

Arbitration under Ethiopian Law: General Overview

Description

By Geda Yoseph, Associate at DMLF



Introduction

Arbitration is a consensual dispute resolution process based on the parties' agreement to submit their disputes for resolution to an arbitral tribunal, usually composed of one or three independent arbitrators appointed by or on behalf of the parties. Arbitration can also be defined as the resolution of a dispute by a privately appointed third-party decision-maker. Arbitration is a mechanism for settling disputes. If there is no dispute, there can be no arbitration. Arbitration is known for its procedural flexibility, which allows parties to engage in an efficient, confidential, and fair process leading to a final, binding, and enforceable award. From an international perspective, arbitration awards are enforceable in over 150 countries around the world due to the application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Currently, both at the national and international level, arbitration is becoming one of the most preferable dispute settlement mechanisms. As compared to formal court proceeding arbitration, arbitration is flexible, saves a lot of costs, and enables the parties to resolve their dispute in an amicable manner. At the international level, arbitration is also one of the areas showing good progress and advancement. Countries are signing different bilateral and multilateral agreements with each other to regulate and facilitate transactions and dispute settlement.

Characteristics Feature of Arbitration

- **Arbitration is a mechanism for resolving disputes in accordance with the rules and principles of the law.**

It is a right-based mechanism. Rules and principles of law may sometimes be chosen by the parties. In contrast, other alternative dispute settlements, like mediation and conciliation, shall not be bound to be governed by any other substantive or procedural laws.

- **Arbitration is consensual as far as its initiation is concerned; an agreement to arbitrate is the cornerstone of arbitration.** There are exceptions for this consensual nature of arbitration under Cooperative Society Proclamation 985/2016 and National Payment System Proc. 718/2012.
- **Arbitration is a private procedure.** The reason it is called a private procedure is that several issues are determined by the parties. The parties organize the tribunal, the parties determine the jurisdiction, and the parties with the tribunal determine the venue, the language, the time, etc. of arbitration. For this reason, arbitration is called a private procedure.
- **Arbitration leads to a final and binding determination of the rights and obligations of the parties.** The process and outcome of arbitration are binding on the parties. Sometimes it is also final and non-appealable.

Advantages of Arbitration as Compared to Court Litigation

- Arbitration permits the parties to choose people with specialized knowledge to judge their dispute. Judges in state courts are less likely to acquire the same degree of expertise in the technical aspects of the transactions that come before them, as are the lawyers who represent the parties and who may later serve as arbitrators in similar transactions. In construction arbitration, there may be engineers or architects as well as lawyers serving as arbitrators.
- The procedure in arbitration is flexible and can be adapted to the needs of the particular dispute. Due to the flexibility and finality of arbitration proceedings, resolving disputes through arbitration may often be quicker and cheaper than resolution through court litigation or other means of dispute resolution.
- Arbitration is not subject to appeal on its merits unless otherwise agreed upon by the parties. What the parties lose in legal security, because errors made by the tribunal in the application of the law cannot be corrected, they gain in the reduced amount of time required to reach a final decision and reduced costs.
- Faster decisions and lower costs as compared to litigation in the courts have been one of the traditional arguments in favor of the arbitration-stamp duty proclamation. Faster decisions and lower costs as compared to litigation in the courts have been two of the traditional arguments in favor of arbitration.

International Commercial Arbitration

In international transactions, people and different international organizations also resort to international commercial arbitration. In international commercial arbitration:

- **Litigating in foreign courts is unthinkable.** While that is good for one party to the transaction, it is not so good for the other party, who faces all the difficulties of litigating in an unfamiliar procedure, in a language that may be foreign and may not be the language of the contract, and not being able to use its lawyers who are familiar with the company. It is also not irrelevant that one party is staying at home while the other party is staying in a foreign country, with all the inconvenience and expense that entails.
- **Arbitration reduces inequalities.** Arbitration of disputes among organizations or people living in

different countries is a means to reduce the inequalities. While it is possible for the arbitration to take place in an arbitration organization located in the home country of one or the other party, it is also possible for the arbitration to be administered by an arbitration organization located in a third country.

- **When the state is a party, a foreign court is even more unattractive.** There are special concerns about the partiality of the courts when the state is a party to the dispute. The state has too many means to influence decisions in its own courts for foreigners to feel comfortable litigating against it there. This factor is the major reason for the extraordinary increase in the number of bilateral investment treaties in recent years in which foreign investors have the option of instituting arbitration in one of several arbitration forums outside the host state.
- **Ease of enforcement:** A final reason for the current popularity of international commercial arbitration is the comparative ease of enforcement of an award as compared to the enforcement of a judgment of a foreign court.

