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The New Era of Finality Clauses in Ethiopia: Parties' Right to Waive the Possibility of Appeals

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Almost 4 years ago, *Kluwer Arbitration Blog* published an article titled "The Fate of Finality Clause in Ethiopia" by Mintewab Afework, which clearly examined the parties' prerogative to submit their disputes to arbitration and to waive their right of appeal on the final arbitral award, as applicable at the time. After 4 years, two significant developments for international arbitration in the country have occurred after seismic and valuable legal reforms have taken place.

First, Ethiopia has ratified the 1958 UN Convention on Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention) in February 2020. That paved the way for the country to become a center for continental arbitration in Africa. Second, in April 2021, the Ethiopian Parliament adopted Working Procedure Proclamation No. 1237/2021 on Arbitration and Conciliation (the Proclamation). The Proclamation resulted from the inclusion of modern international arbitration rules and principles. One of these significant milestones is embedded in Article 49(2), which addresses the issue of the finality of the arbitral award rendered by the arbitral tribunal. In fact, the parties' right to appeal arbitral award has been a source of disagreement for many years in the country.

To give a short bird eye view of the past regime, the governing laws of arbitration prior to the Proclamation were the 1960 Civil Code of the Empire of Ethiopia and the Civil Procedure Code of Ethiopia. The Civil Procedure Code specifically provides for appeal in Article 350.1 that "Any party to an arbitration proceeding may, in accordance with the terms of the arbitral submission and in accordance with the conditions specified in Article 351, appeal from any arbitral award". In addition, Article 351.2 recognizes that parties have the freedom and autonomy to waive their right of appeal in full knowledge of the circumstances. From this, one can infer that parties had the right to appeal a final arbitral award, on fulfilment of conditions laid down under Article 351, unless they voluntarily agreed to waive it. In the Dragados J&P Joint Venture v. Saba Construction case, the Federal Supreme Court Cassation Bench (Court of Cassation) decided that although parties may waive the right to appeal in their arbitration agreement, an appeal can still be brought if one of the parties claim that it was unaware of the circumstances. As a result, the award handed down by the arbitrators can still be appealed. Importantly, the Cassation Bench ?

As a result of the adoption of the 1995 FDRE Constitution, a new court structure was installed, enabling regional states to have their own courts and also establishing the cassation powers of the Supreme Court. Before directly dealing with the power of the Court of Cassation on arbitration matters, it is imperative to note that cassation power of the Supreme Court is different from an

appeal. Appeal is a review on the merit for factual and/or legal errors by courts of any stage, while the cassation power is to be exercised to correct a judgment of a *basic* error of law only by the Court of Cassation.

When we look into the question of finality of arbitral award in light of cassation review power of the Supreme Court, in the unpublished decision *National Motors Corp. v General Business Development* Civil Case No. 21849/1997, a Court of Cassation ruled that when parties agree to submit their disputes to arbitration and waive their right of appeal, that also prevents the cassation review of the final arbitral award. The Court, however, reversed this precedent in *National Mineral Corp. Pvt. Company Ltd. Danni Drilling Pvt. Ltd Co.* Civil Case No. 42239, Vol. 10, 2010, in which the parties have agreed to submit their disputes to arbitration and waived their right of appeal against the final arbitral award. The bench ruled that it still has the power to review the award on fundamental error of law grounds, and this is despite the parties' express agreement on the finality of the arbitral award. In interpreting these decisions, it is imperative to understand that the Court of Cassation, as mentioned above, is of the opinion that appeal rights and cassations have different purposes. Ato Almaw Wolie, who is a Former Federal Supreme Court Judge and was one of the 7 judges who rendered the *National Mineral Corp.* decision, mentioned in an interview that '…the waiver of the right of appeal and finality clause should not override the Constitution's ambition to create uniformity of interpretation across the country by correcting fundamental errors of law. In this sense, Ethiopia's ambition to be an arbitration-friendly country should not override Constitution's provisions.

Interestingly, Ato Almaw Wolie's position has been reflected in the Proclamation, and Article 49 treats appeal and cassation in a different way. More specifically, the Proclamation allows parties to waive their right of presenting the case before a cassation court for review based on error of law under their agreement. Greater autonomy of the parties is thus acknowledged, and arbitration is supported. This means that parties have a statutory right to submit an arbitral award for review relying on a fundamental error of law unless they agree to waive this right. Since the court of cassation was not in place during the Imperial Majesty period, the Civil Procedure Code has nothing to say about this.

According to Article 2.4 of the Proclamation No.1234/2021 of the Federal Courts Establishment Proclamations, a decision that violates the Constitution amounts to a fundamental error of law. Those who follow the interpretation of the Court of Cassation may find themselves in the dilemma of whether the Court of Cassation will reject petitions to review awards that violate the parties constitutional right, or not. The main constitutional right involved in arbitration is the due process right, which includes the right to be heard, the right to have an independent, impartial tribunal to adjudicate the case, and the right to equal treatment. If an award violates these constitutional principles, notwithstanding the parties' agreement on the finality of the award and on the waiver of cassation, the award may still be presented to be set aside by the court having jurisdiction over the case by virtue of Article 50. 2 (C&D), which deals with the courts' power to set aside an award. In this sense, allowing parties to agree on the waiver of the cassation review does not mean awards that violate due process rights as established in the Constitution will be valid and enforceable. Rather, parties can request the ordinary court having jurisdiction to set aside the award.

On the other hand, the case is different in cases of appeal. According to Article 50.2 of the Proclamation, appeal from the decision of the arbitral tribunal to the state courts is not allowed, unless parties agree that an appeal is possible. This is one of the most significant differences from its predecessors, the Civil Code and the Civil Procedure Code. According to the previous rules, an

appeal can be filed under Article 350.2 of the Civil Procedure Code from an award made by an arbitral tribunal, provided that the conditions set forth in Article 351 of the Civil Procedure Code are met, and unless the parties have specifically waived the right in knowledge of the circumstances. Accordingly, appeal was a default right of parties under Art 350.2 based on multiple grounds.

The preamble of the new arbitration rule explains what motivates the efforts to make laws arbitration-friendly. The preamble mentioned that "…[arbitration] helps to complement the right to justice and, in particular, contributes to the resolution of investment and commercial related disputes and to the development of the sector." It also added that "…alternative dispute resolution helps in rendering efficient decisions by reducing the cost of the contracting parties…". Since one of the main reasons that makes court litigation cost- and time-intensive is the appeal process, the new approach of the Proclamation will enable parties to arbitration proceedings to be confident that the award will be enforced in a less costly and more timely manner.

Under Ethiopia's new arbitration laws, the parties' right of appeal and cassation review has been outweighed by their autonomy and contractual freedom, as well as the efficiency of the arbitration process. With the country's liberalization and privatization of previously closed sectors for foreigners and private investors, Ethiopia will probably be one of the preferred seats for international arbitration in Africa. Indeed, as Addis Ababa is an important administrative and diplomatic center in Africa, and is the seat of the African Union and African Economic Commission, the future looks bright to arbitrations seated in the country.

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