Arbitration Award May Now Be ‘Final’: Changes In The Ethiopian Draft Arbitration Law

By:

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Introduction

Concerning finality of arbitral awards, the working approach in Ethiopia is that arbitration award is not final unless the arbitration agreement contains a finality clause. Even those arbitral awards based on agreements with a finality clause may be reviewed by the Federal Supreme Court Cassation Bench (the Bench) based on basic errors of law. But, arbitral awards given abroad are not subject to review by the Bench.

Recently, Ethiopia has drafted an Arbitration and Conciliation Proclamation. According to this draft proclamation, arbitral awards are final unless agreed otherwise. It is also possible to waive the right to take the case to the Bench for basic errors of law.

This blog post deals three issues: first, the previous status of the law and court decisions; second, it discusses the changes made in the draft proclamation; and third, my reflections on the changes.

The Working Approach: An Arbitral Award Is Not Final Unless the Seat Is Abroad

The previous approach is underpinned by the provisions of the Civil Procedure Code, and the FDRE constitution. Under the Civil Procedure Code, Article 350 provides that an arbitration award is appealable unless parties agreed otherwise with full knowledge. So, in principle, an arbitral award is not final.

The FDRE constitution, under its Article 80/3(c), bestows the Federal Supreme Court Cassation Bench with the power of reviewing '**any court's**' decision containing basic error of law and its decisions are considered as law and are binding on all lower courts. This has been backed by the Federal Courts Re-Amendment Proclamation Number 454/2005, Article 2/4, and Federal Courts Proclamation Number 25/1996, Article 10.

In relation to the Bench's power of reviewing arbitral awards, two questions of law always arise. One is whether decisions of 'any court', as stated in the FDRE Constitution, includes arbitral awards or not, and secondly whether an arbitral award that emanate from an arbitration agreement with a finality clause can be reviewed by the bench or not. The Bench itself has passed decisions in relation to these questions.

In *National Motors Corporation V. General Business Development*[1] *(2007)*, the Bench held that the phrase 'any court' also includes arbitral awards; but declined jurisdiction on the basis that the parties had agreed the award to be final. In other words, an arbitral award that emanates from an arbitration agreement with a finality clause is final that cannot be reviewed by any court including the Bench.

After three years, however, in *National Mineral Corporation PLC V. Dani Drilling PLC*[2] *(2010)*, the bench reversed its previous decision and held that no finality clause precludes the Bench from reviewing an arbitral award with a basic error

of law. Seid Demeke, in his case comment, and Mintewab Afework, in her blog post, criticized this decision as against the international experience and denies parties right to waive their right to appeal.

Confirming its stand, the Bench, in *Consta Joint Venture V. Ethio-Djibouti Rail Way Corporation*[3] (the Consta case), stated that it has jurisdiction over an arbitration award with a finality clause, in accordance with the international experience and previous decision of the Bench, as far as the seat of arbitration is Addis Ababa and the applicable law is Ethiopian law. In this case, Consta JV is an Italian company and the Ethio-Djibouti Rail Way Corporation is a joint enterprise of the government of Ethiopia and Djibouti. The case was administered by the Permanent Court of Arbitration (PCA) but the seat of arbitration was in Addis Ababa, Ethiopia. While the applicable substantive law was the Ethiopian laws, the applicable arbitration rule was the European Development Fund Rules (EDF Rules). In this case, the bench took, among others, the seat of arbitration as a factor for determining its jurisdiction.

Later on, in *Agricom International SA V. Ethiopian Trading Business Corporation* [4] (the Agricom case), the Bench declined jurisdiction on the basis that the seat of arbitration was not in Ethiopia. In this case, Agricom is a Canadian company, and Ethiopian Trading Business Corporation is a government owned enterprise. The applicable substantive law is Ethiopian laws, the applicable procedural law is the Grain Feeds Trading Association Rules Number 125 (GAFTA Rules), and the seat of arbitration was London.

The last two cases are international arbitration cases. The bench assumed jurisdiction in the Consta case but declined in the Agricom case. The Agricom decision did not reverse the previous Consta decision; rather it delimited the power of the Bench to review final arbitral awards. Reading both decisions together, it reveals that the Bench has the jurisdiction to review final arbitral awards with a legal seat in Ethiopia, but not if the legal seat is abroad. The bench in distinguishing the Agricom case from the National Mineral case underlined that the legal seat of the national mineral case was in Ethiopia and has no relevance for the Agricom case.

The Bench is of the opinion that it is the seat of arbitration that has an

exclusive jurisdiction of reviewing an arbitral award.The Bench, in the Consta case, stated that the courts of the legal seat have supervisory role, and, citing article 34 of the UNCITRAL Model Law, any application to challenge the award must be submitted to these courts. Furthermore, article 34 of the EDF rules requires parties to consider the award as a final judgment given by their own courts. Thus, it gives the Bench to review this award.

Similarly, in the Agricom case, the Bench decided that it is only the English courts that have the jurisdiction to review the award as the seat of the arbitration is in England subject to English procedural and Ethiopian substantive laws. It rejected the respondent's argument that the Bench has the power to review any basic error of Ethiopian law be it substantive or procedural and irrespective of the place where it was applied.

The Draft Proclamation's Approach: Presumption Reversed But Cassation Continued

The Draft Arbitration and Conciliation Proclamation came up with a different approach from the previous one both in terms of appeal to the appellate courts and review by the Bench. In its Article 48/1, the draft proclamation changed the previous law's presumption that arbitral awards are appealable unless parties agree otherwise. It reversed this presumption and states that arbitral awards are final unless otherwise agreed by the parties in their arbitration agreement. Thus, arbitral awards are presumed to be final.

Regarding the Bench's power of reviewing an arbitral award on the basis of basic error of law, the draft proclamation, in its Article 48/2, states that arbitral awards may be reviewed by the bench unless otherwise agreed. According to this provision, parties are at liberty to waive their right to take arbitral awards to the bench for review. But this waiver must be an express waiver, and failure to insert a waiver agreement will automatically entitle the aggrieved party to request review by the bench. Therefore, the draft proclamation is different from the previous approach in terms of appeal and review by the Bench.

Reflections

Finality is an intrinsic feature of arbitration at least in terms of appeal. The Civil Procedure Code's approach holding the presumption that arbitral awards are appealable is against the international experience. Hence, the draft proclamation's approach is in line with the practice in other jurisdictions. Allowing parties to waive their right to review arbitral awards by the Cassation Bench is also a good move. Through an express agreement in relation to review on basic errors of law, arbitral awards may be final.

The traditional way of inserting finality clauses, which is usually crafted as "the decision of the Tribunal is final and binding" may not be useful to waive right to submit to the Bench for review. To sum up, according to the draft proclamation, arbitral awards are final but subject to review by the Bench unless expressly agreed to waive their right for review.

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[1] National Motors Corporation V. General Business Development, Federal Supreme Court Cassation Bench, File Number 21849, year 2007.

[2] National Mineral Corporation PLC V. Dani Drilling PLC, Federal Supreme Court Cassation Bench, File Number 42239, year 2010.

[3] Consta Joint Venture V. Ethio-Djibouti Rail Way Corporation, Federal Supreme Court Cassation Bench, File number 128086, year 2018.

[4] Agricom International SA V. Ethiopian Trading Business Corporation, Federal Supreme Court Cassation Bench, File number 155880, year 2019.

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