Different Types of Arbitration

There are different types of arbitration that deal with different subject matters. These types of arbitrations include:

- Commercial arbitration
- Investment arbitration
- Commodity arbitration
- Sports arbitration
- IP Arbitration
- Public law arbitrations
- International arbitrations

Major Concepts /Issue in Arbitration

There are four (4) major concepts or issues in arbitration. These are: arbitrability, jurisdiction, arbitration agreement, and separability. Let's consider each of them briefly.

1. **Arbitrability:** In Ethiopia, arbitrability is simply the notion of whether a dispute falls within the category of disputes that can be resolved by arbitration. What disputes are not arbitrable in Ethiopia are listed under Article 7 of Arbitration and Conciliation Working Procedure Proc.1237/2021. This includes divorce, adoption, guardianship, tutorship, succession, criminal cases, tax cases, judgments on bankruptcy, decisions on the dissolution of business organizations, all land cases, including leases, administrative contracts, except where permitted by law, trade competition and consumer protection, and administrative disputes falling under the powers given to relevant administrative organs by law.
2. **Jurisdiction:** Jurisdiction refers to the scope of powers of the arbitration tribunal. Article 19 of Proclamation 1237 provides that the arbitral tribunal can determine its own jurisdiction. With regard to an objection against the decision of the tribunal on its jurisdiction, Art. 19(5) provides that an objection against the decision of the tribunal on its jurisdiction shall be submitted to the First Instance Court within one month from the date of rendering such a decision. The submission of an objection in accordance with Sub-Article (5) of this Article shall not prevent the tribunal from continuing with the arbitration proceedings and rendering an award according to Article 19(6). The implication of Art. 19(5) and 19(6) is that arbitration will not be stayed because of a

jurisdictional objection. The implication is that defendants will not delay arbitration by raising jurisdictional objections. The tribunal may go on and issue its award, and the court may rule that the tribunal doesn't have jurisdiction. In which case, the award will be void.

3. **The arbitration agreement:** An arbitration agreement is an agreement to submit present or future disputes between the parties to arbitration. The notion of an arbitration agreement comprises two basic types: a) A clause in a contract by which the parties to a contract undertake to submit to arbitration the disputes that may arise in relation to that contract (arbitration clause); or b) An agreement by which the parties to a dispute that has already arisen submit the dispute to arbitration (submission agreement). The arbitration agreement has to be in writing in light of Art. 6 of Proc. 1237/2021. An arbitration agreement has to be written, signed, and attested by witnesses in light of Article 6 of Proc. 1237/2021. Arbitration agreement can be made by electronic means such as emails, telegrams, etc. that can be retrieved.
4. **The Arbitration Tribunal:** The Arbitration Tribunal is a sole arbitrator or a panel of arbitrators that hears the case and makes the award or other necessary orders. With regard to the appointment of arbitrators, contracting parties are free to agree on the procedure for the appointment of arbitrators, whether by arbitration centers or by a third party, in light of Article 12 of Proc. 1237/2021. Objection is possible if there are circumstances that create justifiable doubts as to impartiality, independence, or fulfillment of the criteria stated in the arbitration agreement. where one of the contracting parties fails to appoint the co-arbitrator within 30 days from the date of receipt of the notice by the other party, or where the two arbitrators fail to agree on the appointment of the third arbitrator within 30 days from the date of their appointment, or where the contracting parties fail to agree, in the case of a sole arbitrator, the First Instance Court shall appoint such arbitrator upon the request of one of the parties. Once arbitrators are appointed, they have their own rights and duties.

Right of Arbitrators

- Right to fee

Duties of Arbitrators

- The duty to be and remain impartial and independent
- The duty to conduct the arbitration in an efficient manner
- Duty to decide the case expeditiously
- Not meet any of the parties separately.
- Not to receive any gifts from the parties

Decision of Arbitration Tribunal

The arbitrator tribunal, after reviewing substantive parts of the issue final, gives an award. Award is a generic term denoting the decisions of the arbitral tribunal. On the other hand, an order is a decision of the tribunal determining the procedural direction of the proceeding (procedural orders). An award has the aspect of finally disposing of a particular issue in dispute between the parties. In arbitration, both judgment and decree are called awards.

Status of the decision Arbitration Tribunal in Light of Arbitration and Conciliation, Working Procedure Proclamation, Proc. No. 1237/2021

One of the characteristics of arbitration is that it leads to a final and binding determination of the rights and obligations of the parties. Arbitration leads to a final and binding determination of disputes. Article 44(6) also provides that any decision of the arbitral tribunal shall be deemed to be a decision given by a court, shall be binding on the parties, and prevents bringing suit on similar matters between such parties.

Appeal and Cassation Review With Regard to Arbitral Award

Before Proclamation No. 1237/2021 came into force, there was controversy and uncertainty about whether the decision of the arbitrator tribunal was subject to appeal or not, even in the absence of agreement parties. The Federal Cassation Bench also considered several cases, even in the presence of an agreement between parties, to appeal to a formal court after the tribunal rendered the decision. This issue and uncertainty were resolved after the coming into force of Proclamation No. 1237/2021.

