The Marching of New Era for Commercial Arbitration in Ethiopia: Making Ethiopia an Arbitration-friendly Seat?

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Abstract

Arbitration has gained prominence as a preferred forum for commercial dispute resolution, prompting nation states to compete for the coveted title of an arbitration-friendly seat. Ensuring the right legal environment is a necessary, though not sufficient, condition in this journey. Unfortunately, Ethiopia has left behind in promoting arbitration, despite the advent of long-lasting arbitration laws. Legal and institutional pitfalls were among the factors frequently signposted as a reason for the underdeveloped arbitral tradition. In a bid to catch up, Ethiopia recently overhauled its hitherto existing arbitration laws with the ordinance of Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021. This paper aims to assess the role of Ethiopia's new law in making the country an arbitration-friendly seat through qualitatively examining its progressions and retrogressions in light of both fundamental and contemporary notions of arbitration. The paper finds that Ethiopia has taken a step towards arbitration friendliness with the new ordinance, but there remain pressing concerns yet to be advanced.

Keywords: Arbitration-friendly, Commercial Arbitration, Arbitration Seat, The New York Convention, The UNCITRAL Model Law

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ISSN (Print): 2664-3979 ISSN (Online): 2791-2752
https://journals.hu.edu.et/hu-journals/index.php/hujl

1. Introduction

Attributed to its venerable virtues of flexibility, relative certainty, promptness and efficiency, ***"arbitration"*** offers the best commercial dispute resolution forum — compared to litigation.[1] Arbitration as a consensual out-of-court dispute resolution mechanism (DRM) has also vitally contributed for the settlement of a plethora of civil matters. Nowadays, arbitration as a private system of adjudication has become the prevalent norm.[2] In an effort to reap all the benefits of arbitration, nation-states are in a stiff competition in the journey of becoming an arbitration-friendly seat. According to the definition of Delos Guide to Arbitration Places (GAP),[3] a ***"safe seat"*** for arbitration is those places where the legal framework and practice of the court support recourse to arbitration as a fair, just and cost-effective DRM. From the stand point of a legal framework, thanks to the paramount importance of the UNCITRAL model law, national states are working towards adopting the right legal environment in line with modern arbitration principles and practices.[4]

In a country like Ethiopia where there is rampant court congestion, the aspiration to become an arbitration-friendly seat could open a room to take advantage in circumventing and/or reducing case congestion by switching their settlement destine to arbitration tribunals. Incontrovertibly, a reduction of case backlogs leave judges with an increased possibility to render efficient and effective judgment. Being an arbitration-friendly seat, in another continuum, results in the proliferation of domestic arbitrations, increment of FDI and cross-border trade. However, Ethiopia, long after the advent of relatively modern arbitration rules through the

[1]Zekarias Keneaa, 'Arbitrability in Ethiopia: Posing the Problem' (1994) 17 Journal of Ethiopian Law 116 <https://www.africabib.org/rec.php?RID=Q00014782> accessed 15 March 2022

[2] Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008) <https://www.cambridge.org> accessed 14 March 2022

[3] David D Caron and Maxi Scherer, *Delos Guide to Arbitration Places* (Delos Dispute Resolution, [1st] edn 2018) < https://delosdr.org/gap/> accessed 12 March 2022

[4] UN Commission on International Trade Law Secretariat, 'International Commercial Arbitration: Possible Future Work in the Area of International Commercial Arbitration': <https://digitallibrary.un.org/record/1492931> accessed 23 March 2022

instrumentality of the Civil Code and the Civil Procedure Code, remains outside the camp of arbitration-friendly systems.[5] The legal and institutional lacunas are among the factors frequently signposted as a reason for Ethiopia's underdeveloped arbitral tradition. The hitherto existing arbitration laws were criticized for their sketchiness and incomprehensiveness.[6]

