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# The Fate of Finality Clause in Ethiopia

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The cassation bench of the Supreme Court of Ethiopia, whose decisions have precedential value, in National Motors Corp. v. General Business Development case has ruled that parties' final intention to be bound by an arbitration award shall be final and may not be subject to review by courts, including the cassation bench. The bench, however, reversed the favourable precedent in the National Mineral Corp. Pvt. Ltd Co. v. Danni Drilling Pvt. Ltd Co. ("National Mineral case"), where the parties have agreed to submit their disputes to arbitration and waived their right of appeal on the final arbitral award. The bench ruled that it still has the power to review the award on fundamental error of law grounds despite parties' express agreement on the finality of the arbitral award.

In the recent arbitral award in the famous case of the government of Ethiopia and Djibouti (represented by the Chemin de Fer Djibouto-Ethiopien ("CDE")), and Consta Joint Venture ("Consta") the majority of the tribunal under the Permanent Court of Arbitration awarded Consta in excess of 20 million Euros, rejecting all of CDE's defenses and counterclaims. The governing law was Ethiopian while arbitration was conducted under the Procedural Rules on Conciliation and Arbitration of Contracts Financed by the European Development Fund ("EDF Rules"). This award was challenged before the cassation bench on the precedent set by the National Mineral case. The bench, on 24 May 2018, ruled that it not only has the jurisdiction to review an EDF arbitral award for fundamental errors of Ethiopian law but also that such errors existed in the case.

Experts say that this jurisdictional ruling could be a groundbreaking precedent affecting existing and future EDF cases in many profound ways and hence calls for a further study. This article, however, is based on the previous National Mineral case on which the Consta's case was based upon.

With the sweeping precedence in the National Mineral case, parties are denied of their right to waive appeal. This creates another wide avenue of review of final arbitral awards besides appeal and annulment (set-aside) under the existing Ethiopian laws of arbitration. Such approach is not consistent with the legislative and judicial approach followed by many contemporary jurisdictions that are progressively abandoning judicial review on substantive grounds including on grounds of

error of law.

Jurisdictions like the United States are moving away from 'manifest disregard of the law' as a ground of annulling awards in the Hall Street Associates v. Mattel case. Many other jurisdictions such as France, Switzerland and countries that have modelled their national laws after the UNCITRAL Model law International Commercial Arbitration do not allow appeal on international arbitral awards on the point of law. Only limited numbers of jurisdictions allow appeal on a mistake of law. One such example is the 1996 English Arbitration Act, §69, which provides that, in a limited category of cases, an award may be subject to appellate review by the English courts for substantive errors of law. However, the right is subject to several restrictions and most importantly allows the parties to waive their rights of appeal by agreement. The English Courts, in practice, have taken a very restrictive approach to allow challenges on error of law ground.

One cannot deny the merit of judicial review in order to guard against mistakes of law. It is to safeguard against unjust and arbitrary awards and avoid the risk of inconsistent decisions to ensure uniform application of the law. Such argument is in line with the cassation bench's rationale in the National Mineral case. However, international arbitral practice dictates that this public interest of ensuring consistency and predictability has been significantly weighed down in favor of the need for finality of awards, except in very limited circumstances.

Interference in a private agreement is contrary to the fundamental goals of international arbitration as it frustrates parties' choice of arbitration as a neutral and independent forum with no risk of national bias or political pressure. Allowing parties to agree on a neutral playing field promotes international business transactions, while protracted multi-stage litigation through appeals and retrials discourages such involvement in the state. A national legal framework hampered by excessive court intervention could negatively affect the effort to attract foreign investment and participate in international commerce. The restrained intervention also makes courts more efficient by avoiding unnecessary diversion of judicial resource.

As we speak, Ethiopia's arbitration regime makes final arbitral awards susceptible to review by the cassation bench for error of law. This position has been solidified by the recent cassation bench's annulment of the PCA's award.

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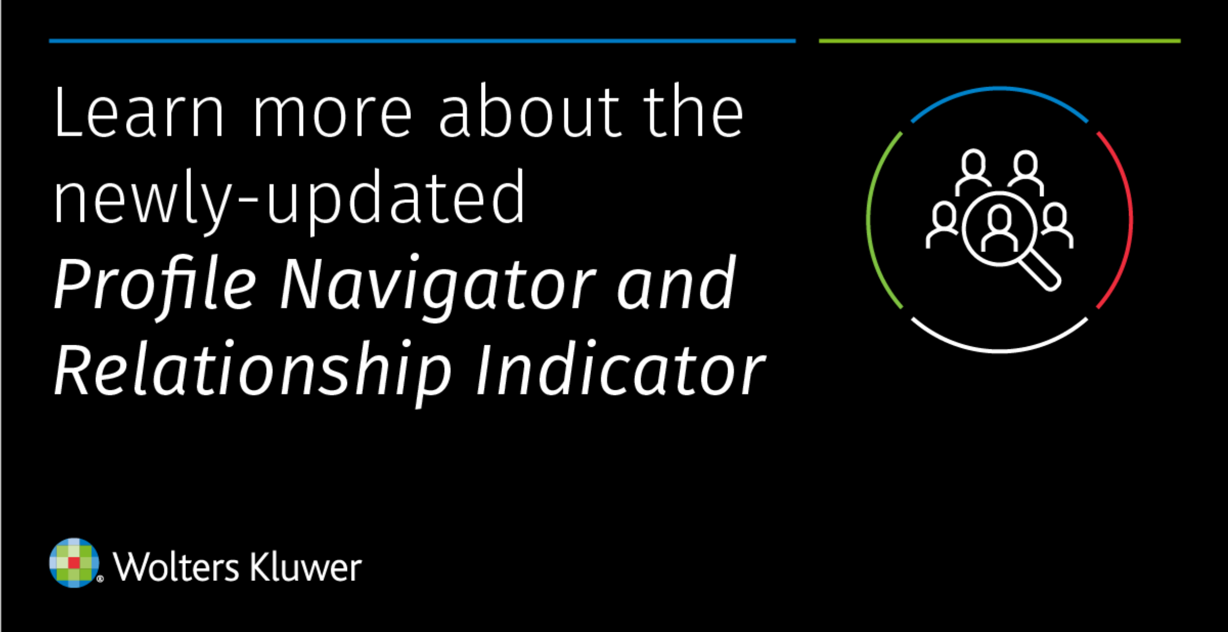


This entry was posted on Sunday, July 22nd, 2018 at 9:00 am and is filed under Africa, Appeal, Arbitral Award, Court of Appeal, Ethiopia, Final Award, Finality, Finality Clause, judicial review, Uncategorized
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