Appeal under Proclamation No. 1237/2021

According to Proclamation No. 1237/2021, Article 49 an appeal is not automatically available; it depends on the presence of an agreement. Article 49(1) states that unless the contracting parties agree otherwise in their arbitration agreement, no appeal shall lie to the court from an arbitral award. In the absence of agreement between the parties, there is no appeal. With regard to an error of law, parties can exclude cassation by agreement. Article 49(2) of Proclamation 1237/2021 provides that unless there is agreement to the contrary, an application for cassation can be submitted where there is a fundamental or basic error of law. According to the above provision, cassation review is available unless excluded by agreement.

Article 49(3) provides exceptions for exceptions. It provides grounds on which appeals are never allowed, even if the parties agree to appeal. These are:-

- Appeal on arbitration on equity, According to Art. 41(5), an arbitral award may be granted based on equity or known commercial practices where such power is expressly given to the tribunal by the contracting parties or the applicable law authorizes such application. With regard to such an arbitral award, parties cannot appeal even by entering into an agreement.
- Arbitration on agreed terms/consent award: According to 43, when contracting parties have resolved their dispute by agreement before an arbitral award is rendered on the subject matter of the arbitration, parties cannot appeal to court by opposing such a decision even by entering into an agreement.
- Arbitration without reason: according to Art. 44(2), contracting parties may agree not to disclose the reason or whether the arbitral award is granted based on mutual consent. With regard to such decisions, parties cannot appeal to the court even after entering into an agreement.

In light of Article 49(3) of Proclamation 1237/2021, parties cannot appeal on the above-listed grounds even by entering into an agreement. Article 49(3) limits parties' autonomy by limiting their contractual power with regard to appeals.

International conventions on Recognition and Enforcement of foreign arbitral awards

There are different international conventions and treaties with regard to recognition and enforcement of

foreign arbitral awards. Let's briefly consider the New York convention.

The NY Convention has two objectives:

- The recognition and enforcement of arbitral **agreements**
- The recognition and enforcement of arbitral **awards**

The Convention is an international treaty and thus part of public international law. Article I(1) of this convention also provides that the Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, arising out of differences between persons, whether physical or legal. It also applies to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought. On 24 August 2020 Ethiopia acceded to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"). The ratification of the NYC comes at a time where the country is undertaking major economic and legal reforms including the privatization and liberalization of mega sectors. It also plays a significant role in attracting foreign investors and creating a good environment for investment.

Investment Arbitration

Ethiopia's special law includes arbitration as an alternative dispute settlement mechanism. A case in point is the Investment Proclamation Procl.No. 1180/2020.

Ethiopia recently enacted a new investment law with the purpose of promoting investment and encouraging foreign investors to invest in Ethiopia. The new investment proclamation introduces several changes, like using a negative listing approach with regard to areas of investment those foreigners can invest in, which is a provisionally positive listing approach. Other than areas reserved for domestic investors, foreign investors can invest in any area. To be more specific, the new investment proclamation also introduces provisions that deal with arbitration, which allow investors to resolve the dispute through arbitration in light of Articles 28(2, 3). Investment Proclamation under Article 28(2) provide that the Federal Government may agree to resolve investment disputes involving foreign investments through arbitration. The inclusion of such provisions in investment law plays a significant role in creating a favorable environment for investment. Another important provision is Article 28(3) of the investment proclamation, which provides that where a foreign investor chooses to submit an investment dispute to a competent body with judicial power or arbitration, the choice shall be deemed final to the exclusion of the other. Currently, at the international level, arbitration is becoming an effective and widely used dispute settlement mechanism. Investors also prefer arbitration over formal court proceedings due to several factors we mentioned above. Hence, recognition of arbitration in investment law is a good legal reform to attract foreign investors.

Conclusion

Arbitration is a formal method of alternative dispute resolution (ADR) involving a neutral third party who makes a binding decision. The dispute will be decided by one or more persons (the 'arbitrators', 'arbiters', or 'arbitral tribunal'), which renders the 'arbitration award'. Parties often seek to resolve disputes through arbitration because of a number of perceived potential advantages over judicial proceedings. Arbitration is often faster than litigation in court. Arbitral proceedings and an arbitral award are generally non-public and can be made confidential. Because of the provisions of the New

York Convention of 1958, arbitration awards are also generally easier to enforce in other nations than court verdicts. In most legal systems, including Ethiopia, there are very limited avenues for appealing an arbitral award, which is sometimes an advantage because it limits the duration of the dispute and any associated liability. Hence Arbitration is becoming the most preferable dispute settlement method, and Ethiopia also recognizes arbitration under Proclamation 1237/2021 and different other special laws like investment law.

For arbitration related inquiries, you may contact us at info@dmethiolawyers.com

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dmethiol_admin

Dagnachew & Mahlet Law Firm LLP