Being cognizant of the legal pitfalls, Ethiopia has recently overhauled its arbitration laws to become a hub of international commercial dispute resolution. Undeniably, adoption of an up-to-date and adequate legal framework is not a '***sufficient condition'*** to make a country an arbitration-friendly seat.[7] An independent, competent and efficient judiciary and arbitration lawyers, arbitration minded business community, accessible and secure seat of arbitration and ethical fortitudes, among other factors, are required to bring life to such decorated and ample law.[8] As a result, any effort made to examine the arbitration friendliness of a nation should essentially explore all those determinant factors. Yet, having an adequate law is a '***necessary condition'*** to be labeled and recognized as an arbitration-friendly seat. This article, in an effort to examine the arbitration friendliness of Ethiopia, is confined to (leaving other factors aside) appraisal of the Ethiopian Arbitration and Conciliation Working Procedure Proclamation (**hereinafter,** "The New Arbitration Law").[9] In so doing, not the whole body of the new law is explored. Only those rules and principles, as enshrined under the new arbitration law, professed as

[5] Hailegebriel Feyissa, 'The Role of Ethiopian Courts in Commercial Arbitration' (2010) 4 Mizan Law Review 297 <https://www.ajol.info/index.php/mlr/article/view/63090/50958> accessed 23 Febraury 2022

[6] Alemayehu Yismawu Demamu, 'The Need to Establish a Workable, Modern, and Institutionalized Commercial Arbitration in Ethiopia' (2015) 4 (1) Haramaya Law Review 37, 42-46 <https://www.ajol.info/index.php/hlr/article/view/148617/138119> accessed 23 February 2022

[7] Fabien Gelinas, 'Arbitration and the Global Economy: The Challenges Ahead' (Social Science Research Network 2000) SSRN Scholarly Paper 1342341 <https://papers.ssrn.com/abstract=1342341> accessed 23 March 2022

[8] Caron and Scherer (n 3) 2

[9] Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021, Fed. Neg. Gaz., Year 27, No. 21, 2 April 2021 (hereinafter 'The New Arbitration Law') art 7 (7)

indispensable barometers for the determination of arbitration friendliness by the arbitration community will be addressed.

To attain the purpose of the paper, the author has applied a qualitatively approached doctrinal legal research method and thereby provided a systematic exposition of the rules governing arbitration in the new arbitration law and analysis the relationship between each rules. The work steps further to intensively evaluate the dearth of the new arbitration law and recommend changes to the rules found inadequate. The author's approach is molded after the works of Loon Fuller and Fekadu Petros on a related thematic area. In his theory of adjudication, Loon Fuller identified essential and optimal requirements of institutions of election, contract and adjudication as underlying institutions of dispute resolution.[10] In related work, Fekadu Petros has also made use of these essential and optimal standards to enunciate the difference between election, contract and adjudication as institutions of dispute resolution.[11]

Taking insight from the approach of these authors, this study identifies some standards as indicators of arbitration friendliness by categorizing them into fundamental and optimal standards to be able to measure arbitration friendliness of the new Ethiopian arbitration law. The fundamental standards are those defining concepts and rules of arbitration without which the institution of arbitration could fails in its original purpose of inauguration. The optimal standards are those contemporary rules and concepts of arbitration that raise the institution of arbitration to an ideal (perfect) level of realization. If someone is cynical of the appropriateness and relevance of those barometers of arbitration friendliness, it equally places the validity of the analysis and finding of this paper into question. Nevertheless, as it is articulated in section two of this article, since the rules and principles of arbitration used as standards for determination of arbitration friendliness by the author are those

[10] Lon L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 (2) Harvard Law Review 353, 363

[11] Fekadu Petros, 'Underlying Distinctions between ADR, "Shimglina" and Arbitration' (2010) 3 Mizan Law Review 105 <http://www.ajol.info/index.php/mlr/article/view/54008> accessed 23 February 2022

rules and principles which are highly celebrated in the realm of international arbitration, they do not invite questions of appropriateness and relevancy at any cost. To put one necessary footnote for the reader, no reference to national arbitral laws of different states, institutional arbitration rules and model laws in this article have the primary purpose of adopting comparative research approach. They are rather used for the purpose of persuasion and articulation of the subject matter understudy.

Depending on the aforementioned backdrops, part two of this article, which immediately follows the introductory part, contains five subsections destined to the articulation of fundamental standards for the determination of arbitration friendliness and simultaneously juxtaposed them with the rules and principles of arbitration enshrined under the new Ethiopian Arbitration Law to be able to determine whether it is arbitration-friendly or not. The third section examines the notion of multiparty arbitration as an optimal standard for the determination of arbitration friendliness vis-à-vis the progresses and troubles of the new Ethiopian Arbitration law in regulating the subject matter. Concluding remark and suggestion of the way forward makes the fourth and final part of this article.

