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Where Do International Civil Servants Go for Justice?

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Immunity from lawsuits afforded to international organizations, such as the United Nations, the World Bank Group and International Labour Organization, may have the beneficial effect of ensuring their freedom from the influences of the governments of their host nations, but it may also have the side effect of depriving hundreds of thousands of international civil servants of access to justice and due process. As explored below, dispute resolution mechanisms of even the leading international organizations are riddled with due process concerns, some of which go to the most basic tenets of international arbitration as we know it.

No Choice but to Arbitrate?

Access to a fair hearing by an impartial tribunal is a fundamental human right enshrined in Article 10 of the Universal Declaration of Human Rights and recognized and protected (at least in principle) by all UN member nations. However, employees of international organizations who have been disciplined or terminated are barred from recourse in domestic courts because: (i) most international organizations have host country agreements that provide immunity from suits; and (ii) almost all international organizations have arbitration clauses in their standard employment contracts. Some have standing administrative tribunals to deal with labor disputes, while others provide for *ad hoc* arbitration. For example, the World Bank Group established the World Bank Administrative Tribunal ("WBAT") in 1980 to serve as a final judicial forum for staff members. Other organizations like Global Green Growth Institute have their own arbitration rules to guide their *ad hoc* tribunals.

Courts have long been divided over whether arbitration agreements embedded in employment contracts encroach upon constitutional or fundamental civil rights.[1)] The US Supreme Court recently considered this issue in *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018). While the 5-4 majority found such arbitration clauses to be binding, the decision was strongly opposed by the minority justices. Justice Ginsberg in particular wrote in her dissent it was "egregiously wrong" and even Justice Gorsuch who delivered the majority opinion indicated that the policy was "debatable". There is greater risk to international civil servants because domestic courts are unlikely to remove the immunity granted by governments to prestigious international organizations so as to host these organizations in their territories.

No Choice of an Arbitrator?

It is a basic tenet of arbitration that the tribunal is independent of the parties to ensure impartiality. This core principle is anchored in the arbitration rules of the ICC, SIAC, KCAB and many others. The need to maintain impartiality is so fundamental that these institutions require the chair or the sole arbitrator to be appointed by the administering secretariat absent party agreement.

This is not echoed in the arbitration rules of a great number of international organizations. Many have adopted a process which: (i) vests the power to appoint tribunal members exclusively to the organization; and (ii) discourages employees from challenging the organization-appointed arbitrators. For instance, Article I of the WBAT Statute provides that the WBAT "functions independently of the management of the Bank Group". But Article IV provides that all members of the Tribunal "shall be appointed by the Executive Directors of the Bank from a list of candidates nominated by the President of the Bank" and "enjoy the same immunities that apply to officials of the Bank Group" with respect to their functions. There is no provision in the Statute that allows staff members to challenge any appointment.

Similar practice is found in the International Renewable Energy Agency (IRENA). Article 12.3 of the IRENA Staff Regulations provides that the Director-General shall make arrangements for staff members to "have access to an independent judicial or arbitral mechanism" should they dispute disciplinary measures instituted against them. But its Provisional Arbitration Rules say: (i) arbitration proceedings are only to be conducted by a sole arbitrator; (ii) the Director-General shall propose the arbitrator candidates and the Council shall approve them; (iii) if the employee objects to the arbitrators, then IRENA's Ethics Advisory Board will appoint an arbitrator from the approved list; and (iv) the decision of the Ethics Advisory Board on the appointment of an arbitrator is "final and without further appeal".[2)]

Such rules and practices are inconsistent with *Oló Baha-monde v. Equatorial Guinea*, Communication No. 486/1991, Annex 'Views (10 November 1993), where the UN Human Rights Committed ruled, "judiciary in Equatorial Guinea cannot act independently and impartially, since all judges and magistrates are directly nominated by the President, and that the president of the Court of Appeal himself is a member of the President's security forces", and that a tribunal is neither independent nor impartial "where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former". This wisdom was echoed in *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916 (9th Cir. 2013), in which the US Court of Appeals for the Ninth Circuit held a situation where the arbitrator is always someone nominated by the employer would be substantively unconscionable.

