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Lack of Arbitrators' Power to Decide on the Validity of an Arbitral Submission – The Case of Ethiopia

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Arbitration is one of the preferred modes of private dispute settlement. Off its several traits, the cornerstone is the fact that it is based primarily on party autonomy and enables the parties to control almost all aspect of it. On the other hand, States put in place a different review and/or control mechanism on the conduct and process of arbitration for different policy considerations. Within the realm of commercial arbitration, States incorporate into their laws several regulatory limitations that empower their judiciary or other organs to regulate certain aspects of arbitration. Needless to say, no State would want to completely forego its regulatory power in commercial dispute settlements. This is appropriate, necessary even, since it is the State's obligation to ensure that justice is being served, even where parties have agreed to privately settle their dispute. This goes hand in hand with the practical consideration that arbitration cannot stand on its own without the support and backing of the State's law and its institutions, especially the judiciary. As the result, the State inevitably interferes in arbitration, be it in the form of deferring matters to tribunals where a valid arbitration agreement exists or enforcing arbitral awards.

Another form of interference occurs when the principle of competence-competence is not recognized in national laws or is applied with restrictions. The laws of most developed nations explicitly recognizes this principle. For instance, the UK Arbitration Act 1996 under Article 30 recognizes an arbitral tribunal's power to rule on its substantive jurisdiction, including the power to rule on the validity of an arbitration agreement. The 2010 Model Law similarly, under Article 23(1), recognizes the power of an arbitral tribunal to rule on its jurisdiction including on objections raised regarding the validity of an arbitration agreement. Since an arbitral agreement serves as the basis on which arbitral tribunals base their jurisdiction, its validity is paramount. In this post, the term arbitral submission is used to refer to arbitration clauses.

Coming to Ethiopia, an attempt was made in the 1960's to introduce modern arbitration and other forms of dispute resolutions mechanisms such as conciliation and mediation. The Ethiopian Civil Code ('Civil Code') promulgated in 1960 enumerates substantive provisions governing arbitration while the Ethiopian Civil Procedure Code, put in place five years after, governs the procedural aspects. According to these Codes, Ethiopian Courts are involved in different parts of arbitration proceeding, beginning from the appointment of an arbitrator to entertaining enforcement, challenge and appeals. The Civil Code provides arbitrators several powers including the power to decide on their own jurisdiction. However, Article 3330(3) of the Civil Code severely limits this power by stating that arbitrators cannot be allowed to determine the validity of an arbitral submission. Ethiopian law, being the focus of this post, defines an arbitral submission as a contract where

disputing parties appoint an arbitrator to settle their dispute in accordance with the principles of law.

Due to this prohibition, any jurisdictional objection raised on the validity of an arbitral submission will need to be decided not by the arbitral tribunal but by a court of law. The policy reason behind this restriction might be based on the fear that an arbitrator(s) would assume jurisdiction, even based on an invalid arbitral submission, with the objective of seeking arbitrator's fees.[1)] One of the components of a tribunal's jurisdictional power is being empowered to decide on the validity of an arbitral submission, since validity confers jurisdiction. Article 3330(3) of the Civil Code, which is in clear contrast to Section 30(1)(a) of the UK Arbitration Act 1996 and Article 23(1) of the 2010 Model Law, forces parties to seek early court intervention, if/when validity is disputed.

Ethiopia is not a signatory to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. Arbitration in Ethiopia is still at a grass root level and the two Codes, that predate the Model Law, have not yet been revised. Courts in Ethiopia have a high tendency of assuming jurisdiction even where there is a valid arbitration agreement, and the policy reason behind the restriction may not be to ensure that arbitrators do not assume jurisdiction on the basis of an invalid arbitral submission. Setting aside ethical considerations, an award passed on such basis would definitely be up for setting aside. This is recognized under Article V 1(a) of the New York Convention as one of the grounds for refusing enforcement of arbitral awards.

Now more than ever, as Ethiopia is opening its doors to investment and businesses, its laws on arbitration are in need of review and should be made arbitration-friendly. One consideration that should be made, when/if the long overdue review of Ethiopian arbitration laws takes place, is lifting the limitation on arbitrator's power on deciding the validity of an arbitral submission. The courts, on the other hand, should adopt a restrictive approach and give way for arbitral tribunals. As such, Ethiopian courts' should assume a supporting and not a leading role.

References

?1 Bezawork Shimelash, The formation, Content, and Effect of an Arbitral Submission under Ethiopian Law, Journal of Ethiopian Law, Vol XVII (1994)

This entry was posted on Tuesday, August 21st, 2018 at 11:00 am and is filed under Arbitrator Challenges, Arbitrator's mandate, Ethiopia, Jurisdiction of the arbitral tribunal
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