2. Fundamental Standards for the Determination of Arbitration Friendliness

There are no hard and fast rules on the proper barometers for the determination of arbitration friendliness. However, it is possible to incontrovertibly point out some standards as indicators of arbitration friendliness from practices and principles which have acquired high level of acceptance before arbitration community. These practices and principles can be found in the works done by international working

groups,[12] national arbitration legislations, and arbitration conventions.[13] Such practices and principles can also be discerned from books and articles published by distinguished practitioners and scholars of arbitration. A further source of such concepts and practices can also be found in specific institutional arbitration rules.[14]

In the same vein with international literatures, the majority of literatures written on arbitration in Ethiopia so far pleasantly accept an expanded scope of arbitral matters, optimized party autonomy, increased power of arbitral tribunal, and adoption of minimal court intervention and pro-enforcement approach as an arbitration friendly gesture which needs to be promoted. These pro-arbitration gestures form part of the so called rudimentary pro-arbitration rules and concepts labeled as fundamental standards for the determination of arbitration friendliness by the author of this work.

In his old-aged contribution, Zekarias Keneaa succinctly articulates how the determination of the scope of arbitrable matters remains an ache in Ethiopia. He poses the problem that Ethiopian laws lack adequate guidelines for the determination of arbitrability.[15] On another note, Aron has reached a seemingly erroneous conclusion that portrays inarbitrability as a principle and arbitrability as an exception to be provided by the law after a systematic explanation of arbitrable matters and exposition of their related problems.[16] In one of his work, Seyoum Yohannes very well portrays the necessity of party autonomy in modern arbitration though the work

[12] The works of the International Bar Association (IBA) such as IBA rules on taking of evidence, IBA Guidelines on conflict of interest, IBA Guidelines on party representation and the model laws, notes, guidelines, reports prepared by international organization such as UNCITRAL, ICC, CIArb are good indicators of works done by international working groups which aimed at indicating best practices and principles in international arbitration.

[13] Robin Oldenstam and Kristoffer Löf, *Best Practice in International Arbitration* (Universitetforlaget Oslo 2015) accessed 15 March 2022

[14] ibid

[15] Keneaa (n 1)

[16] Aron Degol, 'Notes on Arbitrability Under Ethiopian Law' (2011) 5 Mizan Law Review 150 <https://www.ajol.info/index.php/mlr/article/view/145484/135011> accessed 23 February 2022

was primarily confined to the examination of the role of party autonomy in determining substantive law applicable to the merit of the dispute.[17]

Haile Gabriel Feyissa, after revealing the supportive role played by Ethiopian courts, concluded that Ethiopian courts generally assume an extended role, especially during the initial two stages of arbitration. He stresses the existence of premature judicial intervention during arbitral proceedings, broader judicial review of arbitral awards in the form of appeal, setting aside, and cassation review, and stringent conditions for enforcement of foreign arbitral awards which technically denies their enforcement in Ethiopia.[18] Other writers such as Alemnewu,[19] Brihanu,[20] and Diguma[21] have also explain the existence of maximal court intervention and quest for the reform of Ethiopian laws in light of modern arbitration frameworks. In related work, Solomon Emiru has remarked that Ethiopian arbitration law excessively restricts the power of arbitral tribunal by failing to fully recognize the principle of competence-competence, remaining silent on the principle of separability, and adopting a restrictive interpretation of problematic arbitration clauses.[22]

Another category of literature written on the subject matter aspires to examine the enforcement aspect of awards, an aspect that plays a crucial role in boosting the

[17] Seyoum Yohannes Tesfay, 'The Normative Basis for Decision on the Merits in Commercial Arbitration: The Extent of Party Autonomy' (2017) 10 Mizan Law Review 341

[18] Feyissa (n 5)

[19] Alemnew Dessie, 'The Extent of Court Intervention in Arbitration Proceedings: Ethiopian Arbitration Law in Focus' (2019) 2 Sch Int J Law Crime Justice 54 <https://www.researchgate.net/publication/340633799> accessed 25 February 2022

