

International Arbitration Focus Team Ethiopia Team

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The new Ethiopian Arbitration and Conciliation Working Procedure under Proclamation No. 1237/2021

1. Introduction

On 2 April 2021, the Ethiopian House of People's Representatives enacted a new law: the Proclamation to Provide For Arbitration and Conciliation Working Procedure ("Proclamation"), the first codified working procedure for alternative dispute resolution (ADR) in Ethiopia separate from the Ethiopian Civil Code.¹

Up until publication of the Proclamation, ADR – more specifically, arbitration – in Ethiopia lacked a detailed procedure and implementation mechanism. The Proclamation expands the provisions and content of ADR (previously recognised under Title XX of the Ethiopian Civil Code) and clearly separates arbitrable cases from non-arbitrable cases, thereby limiting court intervention in arbitration proceedings. The Proclamation also addresses the issue of the finality of awards rendered in arbitration proceedings (finality clauses).

Furthermore, the Proclamation gives power to arbitral tribunals to determine the existence or non-existence of a valid arbitration agreement between contracting parties, including as to whether they have jurisdiction to oversee the matter or not. The Proclamation acknowledges the concept of severability, which holds that if some of the terms of an arbitration agreement are held to be illegal or otherwise unenforceable, the remaining terms will still apply, and that if a principal agreement that contains an arbitration clause becomes null, it will not make the arbitration clause null. This therefore leaves no ambiguity for parties that wish to include arbitration clauses in their contracts. Furthermore, public and private firms are now permitted to establish an institutional arbitration tribunal.

2. Scope of application

In principle, the Proclamation is expected to apply to all commercial domestic and international arbitration seated in Ethiopia and arising out of agreements signed after the date of its publication (2 April 2021), except

¹ Proclamation No. 1237/2021

for cases that have been expressly listed as non-arbitrable.

According to the Proclamation, arbitration is to be deemed international arbitration if it meets one of the following conditions:²

- The respective principal places of business of the contracting parties are in two different countries at the time the arbitration agreement is entered into.
- One of the following is in a foreign country:
 - the legal seat of arbitration chosen under the arbitration agreement;
 - the principal place of business where the substantial part of the obligations of the commercial or contractual relationship is to be performed; or
 - the place of business in reference to which the subject matter of the dispute arises and is most closely connected with.
- The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

On the other hand, the following matters cannot be referred to arbitration:³

- divorce, adoption, guardianship, tutorship and succession cases;
- criminal cases;
- tax cases;
- bankruptcy judgments;
- decisions on the dissolution of business organisations;
- all land cases, including leases;
- administration contracts, except when permitted by law;
- trade competition and consumer protection;
- administrative disputes falling under the powers given to the competent administrative bodies by law; and
- other cases that by law are not arbitrable.

3. Court intervention in arbitration proceedings

One of the milestones achieved by the Proclamation is the restriction of court intervention in arbitration proceedings. Indeed, Art. 5 of the Proclamation stipulates that a “[c]ourt shall not intervene in arbitrable matters except where it is specifically provided for in this Proclamation”.

This provision is particularly relevant given the past approach of Ethiopian courts, which intervened in the arbitration case between Salini Costitutori S.p.A. and the Federal Democratic Republic of Ethiopia Addis Abeba Water and Sewage Authority in 1998.⁴

In that case, the respondent (the Ethiopian water authority) requested the intervention of the Federal Supreme Court of Ethiopia as a reaction to a

² Id., Art. 4

³ Id., Art.7

⁴ ICC Arbitration No. 10623/AER/ACS.

procedural order issued by the arbitral tribunal constituted under the ICC. The procedural order addressed the place of the proceedings and jurisdictional matters. The Federal Supreme Court subsequently issued a temporary injunction against the arbitral tribunal, ordering the arbitration proceedings to be suspended with immediate effect pending its determination of the respondent's appeal. The respondent then brought a separate action before the Federal First Instance Court of Ethiopia on jurisdictional matters concerning the same case, thereby trying to circumvent the arbitration agreement.

The arbitral tribunal considered this intervention to conflict with its duty to the parties deriving from the arbitration agreement; it therefore considered the injunction non-binding on the arbitral tribunal.

Indeed, had the arbitral tribunal observed the Ethiopian court's injunction, it would have been in clear conflict with the fundamental principle of competence as recognised under Art. 3330(2) of the Ethiopian Civil Code.

The Proclamation now blocks the leeway for unwanted court intervention in any arbitration proceedings and clearly recognises the principle of competence, severability clauses and the confidentiality of arbitration proceedings. The Proclamation has thus drawn a vivid line of demarcation between the competence of arbitration in general and the role of courts in arbitration in particular.

This provision has been appreciated by legal scholars and is believed to safeguard the interests of foreign investors who are interested in investing in Ethiopia.

4. Non-arbitrable cases concerning administrative contracts

One of the paradigm shifts brought on by the Proclamation is the introduction of a list of non-arbitrable cases. Previously, there was ambiguity as to which cases were subject to arbitration and which were not. More importantly, there was a tense controversy over the arbitrability/non-arbitrability of administrative contracts.

'Administrative contract' has no clear and concise definition under Ethiopian law, but Art. 3132 of the Ethiopian Civil Code enumerates the elements that constitute administrative contracts. Unlike the previous legal framework, the new Proclamation establishes a principle whereby administrative contracts are beyond the reach of arbitration unless otherwise expressly permitted by law.

Though this principle is recognised under this new law, exceptional circumstances might occur in which certain types of administrative contracts can be subject to arbitration. However, these exceptions must be specifically distinguished by law (i.e., in contracting authority regulations or directives). Save for these exceptions, the new Proclamation renders all administrative contracts outside the ambit of arbitration.

5. Finality clauses

The new Proclamation addresses the issue of finality clauses in arbitration agreements. Art. 49(1) of the Proclamation states as follows:

Unless the contracting parties agree otherwise in their arbitration agreement, no appeal shall lie to the court from an arbitral award.

Under the previously applicable laws, there was a presumption that contracting parties agreed on a right to appeal any arbitral award unless they had expressly waived the right to appeal “with full knowledge of the circumstances”.

Conversely, Art. 49 of the new Proclamation adopts a presumption that arbitral awards are final and not appealable unless the parties agree otherwise in their arbitration agreement.

It also worth noting that, under Art. 49(2) of the Proclamation, unless there is agreement to the contrary, an application for cassation can be submitted where there is a fundamental or basic error of law.

This provision is a step forward in resolving the long-lasting issue of the finality of arbitral decisions.

6. Arbitration centres

The other new element introduced by the Proclamation is that it gives the green light for both government and private firms to establish their own arbitration centres.⁵ The details of the requirements for establishing an arbitration centre are going to be set out by a regulation to be issued by the Council of Ministers.

Currently, only one institutional arbitral tribunal is established under the auspices of the Addis Ababa Chamber of Commerce and Sectoral Association, by a decree issued during the reign of Emperor Hailesllassie I. The lifting of restrictions will expand the institutional nature of arbitration per se and allow the private justice system to flourish in Ethiopia. This will also create an investment opportunity for legal practitioners and arbitrators to enlarge their scope of activity in the justice system.

⁵ Art. 18 of Proclamation No. 1237/2021.



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