

# Spotlight on Ethiopia as it Annuls a Euro 20 million Arbitral Award

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Five years after filing the Permanent Court of Arbitration (PCA) Case No. 2013-32 under the European Development Fund Arbitration Rules (EDF Rules), the claimant, Consta JV (an Italian contractor), would have hoped for a successful award against the CDE (a joint enterprise between the Ethiopian and Djibouti government) that would be upheld by the local court.

All such hopes were crushed when, on 24 May 2018, the Supreme Court of the Federal Democratic Republic of Ethiopia (Court) (i) ruled that it has jurisdiction to review an arbitral award issued under the EDF Rules, (ii) found fundamental errors in law in the arbitral award and (iii) set aside the arbitral award.

The dispute involved a breach of contract claim arising out of a repair works contract financed by the EDF relating to rehabilitation works being performed on the Ethiopia-Djibouti Railway. The dispute was brought before a tripartite tribunal and the award issued by the majority. Co-arbitrator, Professor James Thup Gathii dissented.

Several issues arise from the Court's decision:

1. Did the Court have jurisdiction and authority to decide on the nullification of an arbitral award issued under the EDF Rules?

2. Did the Tribunal err on a point of law?
3. What is the impact of the Court's decision on arbitration in Ethiopia and on EDF cases?

### **Did the Court have jurisdiction and authority to decide on the nullification of an arbitral award issued under the EDF Rules?**

The EDF is an intergovernmental fund outside the EU budget with most of its resources being managed by the European Commission. Countries that receive EDF funding include parts of Africa, the Caribbean etc., and are signatories to the Cotonou Agreement. In 1990, the Council of Ministers of the African, Caribbean and Pacific Group of States (ACP States) and the European Economic Community approved a new set of rules for the settlement of disputes arising out of construction, supply and service contracts funded by the EDF. The EDF covers disputes between the private sector executing the contract and authorities of the ACP States.

#### The EDF Rules

The EDF Rules provide that the law applicable to the substance of the dispute and the *lex arbitri* are those of the State unless otherwise agreed by the Parties. Furthermore, an award rendered under the EDF Rules is final and binding and parties are required to carry out the award without delay. There is a requirement for an award to be recognised and enforced under the EDF Rules and enforcement of the award is regulated by the law relating to the enforcement of judgments which is in force in the State in whose territory the enforcement is to be carried out.

The seat of the PCA arbitration was Addis Ababa and the governing law of the arbitration was Ethiopian law. The Court had jurisdiction to enforce and recognise the award.

#### The Court's rationale

The Court determined that the EDF Rules give arbitral awards rendered under such rules the status of a final court judgment of the ACP States. This is not incorrect. The Court appears to have taken into cognisance Article 33.3 of the EDF Rules which require each ACP State to recognise an award under the EDF Rules as

binding and ensure it is enforced in its territory as if it were a final judgment of one of its own courts or tribunals. The Court goes further to reason that because the Ethiopian Constitution grants the Court of Cassation the jurisdiction to review final court judgments of all Ethiopian courts for fundamental errors of Ethiopian law, the Court has jurisdiction to review this EDF award as it is analogous to an Ethiopian court judgment under the EDF Rules.

Notably, Ethiopia developed most of its current codes on private law in the last century. Its arbitration law can be found in its Civil Code and Civil Procedure Code. It is generally perceived that Ethiopia's arbitration law applies to domestic arbitration as opposed to international arbitration.

It is unsurprising that the Court adopted the above approach in finding jurisdiction for itself to decide on whether the law had been applied correctly to the EDF award which in the Court's eyes under the EDF Rules is akin to an Ethiopian court judgment.

### **Did the Tribunal err on a point of law?**

The CDE challenged the award on the basis that the majority of the Tribunal had seriously erred in deciding on a point of law in their decision.

The Court annulled the award on a number of substantive grounds. Most importantly, it stated that the Tribunal disregarded evidence of fraudulent bidding by the claimant. Interestingly, it is on this point that Professor James Thup Gathi issued his dissenting award.

The Ethiopian Civil Code provides that a contract may be invalidated based on fraud if the other party would not have entered into the contract had it known of the deception. Without going into detail of the dissenting award and the arbitration case, Professor Gathi relies on this provision and dissents in that he views that CDE would not have entered into the contract if it had known that the joint venture partner in Consta JV, GCF who was to provide technical expertise on railway projects, reduced its share in the JV and its responsibility as a JV partner was significantly and considerably reduced such that it disavowed the responsibility for design. Objectively, this would understandably be an issue for any client in CDE's position particularly where it is relying on the JV partner's skills in a project.

The Court reasoned that under the Ethiopian Civil Code, a contract entered based on fraud is invalidated and as such Consta JV's breach of contract claim cannot be sustained. The Court found that the majority of the Tribunal omitted to address this. The Court went on to say that the only remedy to the parties in such a situation is that they are restored to the position they were in before the contract and they may seek such recourse through a subsequent arbitration. Interestingly, the Court appears to uphold the principle of separability of the arbitration agreement and does not invalidate it.

On the face of it, the Court's reasoning appears legally sound. However, there is concern that the Court opening up the award could potentially attract more challenges counterintuitive to the arbitration process. Would a better approach have been for the Court to revert the award back to the Tribunal for the Tribunal to re-determine on the issue?

### **What is the impact of the Court's decision on arbitration in Ethiopia and EDF cases?**

Undoubtedly, the Court's decision is seen as one of the first of such decisions issued by the highest court of the ACP countries. It is anticipated this will be a ground-breaking precedent that may well affect future EDF cases particularly in Ethiopia.

As of date, Ethiopia is not a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. This, together with the Court's decision, may cause private sector companies to reconsider and proceed cautiously in choosing arbitration as a mode of dispute resolution where Ethiopia is the seat of arbitration.