Separating The Wheat From The Chaff: Delimiting Public Policy Influence on the Arbitrability of Disputes in Africa

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Party autonomy includes the right of contractual parties to choose an adjudicatory forum to determine rights and obligations arising from their legal relationship. To this end, parties in most jurisdictions have the autonomy to decide whether to determine their legal rights in a national court or an arbitration tribunal. However, this right is usually limited to private claims between individuals. Public claims are deemed non-arbitrable because they involve matters considered to affect the larger society. This limitation, which is decided by states according to their social and economic policy, generally defines arbitrable matters. However, the determination of matters that are arbitrable is usually controversial. The controversy arises from the role that public policy plays in determining arbitrability. Indeed, public policy has not lent itself to easy definition, partly because it has no source of reference, and

because it changes from time to time.

Over the years, most jurisdictions, especially developed countries that are considered as desired seats of arbitration, have widened the scope of arbitrable matters. Notwithstanding the absence of a universal definition of public policy, they have restricted the influence of public policy in determining arbitrability. Therefore, courts in developed countries defer to arbitral tribunals on the notion that arbitral tribunals have the competence to decide matters that contractual parties submit to them—kompetenz-kompetenz. Similarly, arbitrators and Judges alike apply the severability doctrine to separate commercial issues intertwined with public policy claims. This approach encourages parties to choose some countries as seats of arbitration which ultimately promotes foreign investment in these countries. In effect, globalization of international trade has necessitated considerable expansion of the scope of arbitrable matters in international commercial arbitration.

Notwithstanding that the role of public policy has waned in most jurisdictions in Europe, Asia, and America,some countries in Africa still widely interpret public policy to restrict matters that are arbitrable. African countries rely on the public policy defense to revoke arbitral clause, stay arbitral proceedings, or refuse enforcement of foreign arbitral awards. This trend stems from the distrust of arbitration tribunals, as well as national courts' protectionist approach. Historically, most developing countries distrust arbitration as an avenue to settle public claims because they are regarded as 'complicated' for arbitrators. The argument is that allowing parties to arbitrate on public claims goes against the sovereignty of these countries. Developing countries, therefore, fear that this unfettered choice will favourparties from industrialized countries because they can unilaterally influence an agreement that is against the developing country's public policy.

The cases of *Shell Nigeria Exploration and Production Ltd v Federal Inland Revenue Service and Anor,* *Statoil (Nigeria) Limited and Anor v Federal Inland Revenue Service*, *Heritage Oil and Gas Ltd v Uganda Revenue Authority* and *Attorney- General v Balkan Energy LLC & Ors,* which are from Nigeria, Uganda, and Ghana respectively reflect a blurred distinction between private rights and public claims. In these decisions, state interests prevail over personal

autonomy. They are a reflection of how national courts are reluctant to fully embrace the doctrines of party autonomy, severability, kompetenz-kompetenz, which are the cornerstones of thriving arbitration practice. However, this is not to argue that there is no prospect for a thriving international arbitration practice in African countries. Some courts now carefully bifurcate private matters from public matters. For example, the Kenyan High Court in *Jatin Shantilal Malde & 9 others v Transmara Investment Limited & 2 others* suggests that if a constitutional interpretation is intertwined with a private dispute, Kenyan Courts will lean towards resolving the private dispute without making pronouncements on constitutional issue, if the dispute can be resolved on the private issues alone.

This Note does not recommend that courts in Africa copy judicial interpretation wholesale from other regions. Neither does it advocate for a total and uniform global interpretation. Rather, it argues that courts in Africa must create their distinctive approach to uniform interpretation on arbitrability that considers Africa's historical, political and economic past and the realism that modern best practices capture in regard, particularly, to the socio-economic contexts for the application of arbitration laws to international commercial disputes.

In sum, courts in Africa must construe arbitrability through a narrow interpretation of public policy, loyalty to the doctrine of *Kompetenz-Kompetenz,* and severability in international commercial arbitration. A proactive judicial approach should be based on distinctive arbitration practices that reflect Africa's socio-economic background as well as contemporary arbitral trends around the world, as this is a viable means to reduce the influence of public policy on questions of arbitrability in Africa. This is because discovering the actual prohibition of the law which constitutes the public policy exception is an interpretive and judicial task. Therefore, Judges, through decided cases, can be forceful in the push for legislative and policy change. It must not be forgotten that ultimately, it is Africa's socio-economic and legal development may very well hang on this change.

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