

Ethiopia's New Arbitration Law: An Overview of Major Changes

By Muluken Seid, 1 May 2021

In April 2021, Ethiopian Parliament approved the new Arbitration and Conciliation Proclamation. Up until now Ethiopia's arbitration law was scattered in the Civil Code and in the Civil Procedure Code. Compared to the development of arbitration laws in the other jurisdictions, Ethiopia's law remained inadequate to meet the needs of investors. The new proclamation thus introduces significant changes in terms of modernization of the law and harmonization with international practices in the field of commercial arbitration.

The proclamation also regulates the establishment of arbitration centers. Under the old law absence of law regulating the formation and operation of arbitration centers discouraged the establishment of centers. This may be attributed to different factors. The arbitration law was not comprehensive, and inconsistent with the modern laws and practices of international commercial arbitration. It was capable of neither organizing nor backing commercial arbitration centers to provide efficient service and address the interest of the business community. Likewise, the government did not abandon its old-fashioned system and encourage business bodies to establish institutional commercial arbitration.

The judicial practice towards arbitration wasn't so friendly as modern arbitration practice would require. Courts intervene early in the arbitration proceedings, exercising wider judicial review power on awards and applying rigorous requirements for recognition and execution of foreign arbitral awards. The law didn't recognize an arbitral tribunal's power to issue interim measures, so much so that parties to an arbitration agreement would be forced to go to state courts for interim measures of protection, defeating or compromising the value of the arbitration agreement. As a result, Ethiopia did not have effective, well-run and institutionalized commercial Arbitration system.

It is these problems that triggered the enactment on April 02, 2021 of the Arbitration, Conciliation and Work Procedure Proclamation, Proclamation No. 1237/2021. The new proclamation introduces a good number of new procedures and practices. The major changes are discussed below:

- A) The shift from mandatory law to party autonomy:-**Out of the 50 provisions that regulate arbitration, party autonomy is expressly stated about 25 times. In other words, the law's provisions apply unless otherwise agreed by the parties in these 25 matters. Hence, the law is serving as a default regulation. Some of the issues left for party agreement are fundamental, eg. appointment of arbitrators, interim measures, place of arbitration,

language, amendment of claims, oral hearing, effect of non-appearance of parties, expert witness, applicable law, majority decision, reasoned award, costs, appeal, etc. This means parties can set a different regulation of these matters. If they don't the law applies. This is a profound change from the old law that tended to regulate everything.

B) Arbitration center:-as stated under article 2(3) and article 18 of the proclamation Arbitration center may be established by government or under private ownership to provide arbitration service. For the time being in Addis Ababa, there are only three arbitration centers: Addis Ababa Chamber of Commerce Arbitration Institute, the Ethiopian Chamber of Commerce Arbitration Center, and the Ethiopian Mediation and Arbitration Center. With the new proclamation, it is expected that the government may also establish an arbitration center following the example of the China International Economic and Trade Arbitration Commission. This much is evident from the definition of arbitration center which includes a center created by the state.

C) Court intervention:-as stated in article 5 of the proclamation, the new law explicitly discourages court intervention in arbitration except where it is expressly permitted by the law. This means as a matter of rule court shall not intervene in arbitration matters. Although arbitration is an independent proceeding, the Tribunal might need the assistance of the court during the proceedings, and the exception is to pave way for facilitative support. The first and foremost role of the court is to oversee the enforceability of arbitration award. Enforcement of an arbitration award is only possible through the involvement of court as the Tribunal has no such power.

D) Non –arbitral matters:- The other significant introduction in the proclamation is an explicit exclusion of certain subject matters from arbitration. Hence, matters related with Divorce, adoption, guardianship, tutorship and succession cases; criminal cases; tax cases; bankruptcy; dissolution of business organizations; land related cases including lease; administrative contract, except where it is not permitted by law; trade competition and consumers protection; administrative disputes falling under the powers given to relevant administrative organs by law are non –arbitral matters. While this list seems rather long,

such an explicit listing is in a way better than a law that doesn't distinguish non-arbitrable matters entirely.

- E) Clear recognition of *competence-competence* principle:-** the doctrine of competence-competence allows the arbitral tribunal to decide on its own jurisdiction. Since speedy trial is vital for business disputes, acknowledging the principle of competence-competence has become crucial for an efficient arbitration law. The power of judicial body to determine its own competence is an accepted principle and a common feature of instruments governing international and judicial procedures in advanced systems. By the same token, unless arbitration tribunals are allowed to decide on their own competence, respondents in arbitration can simply frustrate the proceeding by raising jurisdictional objections. This doctrine is one of the cornerstones of any arbitration law. The rule is conditionally recognized under the old law (Article 3330(2) of the Civil Code) as the parties may authorize the Tribunal to decide on any dispute in connection to its jurisdiction. However, in the same provision it's indicated that the Tribunal in no case may determine the validity of the contract. However, the new proclamations under Article 19 empower the Tribunal to determine any controversy concerning its jurisdiction, the existence and validity of the underling contract.
- F) Tribunal's power to issue interim measures of protection:-** One of the oldest problems of arbitration particularly in Ethiopia is lack express power for arbitrators to issue interim measures of protection-whether to preserve evidence or property in dispute. While, the proclamation allows parties to go to the state court for procuring interim measures of protection such as restraining orders against the other party, the inability of arbitrators to do these makes the whole institution a lame duck. Part of the reason is that third parties such as government institutions did not regard the orders of an arbitration tribunal with the same level of respect they show to court orders. But the new law has turned this around.
- G) Appeal:-** The old arbitration law in the Civil Code and Code of Civil Procedure allowed appeal from arbitration not only for basic procedural irregularities, but also for errors of law or fact. In effect this meant that any arbitral award is appealable, since any appealing party would naturally allege the existence of an error of law or fact. Unfortunately, the new

proclamation fails to break this illogical tradition. Instead of limiting the grounds of appeal to procedural irregularities such as violation of due process rights, it allows appeal on any ground.

However, there are profound changes in the new proclamation. One of these is the changes in relation to appeal is that it is possible only if the parties have expressly agreed to that effect. In the absence of an express reservation of appeal right in the arbitration agreement, appeal will not be admitted from an award. This is a reverse from the CPC which provided that in the absence of opt out, appeal is possible. This however, does not exclude review by cassation court if there is basic error of law, or application for annulment of an award in exceptional circumstances such as an award issued in the absence of an arbitration agreement, a void agreement, award issued beyond the scope of the tribunal's jurisdiction, award issued without notification to the other party, etc.

I. Other changes: The new proclamation also introduced new notions in tune with international arbitration such as seat of arbitration, commercial matters, international vs. domestic arbitration, and a flexible approach to arbitration agreement. This is expected to encourage international commercial arbitration in Ethiopia.