Resolving disputes by arbitration: an encouraging paradigm shift!

(By Yohannes Woldegebriel)

Introduction

Last month, the National Bank of Ethiopia (NBE), organized a discussion on the draft National *Payments and Settlement System proclamation*. This, discussion, which was held at Ghion hotel, was attended by several members of the financial sector and other stakeholders. Representatives of the Addis Ababa Chamber of Commerce and Sectoral Associations (AACCSA) were also among the participants.

The discussion on the bill was unique in many respects. Authorities of the NBE forwarded at their earliest convenience the draft proclamation to AACCSA, albeit with a very short notice, to solicit comments and other inputs from the business community. As usual, the AACCSA quickly formed a task force consisting of members from relevant departments and the Board of Directors to carefully examine the bill and submit comment and suggestions. This is because despite time constraints, the request of the NBE and the issues covered under the draft proclamation merit the careful attention and priorities of AACCSA work.

The other unique feature of the bill is the unprecedented large number of arbitration provisions in the proclamation. Unlike most business related legislations that have been issued over the last decades, this bill marks a dramatic shift and approach on the resolution of commercial disputes. Arbitration has been accepted as a means of disputes resolution pertaining to payments and settlement system. This is quite salutary in view of the fact that the bill necessarily involves business persons and commercial transactions. The law maker in Ethiopia realized the advantage of modern commercial arbitration as means of dispute settlement more than 63 years ago when it incorporated in what was then known as the Addis Ababa Chamber of Commerce under its Charter, which was later issued in the country's official law reporter, the Negarit Gazeta, as General Notice no 39/1947 when it legally mandated it with a power "to resolve commercial and industrial difference through arbitration."

The law maker's decision to provide such power to the Chamber was an understanding of the hard fact that arbitration has been and will remain to be the most suitable means of commercial disputes. Therefore, the National Payments and Settlement System bill which has been prepared by NBE, rightly stipulated numerous arbitration provisions to resolve arbitrable disputes.

The early draft of the bill's arbitration provisions however carry several pitfalls compared to the latest draft tabled for discussion at the Ghion meeting. AACCSA was

provided with a rare privilege to painstakingly examine, comment, and suggest improvement and even redraft some provisions of the bill altogether. In this article, I shall highlight some of AACCSA's input to shape the draft proclamation arbitration provisions.

Before presenting its detailed comment, AACCSA candidly welcome the introduction of fairly detailed arbitration clauses for certain disputes in the draft Proclamation. The draft proclamation, it noted, envisages several legal acts and transactions that are governed under private laws. Commercial relations involve competing interests that seldom results in disputes. Managing such disputes to prevent or avoid further escalation of conflicts and disruption of business relation and if possible, restore harmony by selecting a suitable dispute resolution mechanism is highly desirable. Indeed for commercial disputes, the most suitable and convenient means of dispute resolution is arbitration and other alternative dispute resolution mechanisms. Therefore AACCSA confirmed that arbitration as dispute resolution is in the best interest of AACCSA's constituency and the entire business community in general.

Even though the draft proclamation may be described as a progressive legislation by providing arbitration as dispute settlement mechanisms, the arbitration provisons however, leave much to be desired. Some of the principles embodied in the bill's arbitration articles show major departures from the relevant local and international arbitration rules. For the purpose of this article, I have selected and presented hereunder two issues against and one other in favor the bill.

Appointment of presiding arbitrator (umpire) by parties.

The appointment of a presiding arbitrator is normally the concern of co-arbitrators themselves if the dispute should be referred to a panel of two or more arbitrators. This is particularly evident from article 3332(1) and (2) of the 1960 Civil Code and many other foreign jurisdictions as well as arbitral bodies' arbitration rules.

If the law should leave the appointment of a presiding arbitrator to disgruntled parties, it will be very difficult particularly by a disinterested party to procure his nomination or accept his approval for the nomination by the other party. It is therefore impractical or it takes rather long time until both parties sit together and discuss on the appointment of the chair person of the tribunal. In practice, there have been numerous cases when disputing parties have failed to nominate presiding arbitrator and the dispute is left hanging unresolved and exacerbate existing dispute to a more serious scale.

