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An Overview of the Draft Arbitration Proclamation (Part one)[1]

Introduction

When we come to commercial dispute which arise out of not respecting contractual obligations by one or more parties, settlement of dispute through court come in the for front. However, the existing Ethiopian court system is extremely sluggish, rigid and expensive. On the contrary arbitration is praised for its speedy proceeding[2], flexible process[3], confidentiality of the proceeding[4], finality of dispute[5] which ultimately saves time and money. Although there are some critics against the heart of the system, arbitration stands out as one of the most popular means of dispute settlement mechanism.

One of the many definitions of arbitration is "non-state institution that resolves the disputes entrusted by the parties that found themselves in a dispute."[6] The existing Ethiopian arbitration law is found in the Civil Code of Ethiopia, Article 3325 to Article 3346 of the Civil Code and partly in Civil Procedure Code, Article 315 to 319 and Article 350 to 357. However, recognizing the fact that arbitration is becoming part and parcel of the mainstreaming dispute resolving mechanism, the law maker come up with the draft

[1] Please note that this commentary is based on the first draft proclamation on Arbitration and Conciliation. I am very grateful to Ms. Hibist Desalegn for the valuable comments and suggestions on the earlier draft

[2] Under institutional arbitration proceeding there is time cap to finalized and render decision.

[3] In principle the disputant party can determine the procedure to be followed.

[4] Unlike court proceeding which in principle conduct in public hearing, in case of arbitration all of the proceeding is conducted in camera.

[5] Usually the decision of arbitrator is final and binding.

[6] L Petrevska and others The advantages of solving commercial dispute by arbitration (2017) International Journal of Economic and Law at 123.

arbitration rule.[7] Structurally, the draft has 11 sections and 86 Articles. The main reason to came up with this draft is for the establishment of international arbitration center in Ethiopia which is financed by the government.[8] In this brief, I will discuss, if I can, the main typical feature and some areas of concerns that popped-up during the discussion with various stakeholders.[9]

1. Continuity of uncertainty over arbitrability of administrative contract[10] – it's generally accepted principle that arbitrability or non- arbitrability of any matter is the concern of public policy. In emphasizing this point the competent authors in the field state that: "the concept of non-arbitrability is in effect public policy limitation upon the scope of arbitration as a method of settling disputes. Each state may decide, in accordance with its own public policy considerations as to which matters are incapable of being settled by arbitration under the law of the place of agreement or of arbitration." [11](emphasis supplied) In the same token recognition and enforcement of an award since it may be refused if the subject-matter is not arbitrable under the law of the country where enforcement is sought.[12]

   The draft Proclamation made it clear that unless and otherwise the issue is classified as non-arbitrable under the relevant law[13], all matters are presumed to be arbitrable. The draft Proclamation lists out some of non-arbitrable matters like that of marriage, tutorship and guardian, issue of succession, criminal matters.[14] However, the Proclamation failed to address the most unsettled issue of arbitrability of administrative contract.

[7] File with the author. The draft incorporates both arbitration and conciliation rules.
[8] This was explained during the discussion with various stakeholders.
[9] I had the opportunity to participate in the discussion representing MTA.
[10] For more about the debate please see Yehualashet Tamiru Legalizing the Illegal: Ethiopian Arbitration Law towards a New Jurisprudence (A Case Comment on *Zem Zem* PLC V. *Illubabor* Zone Education Department) Bair Dar Law Review Vol. 6 No.2 pp. 355-370

[11] Allan Redfen and Martin Hunter, Law and practice of International Commercial Arbitration (1936 Sweet and Maxwell Publisher) at 47.
[12] As above.
[13] Here there seems a contradiction between provision of the law. under Article 6(4) of the draft it said any prohibition by relevant law whereas under Article 54(2)(d) of the draft it said if the non-arbitrability is provided under the substantive law. It seems that the second provision exclude procedural part of the law.
[14] In the discussion there was a huge concern that the law should also include taxation as one of the non-arbitrable issue.