[20] Birhanu Beyene, 'Cassation Review of Arbitral Awards: Does the Law Authorize It?' (2013) 2 Oromia Law Journal 112<https://www.ajol.info/index.php/olj/article/view/97100/86406> accessed 25 February 2022 AD. See Also Birhanu Beyene 'The Degree of Courts Control on Arbitration under Ethiopian Law: Is It to the Right Amount?' (2012) 1 (1) <https://www.ajol.info/index.php/olj/article/view/82422/72576> Accessed 25 February 2022

[21] Gellila Haile Duguma, 'Judicial Review of Arbitral Awards by Courts as a Means of Remedy: A Comparative Analysis of the Laws of Ethiopia, The United Kingdom, and The United States' (LLM Short Thesis, Central European University 2018) <http://www.etd.ceu.edu/2018/diguma_gelila.pdf> accessed 25 February 2022

[22] Solomon Emiru Gerese, 'Comparative Analysis of Scope of Jurisdiction of Arbitrators under the Ethiopian Civil Code of 1960' (LLM Short Thesis, Central European University 2009) <http://www.etd.ceu.edu/2009/gerese_solomon.pdf> accessed 25 February 2022

country's goodwill as an arbitration-friendly. Writers give due regard to enforcement of foreign arbitral awards except for the work of Birhanu that attempts to expound enforcement of domestic awards.[23] Writers like Fekadu[24] and Tecklehagos[25] reveal how much Ethiopia adopted an anti-enforcement approach riddled by a lack of similarity in interpretation and application of grounds for recognition and enforcement of foreign arbitral awards.

To get rid of such backwardness, Ethiopia has recently revitalized its arbitration law. Now, legal practitioners, academicians, and other concerned organs are zealous to know the progresses brought by the new law and its implication on the overall arbitration stance of Ethiopia. So far, slight attempts have been made by bloggers to explain the changes brought by the new law. This work is a new approach to studying the subject matter in two prisms. One, unlike most prevailing works that have attempted to examine a single aspect of the Ethiopian arbitration regime, it strives to analyze all relevant aspects of arbitration law that have an eventual effect on the determination of arbitration friendliness. Two, it is a breakthrough in examining the role of the new Ethiopian arbitration law in making the country an arbitration-friendly seat. Hence, in the following sub-sections the author will scrutinizes the basics of these fundamental standards and simultaneously juxtapose them with the rules and principles of arbitrations enshrined under the new Ethiopian Arbitration Law to be able to determine arbitration friendliness of the new law.

[23]Birhanu Beyene, 'The Homologation of Domestic Arbitral Awards in Ethiopia' <https://www.researchgate.net/publication/256042287>> accessed 26 February 2022

[24] Fekadu Petros, 'The Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Advantages, Disadvantages and Some Remarks on Ethiopia's Course of Action Ahead' (2014) 8 (2) Mizan Law Review 470 <https://www.ajol.info/index.php/mlr/article/view/117556/107114> accessed 25 February 2022

[25] Tecle Hagos Bahta, 'Recognition and Enforcement of Foreign Arbitral Awards in Civil and Commercial Matters in Ethiopia' (2011) 5 Mizan Law Review 105 <ttps://www.ajol.info/index.php/mlr/article/view/68771/56836> accessed 7 May 2022

2.1. Determination of Arbitrability in Modern Arbitration Laws

Arbitrability, in its objective perception, is used to describe disputes amenable to arbitration.[26] Not all disputes are amenable for determination by arbitration due to some public policy reasons. The older justification for inarbitrability was the perception that the referral of some categories of dispute to arbitration, an institution not controlled by the state itself, goes against sovereign dignity. Today, arbitration friendly legal systems have relinquished this view.[27] Nowadays, beneath every restriction on arbitrability there exists one solid justification.[28] The central theme behind non-arbitrability of certain disputes is a perception that only a court could correctly interpret matters involving public concern and give effect to it in accordance with the intention of the national parliament.[29]

So far, states have adopted different approaches in crafting their arbitrability provision in national laws. A close inspection of various national laws reveals the following three dominant approaches for determining arbitrability. Some states employed the "disposal right approach" and accordingly, matters which the parties may freely dispose of are made arbitrable. Other states have adopted the approach of inalienable right for arbitrability and declared inalienable subject matters inarbitable.[30] Inalienable rights, among other rights, relate to questions of personal status and capacity, divorce, or judicial separation that majorly contains non-economic interests.[31] However, according to some state laws that follow the inalienable rights approach, some non-monetary claims can still be arbitrable if

