbitrators always wish to see into it that the dispute brought before the arbitral tribunal is resolved in the shortest time possible. This wish may not be the case, as many disputes at the international arbitration have dragged on for very long time. The merit of time saving through arbitral discretion is beneficial to the arbitrators and parties, particularly, the winning party. For example, the case of SUDAPET of Sudan verse NILEPET of South Sudan took five years before an award was rendered at the LCIA.

When the final award was issued using arbitral discretion given the laxity SUDAPET has, the parties appreciated the final award. This appreciation of parties was tweaked on time saving given that the arbitration process was going to take long time due to numerous administrative changes SUDAPET was going through.

Moreover, arbitral discretion has positively impacted on procedural autonomy through lessening of default situations. As it was demonstrated through various UNICTRAL Arbitration Rules, default clauses are reserved as fallback conclusive triggers of administration of justice to the parties when parties fail to adhere to required communications or fail to appear at the tribunal for hearing as argued elsewhere in this study. To be sure, when the arbitrators exercise their discretion, they are in away eliminating the default situations. The merit of scrapping off default clauses is that parties cannot longer be punished for delaying on any proceeding required by any arbitral tribunal as arbitral discretion replaces default settings (Mandy, 2000).

On the other hand, arbitral discretion has impacted negatively on the procedural autonomy. This

has been demonstrated through biasness of the arbitrators during the entire arbitration process. When the arbitrators apply their discretion, they hijack the procedural autonomy and through this hijack, they sneak in their biasness. This biasness could be triggered by race, religion or any vested economic and political interests of arbitrator (s). In the case of Ministry of Petroleum of Sudan verse Ministry of Petroleum and Mineral Resources of Egypt over the dispute of exploration basin, at Saudi Centre of Commercial Arbitration (SCCA) at Riyadh in 2010, the arbitrators were biased against Sudan given the economic and political interests Saudi Arabia had with Egypt. This biasness curtailed the procedural autonomy.

In addition, abuse of authority has been viewed as one of the negative impacts of arbitral discretion over party autonomy. When arbitrators exercise their discretion, they often abuse the power given to them by the law. In the case of Government of Southern Sudan verse Government of Sudan over Abyei Dispute in 2009, the Permanent Court of Arbitration in the Netherlands abused its discretionary powers by including a small town called Panthou in the arbitration final award, although Panthou was not part of Abyei dispute but just a neighboring town to Abyei in South Sudan. This abuse was seen as political expedience given that the arbitrators thought that by adding Panthou into final award, then it will be easy to make Abyei into four strategic towns and divide it; two to Sudan with oil resources and two to South Sudan with the people of Abyei including the town of Panthou.

What is more, unfair and inefficient proceedings are the results of arbitral discretion which have continued to affect the procedural autonomy. Because of haphazard application of this arbitral discretion, arbitral proceedings are extremely affected. For instance, during complex proceedings of arbitration such as when parties disagree on the amiable compositeur, the timelines of communications, submission of evidence and hearing dates, arbitrators are supposed to try their level best to persuade the parties or a party to adhere to the requirement of arbitral tribunal and the lex arbitri. Failure of the arbitrators to cajole the parties and proceed to exercise their discretion render unfair and inefficient proceedings to the arbitration outcome (Ansari, 2014).

Besides, arbitral discretion has negatively impacted on procedural autonomy due to lack of uniformity of laws and rules. Countries that have not adopted Model Law and ICC Rules will always use their different rules in the arbitration of their disputes or rely on the law of the seat. For example, South Sudan and Sudan don't have arbitration centers or institutions and this is due to the scary situation of not having enacted their arbitration and conciliation Acts and more importantly adopt UNCITRAL arbitration rules. If South Sudan will have dispute with Uganda today, it will have to rely on the law of the seat of arbitration only without any fallback on its arbitration law. Given that Uganda has fully adopted the Model Law in its Arbitration and Conciliation Act, 2008, it is well placed to argue its arbitration internationally. In a situation of different rules and proceedings, it is difficult to have any successful arbitral discretion.

Furthermore, frequently invoking of arbitral discretion sets bad precedent to many international arbitration institutions. For instance, a party that felt that the final award issued was not fair because arbitrators extremely exercised their discretion outside the law will never recommend such as arbitration institution. For example, people of South Sudan and their government argue that they will never recommend Permanent Court of Arbitration in the Netherlands because of its abused discretionary award on case of Government of Southern Sudan verse Government of Sudan over Abyei Dispute in 2009. Such feelings are arisen because of bad precedent set by an institution such as the Permanent Court of Arbitration in the Netherlands. Thus, setting of bad precedent has remained the darkest side of arbitral discretion (Dunsford, 1989).