In light of this, one must question whether arbitration conducted under arbitration rules of international organizations that allow only one party the power to constitute the tribunal is fair. Unfortunately for international civil servants, no domestic court may be available to make such determination for them, and it is entirely up to their own organization that has the power to adjudicate on their grievances.

No Place to Arbitrate?

Another basic tenet of international arbitration is that there should be an agreed place of arbitration

or an agreed mechanism to determine the seat, so that the tribunal may apply the proper *lex arbtri*. Not so in many self-adopted arbitration rules of international organizations. Many of them do not specify the place of arbitration, and the United Nations Office for Project Services ("UNOPS") – which is the contracting body of employment contracts for all UN employees – even goes so far to deny the existence of a seat. Article 17.2 of the Terms and Conditions of UNOPS Individual Contractor Agreement explicitly states, "there shall be no place of arbitration".

In the absence of guidance by civil procedure rules of the *lex arbitri*, we have found that procedural standards adopted by tribunals of international organizations have differed wildly, and there has been little uniformity or consistency in the standard of proof or level of review applied to similar employment disputes. For instance, in *M v. International Bank for Reconstruction and Development*, Decision No. 369 (2017), the WBAT conducted a *de novo* review of an administrative decision of the international organization stating that "in disciplinary matters, [the Tribunal's] review is not limited to determining whether there has been an abuse of discretion but encompasses a fuller examination of the issues and circumstances". However, in *S v. Global Fund to Fight AIDS, Tuberculosis and Malaria*, Judgment No. 3682, the International Labour Organization Administrative Tribunal adopted an entirely different standard requiring the employee challenging an administrative action to "establish a manifest error of fact in the investigation report warranting the intervention of the Tribunal".

Is There No Hope for International Civil Servants?

Not all hope is lost for employees of international organizations, however. There have been some developments in various countries where domestic courts have held that the immunity accorded to international organizations do not apply with respect to employment disputes. In *Alberto Drago v. International Plant Genetic Resources Institute (IPGRI)*, Court of Cassation, all civil sections, 19 February 2007, No. 3718, ILDC 827 (IT 2007), the Italian court held that the IPGRI's immunity granted by the headquarters agreement with Italy was incompatible with the fundamental constitutional rights as the IPGRI had failed to provide an independent and impartial judicial remedy for the resolution of employment disputes. A similar conclusion was reached in *Siedler v. Western European Union*, Brussels Labour Court of Appeal (4th chamber), 17 September 2003, Journal des Tribunaux (2004), 617, ILDC 53 (BE 2003), in which the court denied immunity of WEU because WEU's internal employment dispute resolution process was irreconcilable with the employee's right to a fair trial.

Conclusion

International organizations have long been strong proponents of protecting human rights, regardless of nationality, ethnicity, sex, or religion. It is therefore especially unfortunate that some of those organizations do not afford their own employees the due process rights and the rights to an impartial tribunal. Perhaps it is time for a closer scrutiny of international organizations and their arbitration rules.

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References

See also, *Heller v. Uber Technologies Inc.*, 2019 ONCA 1 (Ontario Court of Appeal holding that arbitration clause used by Uber in driver's contract amounted to "illegal contracting out of an employment standard" and therefore unenforceable); *Clyde & Co LLP, John Morris v. Krista Bates van Winkelhof*, [2011] EWHC 668 (QB) (English High Court holding that arbitration clause in the
?1 LLP agreement violated statutory provisions in the Employment Rights Act 1996 and Equality Act 2010); and Case of *Waite and Kennedy v. Germany*, Appl. No. 26083/94, ECtHR judgment of 18 February 1999 (European Commission of Human Rights holding that the German courts had not violated ESA employees' right of access to court by granting international organization immunity to ESA).

?2 *See* Rules 7, 8, & 9 of the Provisional Arbitration Rules of the IRENA.

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