Where the nomination and appointment of a presiding arbitrator is left to co-arbitrators, as is the case under our civil code, it will be easier for co-arbitrators to make the right selection at the right time. In fact, more than anybody else, co-arbitrators are aware of the best person that can coordinate the tribunal's activities. If parties have already appointed their arbitrators, it is logical that these arbitrators in turn select the umpire. This procedure enables disputing Parties to indirectly select the presiding arbitrator. In fact arbitration bodies such as AACCSA Arbitration Institute (AI) go much further to secure comments of the disputing parties as required by the Revised Arbitration Rule of AACCSA before confirmation of the presiding arbitrator.

Therefore for the foregoing reasons, AACCSA recommended that article 38(2) (a) of the first draft of the proclamation to be redrafted as follow.

"If the dispute is between only two parties each party shall be entitled to appoint one arbitrator and the arbitrators so appointed shall appoint the presiding arbitrator."

Possibilities for appointment of too many arbitrators

AACCSA observed that the draft proclamation provides a possibility for the appointment of numerous arbitrators depending on the number of the parties to the dispute. This conclusion is necessarily drawn from article 38(2) (b) which provides "if the dispute is between three or more parties, *each party shall be entitled to appoint one arbitrator*."

The dimension of parties to an arbitration proceeding may be two or more. In fact parties may be either applicant or respondent. But we can have multiple applicants or respondents too. Where parties to an arbitration proceeding is more than one i.e., more than one applicant and one respondent, all of them are not entitled to appoint their respective arbitrator and the number of arbitrators appointed cannot be the same as the number of the parties involved. Normally arbitration is conducted by a sole arbitrator or three arbitrators. In some instance, it may be five. The basic principle provided under our civil code is that where the number of arbitrators is *even*, it should be *odd* number to enable for any ruling or award to be rendered by a majority vote and break any situation of deadlock.

The administration of arbitration by a legally mandated arbitration body such as AACCSA AI has proved that it is often unwise to appoint more than three arbitrators. This is because there are lots of administrative problems to coordinate and manage the conduct and appointment of the arbitration sessions and other related matters. With regard to the appointment of arbitrators, in a multi-party arbitration

proceeding, all applicants and all respondents should select co-arbitrator or arbitrators jointly and not each of them are entitled to appoint a co-arbitrator. In such circumstances, each applicant or each respondent would have to sit together and discuss on harmonizing their interests and agree on the selection of co- arbitrators.

Article 10(3) of the Revised Arbitration rule of the AACCSA resolve the problem of appointing co-arbitrators on multiple parties' arbitration proceeding as follow:

> "Where there are multiple parties on either side or the dispute is to be decided by more than one arbitrator, the multiple claimants, jointly, and the multiple respondents, jointly shall nominate an equal number of arbitrators. If either side fails to make such joint nomination, the Institute shall make the nomination for that side. If the circumstances so warrant the Institute may nominate the entire arbitral tribunal, unless otherwise agreed by the parties."

Finality of arbitration Award

The draft proclamation has also introduced one of the most widely recognized and accepted principle of arbitration. Arbitration award should be in principle, final and binding subject however, to a review on manifestly illegal award by the tribunal. It is indeed wastage of money, time and other valuable resources to resort to arbitration and then file a case at court all over again. It would be better for a party to start court proceeding from the very outset than disagree on the finality of an arbitration award. Arbitration award may be reviewable and challenged on those grounds for example, under article 351 of the civil procedure code. The restricted grounds to challenge arbitration award is quite proper and in the absence of these grounds, it is absolutely right to accept arbitration award as final and binding. This ultimately saves time and resources of the parties to take their dispute to state courts on unacceptable and frivolous grounds. Accordingly ACCSSA welcomed the draft provision on the finality of arbitral award as it is.

Conclusion

Much to the satisfaction of AACCSA and indeed the business community, NBE endorsed most suggestions in its latest version of the draft proclamation. This is quite encouraging trend between the government and the business community for mutual advantage and common goal. NBE must be congratulated for its early initiative to solicit inputs and suggestions from AACCSA and even accept suggested amendments. The making of national laws is basically not the domain of government bodies alone. The business community has repeatedly contributed and will continue to support in

shaping various draft legislations when requested and on its own initiative. Government bodies should also accept that the business community has a valuable role to play in various phases of the preparation and drafting of laws as well. Most importantly, however, the recognition and acceptance by the NBE recent bill on the resolution of commercial dispute resolution using arbitration is quite exemplary and worthy of emphasizing.