5. Can arbitral discretion be replaced by default setting or both of them be kept together in international arbitration?

As demonstrated earlier, arbitral discretion is relevant in international arbitration and cannot be replaced by default setting. This is because there are situations that would always require both arbitral discretion and default setting. Such situations as discussed earlier and should be

emphasized here on the arbitral discretion include time saving in international arbitration. As pointed out earlier, time is of great essence in the international arbitration. While the invoking of arbitral discretion can saves lengthen process of arbitration, no all the parties will always be impressed by the outcome of arbitration (Ansari, 2014). But the good news is that arbitral discretion would always end the arbitration. Although arbitral discretion assists to save time for all parties and arbitrators, default setting can do the same. When an arbitrator invokes default clauses, he/she does so to save time and energies given that parties' failure to adhere to the schedule of arbitral tribunal, delay the arbitration process and waste times. However, the different between arbitral discretion and default setting is that arbitral discretion hijacks party autonomy while default setting hijacks ignorance and lazy parties to the arbitration process.

Given that there is no total arbitral discretion, as persuasions and negotiations are done first with parties before applying it, there is total default setting as it is clearly stipulated in the laws and rules. What it means is that arbitral discretion allows some flexibility while default setting can be rigid unless notifications for failures are communicated to the arbitral tribunal on time (Greenberg and Kee, 2011). While default awards may not be considered as awards in the international arbitration, there is strong evidence beyond reasonable doubt that they will always end up as awards if the defaulted party refuses to challenge them. This legal window is provided in the New York Convention which argues that awards rendered in arbitration with international character are only enforceable when no any party challenge the fairness of the awards (New York Convention, 1958). This basic or fundamental concept of fairness is highly debatable as each party when its losses the case will always feel that the arbitral tribunal issued unfair judgement or award. The principle of fairness argues that all parties should be involved and listened to during the arbitration process. However, when one of the parties continued to default by failing to adhere to the arbitration notifications, summons and guidelines, then it is fair that the judgement or award is issued. The modern law was not made to perpetually wait for those parties who have refused to abide by the arbitral tribunal schedule. Law has to be enforced, thus, Lex Lata. This is the principle of fairness attached to defaulters. It is prudent to argue that both arbitral discretion and default setting clauses are meant for the pursuit of natural justice in international arbitration. Although, they can be abused and arbitrators can turn bias, they are independent clauses and none can replace one another.

6. Conclusions

The study has presented a very robust, comprehensive and yet interesting argument on international arbitration. While surveying legal empirical literatures, the study begun by understanding the importance of arbitral discretion, default settings and procedural autonomy in international arbitration. The arbitral discretion, default settings and procedural autonomy are recognized by various institutional rules commencing from the New York Convention, UNCITRAL arbitration rules to specific countries model clauses. From the analysis of the extent of how arbitral discretion has impacted procedural autonomy, it is fair and with confidence to conclude that arbitral discretion has hijacked party autonomy through the exercise of powers of the arbitrators. While arbitral discretion saves time and enhances flexibility in international arbitration, it has been abused, interfered with in its proceedings and set bad precedent in many jurisdictions. It is critical that arbitral discretion is triggered after arbitrators have persuaded the parties to follow the procedures of arbitral tribunal and yet neglected to do so.

Default settings have continued to energize and remind parties to adhere to the arbitral tribunal schedule without failures. While some legal practitioners have argued that default judgements or awards are not enforceable, they are enforceable if they are not strongly challenged by the defaulted parties. Neither arbitral discretion nor default setting can replace one another because they are all important in international arbitration. Although the future of arbitral discretion may look bleak due its nature of hijacking procedural autonomy, arbitral discretion continued being applied in its relevant situation. Default setting and procedural autonomy should co-existence as each of them ensures that fairness and justice is rendered in the international commercial arbitration.

7. Recommendation for further research

While the study has exhaustively argued the impacts of arbitral discretion on procedural autonomy vis-a-vis the importance of default setting on party autonomy, the researcher still humbly feel that much knowledge is required. Further research is hereby recommended to the legal scholars to study the future of default setting on procedural autonomy in complex commercial arbitration situations.

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