

An Overview of the Draft Arbitration Law in Ethiopia (part two)

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Introduction

In the first part I had discussed some issues under the draft proclamation. This includes arbitrability of administrative contract, competency-competency, separability doctrine, pauper proceeding, appeal and the standard to challenge the arbitrators. In this part, I will briefly discuss the role of the court in arbitration proceeding, the New York Convention and the nature and impartiality of the Center as envisaged under the draft proclamation.

1. The role of the court in arbitration proceeding: - In every jurisdiction there is a competing and conflicting interest of maintaining the balance between excessive judicial intervention and necessary intervention of the court in the arbitration proceeding.² However, the contemporary trend is that the court as much as possible should minimize their intervention in Arbitration proceeding.³

In principle arbitration proceeding takes place without court intervention unless the law specified otherwise. Although arbitration is an independent proceeding, the Tribunal might need the assistance of the court during the process.⁴ 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. Second, unlike court proceeding whereby the judges are appointed by the parliament⁵, the arbitrators are chosen by the parties in arbitration proceeding. However, if one of the parties failed to choose, the court may choose the arbitrators.⁶

Third, arbitration clause or submission is a contractual transaction and binding only on the contracting parties.⁷ This implies that the Tribunal doesn't have a cohesive power over third party. Therefore, the Tribunal might need the assistance of the court to bring third

¹ This commentary is based on the first draft proclamation on Arbitration and Conciliation. I am very grateful to Ms. Hibist Desalegn for her valuable comments and suggestions on the earlier draft.

² Hailegebriel G. The role of Ethiopian Courts in Commercial Arbitration (2010) 4:2 Mizan Law Review at 300.

³ As above.

⁴ B. Bulut The Role of the place of arbitration in International commercial Arbitration proceeding; Turkey as a place of Arbitration (2011) 4:1 Ankara Bar Review at 39.

⁵ Article 78 of the Constitution.

⁶ As per Article 3334(1) of the Civil Code.

⁷ UNCTAD Dispute Settlement: international Commercial Arbitration (2005) at 3.

party into the proceeding.⁸ Fourth, interim measures of the Tribunal will not be directly enforced and hence court intervention or assistance is required. And finally, the aggrieved party might appeal to the court for setting aside of the judgment.⁹

The draft arbitration law seems to adopt maximalist approach of court intervention. On many occasions the draft law allows the unnecessary intervention by the court. In the coming page, some of the unnecessary court intervention provided in the draft proclamation will be discussed.

Because challenging the arbitrators is an essential mechanism to ensure the integrity of the proceeding, with the exceptions of few common law countries, most national legislations allow the parties to challenge the arbitrator(s).¹⁰ The parties have the right to object the arbitrators for various reasons: impartiality, independence, neutrality and others. If the objection was brought against an arbitrator, the unchallenged arbitrators¹¹ will decide on the objection and in case of equal vote the president of the arbitration institution will have the final vote. As per Article 31(5) of the draft proclamation, the party may appeal to the court on the decision of the challenged arbitrators. Furthermore, as indicated under Article 31(6) of the draft proclamation, until the court decides on the objection, the arbitration proceeding will be pended. This might be used as a delay strategy or even as guerrilla tactics by one of the parties and frustrates the two defining features and purpose of arbitration i.e., speedy disposition of the case and self-policing system.¹²

As per Article 32(2) of the draft law if the arbitrator(s) are not doing their task properly (improper conduct), the party may apply to the Center.¹³ However, if they are not satisfied by the decision, they might appeal to the court. This rule is even worse than what is provided under the Civil Code. As per Article 3343 if the arbitrator delay in discharging his duty then the authority agreed by the party may decide on the application and no appeal lays on this decision.

⁸ Under various provision of the Civil Procedure Code it's indicated that the court may demand any evidence and summon any party.

⁹ This is provided under Article 3345(2) of the Civil Code.

¹⁰ C Orland Ethics for International Arbitration (1998) UMKC Law Review at 96

¹¹ The challenged arbitrator should be excluded because of the old maxim that "justice must be seen to be done and that a judge should not sit in his or her own cause."

¹² Jo- Mei Man Procedures for challenging Arbitrators: Lessons for and from Taiwan (2012) 5 Contemporary Asia Arbitration Journal at 299

¹³ This means the arbitration center that going to be established by the draft proclamation.

