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Hybrid Dispute Resolution Fora and the Rule of Law



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International commercial courts and the rule of law

- If these are specialised national courts with local judges speaking English and knowledgeable about international business law - cannot see any special rule of law issues. As many rule of law issues are there are relevant to the jurisdiction.
- Netherlands Commercial Court, China International Commercial Court, Singapore International Commercial Court, International Chamber of the Paris Court of Appeal, in the German State of Hesse
- However, needs a closer examination when the courts are outside the national judicial system, staffed primarily by expat judges and experts and applicable law is some version of the common law in civil law jurisdictions
- Qatar International Court , DIAFC International Court, AIFC Court, Abu Dhabi General Markets Courts

Lord Bingham: The Rule of Law

1. The law must be accessible, clear & predictable.
2. Questions of legal rights should be resolved by the law and not the exercise of discretion.
3. The law should apply equally to all, except where objective differences justify differentiation.
4. Ministers must act within their powers and not exceed their limits.
5. The law must afford adequate protection of fundamental human rights.
6. The law should provide access to justice, especially where people cannot resolve inter-personal disputes themselves.
7. Courts and tribunal processes should be fair.
8. The state should comply with international law.

What is meant by the “rule of law?”

- According to the World Justice Project similar to what Lord Bingham Lord Chief Justice understood:
- No-one is above the law and everyone is accountable under law
- The process by which law is enforced is just and fair
- Justice is delivered by competent, ethical, and independent representatives that reflect the makeup of the communities they serve.
- Lord Bingham: Questions of legal rights should be resolved by the law and not the exercise of discretion.

Rule of Law Aspects

- The law must be accessible, clear & predictable.
 - Common law or Lex Mercatoria. Rome 1 – national law applicable. Where do you find it? Different national legal systems.
- **The supreme role of law**
 - No-one is above the law and everyone is accountable under law?
 - Yes.
- **The process by which law is enforced is just and fair**
 - These are rather subjective terms. Enforcement can be a problem.
- **Law v exercise of discretion**
 - Lord Bingham: Questions of legal rights should be resolved by the law and not the exercise of discretion.
 - If the applicable laws are rather vague, then much will depend on the exercise of discretion.

- **Justice is delivered by competent, ethical, and independent representatives that reflect the makeup of the communities they serve.**
- Little doubt about competence. But do they reflect the makeup of communities they serve?
- Do not speak the local language, not familiar with local issues or law, matters of public interest (ISDS criticism). Balance experience and the local knowledge. Not a good idea to exclude recruitment from the relevant jurisdiction. Important to build the local capacity.
- However, if the exclusive economic zone users are sophisticated English-speakers with good knowledge of common law - that makes sense
- Whether arbitrators are ethical depends on definition of ethics in treaties and interpretation of tribunals (to be discussed). Ethics of which jurisdiction should apply? The seat of the court (could be not properly developed)? The home state(s) of the judge? Then no sanctions/policing, different approaches in different jurisdictions. A whole panel on it.

Long-term sustainability

- UAE, Qatar, Kazakhstan - resource-rich countries
- Takes a long time to develop reputation and attract new cases, expensive process
- The risk of increasing dependence on imported expat judges and foreign law firms
- What happens if they run out of money?
- Long-term sustainability focused on strengthening the local capacity

Constitutional Law issues

- **Brussels International Business Court (BIBC)**
 - Superior Council of Justice:
 - the judges will be chosen among Belgian judges with good English and trade law
 - The independence of the BIBC given that the bill gives the power of appointment of its judges to the executive branch instead of the Superior Council of Justice as per the Constitution;
 - Issues of an 'institutional' equality of arms between the parties in cases before the ordinary national courts and the BIBC;
 - Transparency of the new institution, especially when it comes to its financing.

The first Advocate General at the Court of Cassation of Belgium: two speeds justice

- The law should apply equally to all, except where objective differences justify differentiation.
- “to avoid a distortion between, on the one hand, justice for litigants, mostly foreigners, who will choose the BIBC and benefit from an adequate material environment and speedy decisions, and, on the other hand, that of the others citizens, who will have to be content with justice being done on obsolete premises, without adequate human resources to render justice within a reasonable time frame”.
- The judges in this court would be chosen among Belgian judges and counselors who show proof of a sufficient knowledge of the English language and of international trade legislation.

Rule of Law considerations

Good for specialised disputes: no need to travel (finance, governed by English law)	The judges do not always represent the local communities
Highly qualified judges, set examples of integrity, fast, cheap and efficient process	Laws risk being unclear to the local communities, antagonistic to the local bar
Speaking the same language and using the same law as businesses	Expense (from state coffers) and constitutional issues (Qatar)

What can be done: RoL and development

- International courts should play a bigger role - Sir William Blair
- Activities to share the best practices with domestic courts
- Emiratisation/Qatarisation/Kazakhstanization
- Being conscious of the costs for the public and long-term sustainability
- Facilitate consistency of decisions - database jus mundi
- Organise conferences like this
- Train local lawyers, counsel and judges - international commercial law, legal English, skills
- Facilitate convergence of substantive and procedural rules – one system in the future; practitioners
- Comparative law project in KZ – long process