

How to Disqualify and/or Remove Arbitrators Under Ethiopian Arbitration Law: Is Ethiopian Law on the Right Track?

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Michael Teshome

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If you are a counsel in an ongoing arbitration, you have two obligations: 1) navigate your ways through provisions of the applicable law so that you can litigate as a professional; 2) satisfy your client with your service and make sure that all his questions are answered properly.

Especially, if an arbitrator (whether or not chosen by you) is not discharging his or her duty on time, if you suspect there exists a relationship with the other party, does not understand the case properly, fails to communicate meetings which are crucial to the parties, delegate his or her duty to another person, you might wonder what to do in that regard before things get worse, or before an award is rendered.

It is impossible to think of arbitration without arbitrators. After all, parties choose arbitration to save time, maintain confidentiality and use the advantage of choosing their own arbitrators and seat. In other words, parties choose arbitration because they feel like they can be well represented and ultimately get a fair award. Had it not been for procedural flexibility and specificities, it would have been impossible to speak about arbitration.

Until a final award is given, arbitrators are expected to act independently and

impartially. You expect them to act professionally to the best of their abilities as their conduct maintains the integrity of arbitration.

This short blog post attempts to discuss ways in which an arbitrator can be disqualified and removed in accordance with the Civil Code of Ethiopia. An award rendered by an arbitrator who is partial will not be enforced both under the New York Convention and Ethiopian arbitration law. In fact, article 351/d/i-iii/ of the Ethiopian Civil Procedure Code stipulate that it will be reviewed by appeal.

Disqualification of an Arbitrator: Article 3340 of the Civil Code and Its Vagueness?

Who can submit an application to disqualify an arbitrator? What are the grounds that must be considered? A party, whose interest is compromised, due to an arbitrator's behavior, can submit an application to "disqualify" an arbitrator.

The application can be submitted either to the court having jurisdiction or to the arbitral tribunal. As a corollary, if the application to disqualify an arbitrator gains acceptance, he or she will be disqualified.

According to the 1960 Civil Code, an arbitrator can be disqualified based on these grounds:

- Age,
- Criminal conviction,
- Unsound mind,
- Illness,
- Absence, or
- Any other reason which bars him from discharging his or her duty within a reasonable time.

However, a party may seek disqualification of the arbitrator appointed by him "...only for a reason arising subsequently to such appointment, or for one of which he can show that he had knowledge only after the appointment", according to article 3341 of the Civil Code.

The general rule that is used to disqualify an arbitrator is found under article 3340/2/ of the Civil Code: "...any circumstances casting doubt upon his impartiality or independence." This rule corresponds with article 10 of the UNCITRAL model law which says: "an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence or if he does not possess qualifications agreed to by the parties..."

Yet, the Ethiopian Civil Code fails to define this phrase: "any circumstance casting doubt upon his impartiality or independence." This might leave much room for parties to submit an application to disqualify an arbitrator; and case law has a lot to show.

The procedure prescribed by the law to disqualify an arbitrator is:

- An application to disqualify an arbitrator should be made to the arbitration tribunal by a party before an award is rendered and as soon as the party knew of the grounds for disqualification;

- If the application is dismissed, then the party can lodge an appeal within 10 days.

Let us take cases as examples...

In a case between Harar Trading (claimant) and Gelateli Hanki Co. (respondent), which was ad-hoc arbitration, published on Arbitral Awards Volume 2, page 191, the respondent's attorney submitted an application to the sole arbitrator asking for his disqualification citing the following reasons:

"...While the sole arbitrator was a judge at the Federal High Court, he abused me; I had submitted an application requesting disciplinary measures to be taken against him and an action was taken accordingly. Thus, it is difficult for me to believe that he will render an impartial award..."

In deciding on the application for removal, the sole arbitrator said that

"...Even though the respondent's lawyer mentioned the file in which he claims that there was abuse, as I am not certain about the final decision, I cannot accept or refuse to be disqualified based on mere speculation... he may have approached my bench while I was a judge; He may have discontent as a result of my decision. Nonetheless, I believe that all of the judgments I gave were according to the law. Even if he claims that there was a disciplinary action, the action was not properly stipulated... further, we do not have intimate relationship, we do not know each other that much... therefore, claims he brought against me were unsubstantiated and have no legal basis."

A party cannot simply apply to disqualify an arbitrator just because he is unhappy. The claim must be founded upon legally acceptable instances. If arbitration allows parties' emotion to be involved, it will be difficult to maintain its autonomy and will make people consider it as a child's play. But what does recent Ethiopian case law show?

The Federal Supreme Court Cassation Division Case Number 135094 (Volume 21) decided that "...as per article 3340/2/ of the Civil Code to disqualify an arbitrator it is not necessary to prove that a close connection between an arbitrator and a party. It is enough if there are any circumstances casting doubt upon his impartiality or independence... In the case at hand, the second respondent, which is apparently the arbitrator, was made a party to the suit by Federal First Instance Court; he continued to be joined as a respondent both at the Federal High Court and Cassation Decisions... this means he was litigating to be made an arbitrator..."

and this creates doubts on his impartiality...”

The Cassation basically stated that if the arbitrator argues against a party who requests him to be disqualified, he or she must be disqualified, because as per article 3340/2/ of the Civil Code such a scenario will give rise to circumstances casting doubt on the arbitrator’s impartiality. Is this the right way to go?

Removal of an Arbitrator under the Civil Code of Ethiopia

Disqualification of an arbitrator is a wider concept than removal. The Civil Code only gives one article to removal and seems to leave the rest under the umbrella of disqualification. It is unclear why the legislature chose to deal with removal and disqualification in this way. Even if we say their effect is the same, there lies no reason as to why the legislature needed to differentiate between disqualification and removal.

According to Article 3343, after accepting his or her appointment, if an arbitrator unduly delays the discharge of his duties the authority agreed upon by the parties, or in the absence of such agreement, the court, can remove him from his position. A reasonable question would be what the difference between article 3343 and 3340/1/. According to article 3340/1/, an arbitrator can be disqualified “... for any other reason unable to discharge his function properly or within a reasonable time.” Thus, one may ask the relevance of article 3343 which says that an arbitrator can be removed if he delays the discharge of his duties.

In fact, there is no difference between the two articles. In fact, the criterion in article 3340/1/ can be broadly interpreted to mean the condition laid down in article 3343.

Conclusion and Recommendation

The Ethiopian arbitration law needs to be amended when it comes to disqualification and removal of arbitrators – it can learn a lot from the IBA Guidelines on Conflict of Interests in International Arbitration. The grounds laid down under article 3340 and 3343 seem to be redundant, and no clear interpretation of the law in relation to article 3343 has been given by the Federal Supreme Court Cassation division.

Especially, the interpretation given by the Cassation bench is so wide that an arbitrator who argues against a party who brought a claim for his or her disqualification has to be disqualified. This has a lot of practical ramification.

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