

Confidentiality: the essential attribute of Arbitration.
(By Yohannes Woldegebriel)

There is no doubt that arbitration is a convenient and perhaps the most suitable dispute resolution mechanism that businesspersons across the world naturally prefer to resolve their disputes. Businesspersons' choice to arbitration in solving commercial disputes is made, as usual, on their forward looking and prudent judgment to maintain their credibility and avoid adverse consequences that comes out of the publicity of the causes and outcome of their disputes. There is also another important reason that justifies confidentiality; every businessperson wish to maintain its legitimate trade secretes that has been the main reason for its success. Some of the major multinational companies in the world managed to ensure their long existence and profitability in the market owing to their strict adherences of company or trade secrets.

Commercial disputes are seldom unavoidable in business activities. Most business controversies are settled amicably by negotiation held by the parties themselves. On the other hand, many commercial disputes are also solved with the latent or active involvement of third persons that tries to urge disputing parties to reach to settlement themselves or by a proposed solution. Few disputes however, require to be solved by arbitration in situations where businesspersons are clever enough to insert an arbitration clause or agree on arbitral submission and effectively withdraw the involvement of state courts.

Arbitration, whether conducted on ad hoc basis or administered by an arbitration institution, implies privacy of the proceedings. The parties to an arbitration agreement decided to oust the jurisdiction of courts in respect of any dispute arising from their contractual or even non-contractual relationship for an overriding reason to solve the dispute themselves. If businesspersons failed to agree on arbitration to resolve their disputes, obviously courts will be required to resolve the dispute, which are under legal obligation to consider the case openly and interested persons including the media have almost unrestricted access to witness each and every phase of the proceedings.

Confidentiality of arbitration proceeding is necessary because the applicable law requires and it is related with the privacy right of the parties. Arbitration is a private justice mechanism of resolving disputes that arise or has arisen between parties. As a

result, it is quite logical that every step of the arbitration proceedings, documents and information is kept in secrecy.

Dispute can occur for various reasons. Commercial dispute may arise out of contractual or non-contractual relationships. Most commercial disputes arise due to non-performance of obligations, which may have several reasons including but not limited to bad faith, lack of experience or capacity, misrepresentation, inadequate resource, unexpected problems that rendered execution of the contract expensive or onerous, etc ... The success of a businessperson or organization is mainly attributable to its unrivaled credibility and in this regard, it is needless to mention here that every businessperson understands the great benefit of his/her business goodwill.

Disclosure of business disputes that are under a confidential arbitration proceeding shall necessarily result in the publicity of the causes and consequences of a dispute. It brings to the attention of even disinterested audience hasty and potentially explosive accusation of dishonesty of one or more disputing party in the eyes of its long time business partners or customers, tarnish its image, reveal temporary problems which may be resolved in the short run but may entail lasting negative business effect and put the business vulnerable to its competitor. Put simply, disclosures of an arbitration proceeding will not only become damaging but defeating of the entire purpose of the arbitration.

Arbitration of commercial disputes involves several persons and activities that are covered by a legal and ethical obligation to prevent and avoid the damaging and defeating effects of disclosures. These are the parties themselves, the arbitrators and in the entire staff of arbitration institutions and in fact other relevant persons that became aware of the arbitration proceeding such as experts. The statement of claims, statement of defense, counterclaims, evidences, statement of witnesses or experts, submissions, interim awards, awards and all correspondences with the arbitrators, the parties and the institution that administer the arbitration must also be kept confidential.

The Revised Arbitration Rule of the Addis Ababa Chamber of Commerce and Sectoral Association (AACCSA) strictly maintain the principle of privacy and confidentiality of all arbitration proceedings conducted by and documents kept under the custody of the Arbitration Institute. Articles 21.7, 22.3, and 26.5 specifically require

arbitrators, the parties and the staff of the arbitration institute to maintain secrecy. The statement of acceptance and declaration of independence form that each arbitrator willfully sign and consent to accept before assuming the towering responsibility to arbitrate, among others, provide several terms and conditions and specifically, obligates arbitrators to “keep confidential all information coming to his knowledge as a result of his participation in the proceeding as well as the contents of any award by the tribunal.”

Disclosure of an arbitration proceeding and documents may be made for a legitimate reason of enforcing rights or when required by law or ordered by courts. There are very limited instances where disclosure of cases under arbitration may be made and further this may be subjected to other procedural requirements. For example, an award may be publicized upon the written consent of both parties in the arbitration proceeding and if the arbitration is administered by the Arbitration Institute as in the case of the AACCSA Arbitration Institute, the later must be so informed in writing.

In cases of institutional arbitration administered by the Arbitration Institute of AACCSA the Revised Arbitration Rule become part of the contract and agreement to arbitrate and hence legally binding for all parties involved. Therefore, any breaches of this contractual commitment result in civil and criminal liability under the relevant provisions of the civil and the criminal code.

Businesspersons often resort to arbitration, among others, to avoid publicity of their disputes that invariably damages their good business relation with the other party and indeed with their customers at large. Legally unauthorized and unwarranted disclosure of any document or information that forms part of the arbitration proceeding is not only a betrayal of the trust on the arbitration system but also a violation of the fundamental rights of parties. Unauthorized and illegal disclosure of the confidentiality of arbitration for undeserved monetary advantages of individuals or institutions is even more serious violation against rights of all persons involved in an arbitration proceedings and justice. Where unauthorized and illegal disclosure of an arbitration proceeding is made by the arbitrators that are professionals of law, engineering, insurance, labour, etc...particularly with their name appearing for instance in the award, it is often assumed to be an illicit act of soliciting oneself for nomination and appointment as an arbitrator at the expense of others which is ethically unacceptable.