2. Incorporation of separability doctrine: - There is a generally accepted principle that invalidity of the main contract leads to the invalidation of subordinate contract.[15] As the extension of this understanding in the early time, arbitration clause in the arbitration agreement was form part and parcel of the contract and hence, invalidation or nullity of the underline contract will lead to the invalidation of the arbitration clause in the agreement.[16] However, in the contemporary arbitration, an arbitration clause is presumed to be independent or separate from the underline contract. There are two significant issues in the doctrine of separability: validity of the main contract and validity of the arbitration clause.[17] Thus, arbitration clause is quite distinct from the other parts of the contract and it can only be invalidated on the grounds that are related with the arbitration clause itself.[18]

   Under the existing Ethiopian arbitration legal regime, it is unclear to what extend arbitration clause (*clause compromissoire*) might be affected by the invalidity or unenforceability of the underlining agreement.[19] However, the draft arbitration proclamation clearly provided that the arbitration clause in the contract is separate and independent from the main contract.[20] This being stated, the draft proclamation failed to explicitly deal the effect of invalidation of the main contract on the arbitration clause.[21]

3. Incorporation of competence-competence doctrine: - The doctrine of competence-competence is all about the power of the arbitration tribunal to determine whether or not the Tribunal has jurisdiction.[22] This doctrine is one of the cornerstones of any arbitration law. For instance, under the UNCITRAL model law it's indicated that" the arbitral tribunal may rule on its own jurisdiction, includes any objections with respect to the

[15] A Nussbaum The Separability doctrine in American and Foreign Arbitration (1940) 17 New York University Law Quarterly Review at 610.
[16] Tibor Varady and others, International Commercial Arbitration: A Transnational Perspective at 85.
[17] A Mustafeyava Doctrine of separability in International Commercial Arbitration (2015) 1 Baku St. University Law Review at 94.
[18] Ibid at 97.
[19] Solomon Emiru Comparative Analysis of separability, competence-competence and the rule of interpretation of arbitration agreements vis-à-vis the Ethiopian Arbitration Law (2016) Ethiopian Bar Review at 51.
[20] Article 9(2) of the draft proclamation.
[21] The Amharic version state the following "በውል ስምምነት ውስጥ የተካተተ የግልግል አንቀጽ ከሌሎቹ የውል አንቀጾች የተለየና ራሱን የቻለ ስምምነት እንደሆነ ተደርጎ ይቆጠራል።"
[22] Ryan Reetz The limits of the competence-competence doctrine in United States Courts (2011) 5: 1Dispute Resolution International at 6.

existence or validity of the arbitrator agreement."[23] This rule is partly recognized under the Ethiopian law since as per Article 3330(2) of the Civil Code the party 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.[24] However, the draft law under Article 34 empower the Tribunal to determine any controversy concerning the jurisdiction of the Tribunal, the existence and validity of the underline contract.

4. Envisage the possibility of pauper proceedings: - the draft Proclamation state that the arbitration institutions, to the extent possible, should provide arbitration service for free. This might affect the arbitration integrity and jeopardize the interest of the other party. Unlike court proceeding, in case of arbitration, the arbitrators provided their professional service for consideration. If one of the parties permitted their claimed to be filed through pauper, it will compromise the independent and impartiality of the arbitrators since the arbitrators will have financial stake in the outcome of the dispute. This especially true in case of contingency fee basis. Moreover, if the other party succeed in the proceeding, he will get nothing but expense from the proceeding.
5. Provide higher standard to challenge the arbitrators: - Needless to say, one of the integral parts of arbitration proceeding is the independent and impartiality of the arbitrators. Although almost all the major international arbitration rules provide impartiality and independence requirements, still and all another problem in the existing arbitration system is the lack of impartiality and independence on the part of arbitrators.[25] According to systematic-bias argument arbitrator with the view to promote arbitration and secure future appointment favor the stronger party.[26] According to 'double hatting' or revolving door argument an arbitrator who acts as a counsel in one case becomes an arbitrator in another case and professional witness in some other cases.[27] As a result

