Kluwer Arbitration Blog

Arbitration in the Era of Market Liberalization in Ethiopia

Mintewab Afework (Aman & Partners LLP) · Thursday, August 22nd, 2024

Ethiopia has been on the pursuit of market liberalization in an effort to boost economic growth. We have been witnessing a wave of new laws in Ethiopia with significant implications to a market that has long been closed to foreigners. In April 2024, a law passed by the Investment Authority opened the import, wholesale, retail and export (of raw coffee, khat, oilseeds, pulses, hides and skins, forest products, poultry and livestock bought from the local market) sectors to foreign investments. In the biggest market liberalization yet, the Council of Ministers has just approved the opening of the banking sector to foreign investment, an area that was long kept out of reach of non-Ethiopians. The digital financial services sector was just recently liberalized in 2022. It is also a recent memory that Safaricom Ethiopia has joined the market as the first private telecom service provider, ending the long era of the monopoly of the state-owned telecom company.

As foreigners eye the market enticed by this liberalization effort, one of their biggest considerations will be their ability to access alternative dispute resolution mechanism like arbitration to avoid political and legal risks. Empirical studies show that arbitration enhances foreign direct investment (FDI) flows. More particularly, investors would want to ensure that any award they may secure abroad will be recognized and enforced in host states.

This article provides an overview of recent changes introduced to the arbitration regime of Ethiopia, such as the ratification of the New York Convention ("NYC") and the subsequent adoption of a national arbitration law with a particular focus on the enforcement of interim measures and awards. It also addresses a recent court precedent that has been an important step forward in creating an arbitration-friendly environment.

Changes in the Arbitration Regime

Ethiopia has been significantly reforming its arbitration regime by ratifying the NYC, enacting an arbitration law in 2021 titled the Arbitration and Conciliation Working Procedure Proclamation no. 1237/2021 ("the Arbitration Law"), and developing positive court precedents in favor of arbitration. These developments are significant departure from the previously scattered arbitration laws that failed to adequately support arbitration proceedings and ensure the enforcement of foreign awards in Ethiopia.

The Arbitration Law largely mirrors the 2006 UNCITRAL Model Law, thereby aligning Ethiopian law with a model that has been widely adopted by countries around the world. It has introduced

major changes that enhance respect for party autonomy and limit court intervention, including limiting the grounds for setting aside awards.

The Arbitration Law includes clauses that prevent disruptive court interference in arbitration. It prohibits courts from intervening in arbitration except where court intervention is specifically provided for in the law (Article 5). Courts are required to dismiss a suit and direct the parties to arbitration if a party raises an objection that there is an arbitration agreement, unless the arbitration agreement is void. In contrast to the prior arbitration provisions under the 1960 Civil Code ("the Civil Code"), the Arbitration Law clearly embraces the principle of *competence-competence* by granting the tribunal the power to decide on its own jurisdiction (Article 19). Previously, arbitrators were able to decide on their own jurisdiction only when such power has been vested in them in the arbitration submission.

The Arbitration Law also addresses the issue of interim measures in detail, while the previous laws were silent on the matter, leaving the judiciary in limbo as to how to entertain requests for such measures. Under the Arbitration Law, interim measures granted by arbitral tribunals are binding in Ethiopia irrespective of the country in which they were granted, subject to the conditions on the recognition and enforcement of foreign awards (Article 25(1)). Unless otherwise agreed by the parties, the arbitral tribunal may issue interim measures upon a request by one of the parties if the tribunal deems the interim measure necessary. The tribunal considers the likelihood of irreparable damage to the applicant if an order is not issued versus the impact of the order on the person against whom the order is sought. In this regard, a person requesting the provisional interim measure may be required by the arbitral tribunal to provide sufficient security to cover the damage that may be caused to the other party. Furthermore, if it is believed that the interim measure was inappropriate or should not have been granted under the circumstance, the party that requested the interim measure may be liable to pay compensation for the damage caused by the interim measure (Articles 21(3), 21(4) and 22(6)). Currently, there is no binding court precedent in this regard, and we have yet to see how courts are going to interpret the law and enforce foreign interim measures.