Unlike courts which get their mandate from the law, the power of the arbitrators emanated from the agreement of the parties. This implies that any challenge to the jurisdiction of the arbitrator leave them powerless.¹⁴ The guru person in the area of arbitration defined jurisdiction as “the power of the Tribunal¹⁵ ... to render a judgement binding an individual or his property.”¹⁶ As per Article 35(6) of the draft arbitration proclamation, any party may appeal to the court by objecting the jurisdiction of the Tribunal.

In this case, the arbitration proceeding shall be pended until the court provided its judgement. This cause inconvenience, delay and unnecessary cost to the proceeding.¹⁷ This provision at least should be reframed in a manner that the challenged arbitrator may continue to entertain the matter until the court decides on the objection.¹⁸

Moreover, the court may give stay of execution of any type of grievance brought by the party. This and many other provisions simply show the draft proclamation excessively allows the intervention of the court in the arbitration proceeding. The draft as stands, cripple most of the golden rules of arbitration, autonomy of the party, self-policy system and speedy disposition of the case.

2. Possibility of conflict with New York Convention: - The New York Convention is praised as “a universal constitution charter for international arbitral process.”¹⁹ Although Ethiopia has signed the Convention, it has never ratified by alleging that it may affect the sovereignty and exposes the country for tremendous financial arbitration award.²⁰ However, there is a policy shift towards ratifying the New York Convention.²¹ Under Article 1.3 of the New York Convention, it’s indicated that a member state may put reservation and limit the applicability of the Convention on the basis of reciprocity. From policy standpoint Ethiopia takes firm believe to take reciprocity as a precondition for

¹⁴ Solomon Emiru Comparative Analysis of Separability, Competence-Competence and the Rule of interpretation of Arbitration Agreements vis-à-vis the Ethiopian Arbitration Law (2016) Vol. 5 No. 1 at 30.

¹⁵ I made the change from court to Tribunal.

¹⁶ Robert Allen Sedler Ethiopian Civil Procedure (1968) Oxford University Press at 19.

¹⁷ Article 31(5) of the draft proclamation

¹⁸ Canada, Hong-Kong and Peru adopt such type of approach.

¹⁹ Gary Born, International Commercial Arbitration (2014) (Kluwer Law International) at 99.

²⁰ Fekadu Peteros, The Convention on the Recognition and Enforcement of Foreign Arbitral Award (2014)8:2 Mizan Law Review at 474.

²¹ There was a discussion concerning the ratification of New York Convention taken place 24 August 2019.

recognition and enforcement.²² However, the draft Arbitration rule completely cancel out the possibility of reciprocity as a ground for refusal to recognize and enforce arbitrable award. This might show policy incoherence and lead to contradiction.

Under the Convention, the grounds for refusal of foreign arbitration award is exhaustively discussed under Article 5. One of the grounds for refusal to recognize and enforce arbitration award is if the recognition and enforcement of the award would contradict with public policy.²³ However, the draft rule inserts extra grounds which is similar with public policy: public moral and national security.²⁴ This and many other provisions show that there is contradiction between the New York Convention and the draft rule. To cure this problem, as suggested by one participant, it's advisable either to totally avoid section 8 of the draft or just cross refer to New York Convention.²⁵

3. The nature and impartiality of the Center: - the main purpose of the draft proclamation is to establish international arbitration center (hereinafter referred as the Center) with the financial support of government. Arbitration is by and large a private proceeding and it is not common to establish government backed Center. Article 17 of the draft state that the Center will get its finance from the government, donation and service fee.

Needless to mention, the arbitration institution should be independent and impartial from any influence of other political groups and any other interested person. If the Center is going to be financed by the government and even receive donation from foreign entities and companies, its independency will be very doubtful and questionable. How could a Center financed by the government be expected to rule against government owned corporations?

On top of this, the role of the Center is not well stated under the draft proclamation. As per Article 16 of the draft, the Center will have two competing and conflicting tasks: serve as arbitration center and register other arbitration center. Furthermore, as per Article 10(2) of the draft, the Center shall be accountable for the Federal Supreme Court. This make its unclear whether the Center is executive wing of government, judiciary or independent

²² This is reflected in discussion with various stakeholder about the New York Convention taken place 24 August 2019.

²³ under Article 5(2)(b) of the New York Convention.

²⁴ See Article 62(2) (e) of the draft proclamation.

²⁵ This recommendation was forward by Seyoum Yohannis.

institution.²⁶ Additionally, if the Center is going to register and de-register other competing arbitration institutions, how is it going to be impartial in assessing other competing centers, is the big concern.

²⁶ This issue was vehemently raised by Fekadu Peteron in the discussion with various stakeholder.