[23] Article 16(1) of the UNCITRAL Model Law.
[24] Article 3330(3) of the Civil Code.
[25] M Tupman Challenge and disqualification of arbitrators in international commercial arbitration (1989) 38 International and comparative law quarterly at 28.
[26] W Park Arbitrator Integrity: The Transient an the permanent (2009) 46 San Diego Review at 658.
[27] M Langfod, D Behn and H Lie The revolving door in international arbitration' (2017) 20 Journal of International Economic Law at 320 as quoted in T Ngodeni A critical Analysis of the security of foreign Investments in the Southern African Developmental Community (SADC) (2018) PhD Dissertation (file with the author) at 95.

handful of people controls, sometimes they are referred as 'inner mafia'[28], the whole business and compromise the impartiality and independence of the arbitrators.[29]

As a result, lack of impartiality and independency there is always a room to challenge the arbitrators. The draft Proclamation opts for less strange yardstick to challenge the arbitrator. As per the draft arbitration Proclamation mere appearance, quasi-certain or possibility of impartiality is not sufficient to disqualify the arbitrator rather there should be 'manifestly or high probability' of impartiality should exist to challenge the arbitrators.[30] However, in case of arbitration in general and party-appointed arbitration in particular the possibility of impartiality is very high and as one of the fundamental and essential part of due process in any arbitration proceeding, it is always advisable to put less stringent standard to challenge arbitrators.

6. Appeal as a right: - one of the reasons why the arbitration proceeding is so attractive to commercial disputes is because of finality of the award. The absence of substantive review mechanism is one of the striking features of arbitration process[31] and generally, appeal on the merit of the case is not permitted. This is as a result of two reasons. First and foremost, there is fundamental difference between the court and tribunal in resolving dispute. The court focus on the public purpose rather than mere dispute settlement. In confirming this one of the most influential figures of his generation, Owen Fiss, state that" the function of the judge- a statement of social purpose and a definition of role- is not to resolve dispute, but to give the proper meaning of our public value... The function of the arbitrator is to resolve a dispute."[32]

   The second reason is more of a practical one. There is always a temptation from the losing party what to appeal for the reversal of the Tribunals finding. This is well noted by a seasoned arbitrator when he said" efficient arbitration implicates a tension between the rival goals of finality and fairness. Freeing awards from judicial challenge promotes finality, while enhancing fairness calls for some measure of court supervision. An

[28] Who benefits? A deep dive into the incestuous world of ISDS arbitration(2016) available at https://thenextturn.com/who-benefits-a-deep-dive-into-the-incestuous-world-of-isds-arbitrations/(accessed 30 July 2019).
[29] F Cristani Challenge and disqualification of arbitration in international investment arbitration: an overview (2014) 13 The Law and Practice of International Court and Tribunal pp. 153-154.
[30] Article 30(1) of the draft arbitration rule.
[31] T cate International arbitration and the end of appellate review (2012) 44 International law and Politics at 1110.
[32] Own Fiss, Forward the forms of justice (1979) 93 Harvard Law Review 30-31.

arbitration's winner looks for finality, while the loser wants careful judicial scrutiny of doubtful decisions."[33](emphasis supplied)

Comparative analysis also suggests the prohibition of appeal. For instance, under the International Convention on the Settlement of Investor Disputes state that the decision of the Tribunal is final and binding and no appeal is permitted.[34] Therefore, the draft Proclamation should be drafted in a manner that reflect the typical and unique feature of arbitration. And hence, the draft Proclamation should be redrafted as follow" Unless the parties agreed otherwise, the award shall be binding and shall not be subject to appeal."

[33] William W. Park Why court reviewed arbitration award at 596.
[34] Article 53 cumulative with Article 54 of the ICSID.