Recognition and Enforcement of Arbitral Awards

The most significant change under the current developments is with regard to the recognition and enforcement of arbitral awards. It is worthwhile taking a brief look back at the previous practices in order to appreciate the recent developments. Prior to these developments, investors in Ethiopia faced a dilemma in choosing a seat of arbitration for fear of an inability to enforce award in their favor. If an investor chose to designate the seat of arbitration outside of Ethiopia, it risked enforceability of the award in Ethiopia due to the requirement of "reciprocity" under the Civil Procedure Code. Previously, Ethiopian courts interpreted the "reciprocity" requirement to mean the existence of a judicial assistance treaty between the two countries. However, Ethiopia only had a handful of such treaties, thereby curtailing enforcement of awards from all other countries. If an investor, on the other hand, chose Ethiopia as the seat, it opened a door for scrutiny by an Ethiopian court, which has the constitutional right to review final decisions on grounds of fundamental error of law. Court precedents affirmed this position by deciding that, when the seat of arbitration is in Ethiopia, the highest court of Ethiopia has the power to review a final arbitral decision despite a clear finality clause in the arbitration agreement.

With the adoption of the NYC, courts must now recognize and enforce foreign arbitral awards

from member countries, unless the award is set-aside by the limited grounds listed under the NYC. The Arbitration Law further solidifies this by stating that, unless the parties agree otherwise, no review by the Cassation Bench can be undertaken on a final arbitral award on grounds of error of law. This is a significant leap towards an arbitration-friendly environment.

Favorable Interpretation by Courts

We are also beginning to see court precedents that positively interpret the new legal developments. In May 2023, the Cassation Bench of the Federal Supreme Court in the *Heighton Incorporated v. Ministry of Agriculture* (Cassation File No. 225202) case interpreted the requirement of "reciprocity" in a liberal manner. The case was brought before Ethiopian courts to enforce a 2018 GAFTA arbitral award rendered in England in favor of Heighten Incorporated. At the time, Ethiopia was not a signatory of the NYC.

The Ministry of Agriculture challenged the enforcement, claiming that since Ethiopia and England do not have a bilateral treaty and Ethiopia was not a signatory of the NYC, the reciprocity requirement under the law had not been satisfied. The award creditor argued that the English Arbitration Act of 1996 provides for recognition and enforcement of foreign awards even where the award is made in a country that is not a party to the NYC. The lower courts rejected the enforcement request, citing Article 100(1) of the English Arbitration Act of 1996, which the courts construed to indicate that English courts will not uphold awards made in countries that are not signatory to the NYC.

However, the Cassation Bench stated that there are legal grounds for the enforcement of awards made in non-signatory countries of the NYC, citing Article 104 of the English Arbitration Act. It decided that Ethiopian courts should generally consider the law and practice of courts where the award was given to determine whether those courts enforce Ethiopian awards. The Bench remanded the case to the Federal High Court with instructions to assess the enforceability of Ethiopian awards in England through expert testimony or other means by evaluating the practice and the law in England. This decision clarifies that proving reciprocity does not necessarily require the exitance of a judicial assistance treaty, which is in line with the law and practice of many arbitration-friendly jurisdictions.

Conclusion

We hope that courts will continue to uphold a body of jurisprudence that supports arbitration. They shall strive to respect parties' choice of arbitration as a means of dispute settlement, refrain from unwarranted interferences, provide judicial assistance to support arbitration proceedings such as enforcing interim measures, and limit the grounds for challenge on recognition and enforcement of awards by interpreting such grounds narrowly. As Ethiopian markets open, potential investors will undoubtedly want to ensure that Ethiopia remains an arbitration-friendly regime, and courts play an important role in ensuring that.

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This entry was posted on Thursday, August 22nd, 2024 at 8:23 am and is filed under Arbitration Reform, Ethiopia
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