[26] Bernard Hanotiau, 'The Law Applicable to Arbitrability' (2014) 26 Singapore Academy of Law Journal 874
[27] Beata Kozubovska, 'Trends in Arbitrability' (2014) 1 (2) IALS Student Law Review 20 <https://sas-space.sas.ac.uk/5615/> accessed 23 March 2022
[28] Andrew Rogers, 'Arbitrability' (1992) 1 Asia Pacific Law Review 1 <https://www.tandfonline.com/doi/full/10.1080/18758444.1992.11787959> accessed 23 March 2022
[29] ibid
[30] Sofia Elena Cozac, 'Arbitrability of Disputes and Jurisdiction of Arbitrators'' [2018] Rev Stiinte Juridice 231
[31] ibid

parties are capable of concluding a compromise upon the matter in dispute. Some other states deploy the "listing approach" by enumerating matters which are considered inarbitrable.[32]

In a short, in deciding arbitrability, each state may tail it following its own economic and social policy.[33] Today, the gradual decline of judicial hostility towards arbitration has brought an expansion of the domain of arbitrable matters.[34] Whatever of the aforementioned approaches that the state follows in determining issues of arbitrability, expansion of the domain of arbitrable matters has become the new normal in modern arbitration laws.

The old Ethiopian arbitration regimes were blamed for lack of general guidelines for determination of arbitrability.[35] Even, some scholars argued that only the general principle of public policy laid the ground for determination of arbitrability.[36] The new Ethiopian arbitration law, however, demonstrates relative progress in the determination of arbitrability compared to the old system. Nevertheless, a critical examination of the new law's approach towards determination of arbitrability unveils that the law has not brought a plenary correction to the problem and there still remain issues to be resolved.

The new law has opted for the stipulation of inarbitrable matters rather than providing a general framework as it has promised in the preamble. Accordingly, we may come across some basic exclusionary rules adopted by the new law which

[32] See Italian Rules of Civil Procedure art 806, Switzerland Federal act on Private international law art 177

[33] Blackaby Nigel and others, *Redfern and Hunter on International Arbitration*, vol 1 (Oxford University Press 2015) <http://oxia.ouplaw.com/view/10.1093/law/9780198714248.001.0001/law-9780198714248> accessed 24 March 2022

[34] Harshad Pathak and Pratyush Panjwani, 'Mandatory Rules and the Dwindling Restraint of Arbitrability' (2018) 5 NLUD Student Law Journal 282

[35] Keneaa (n 1) 117

[36] Tilahun Teshome, 'The Legal Regime Governing Arbitration in Ethiopia: A Synopsis' (2007) 1 Ethiopian Bar Review 117, 125

eventually have the effect of creating chaos in the identification of arbitrable matters in Ethiopia.

The first exclusionary rule is the outright subject matter exclusion adopted commencing from sub-articles 1-8 of article 7. The writer is cynical of this outright exclusion of certain subject matters through the listing approach. Some cases like tax disputes, bankruptcy issues, dissolution of business organizations, and trade and consumer protection matters are neither of sheer public interests nor pure economic concerns. They involve both matters of public concern and individual economic interest. Now the argument is, if it is a wise approach to out-rightly and unconditionally exclude these matters from the ambit of arbitration. Other national arbitral laws tackled such issues entangled with both public and private concerns by providing a general framework for arbitrability in terms of either the "Disposal right approach"[37] or "Inalienable right approach"[38] and thereby leaving room for the judiciary or the arbitral tribunal to determine the arbitrability on a case-by-case basis.

Eventually, such an outright exclusion of certain subject matters from the ambit of arbitrability through the listing approach narrows the domain of arbitrable matters. The hitherto existing laws on arbitration in Ethiopia, in this regard, had at least left a possibility for arbitrability of civil matters not explicitly deemed inarbitrable by law. It was argued that under the old saga at least from the point of view of the law, administrative contracts were the only matters explicitly excluded from the ambit of arbitration by Article 315 (2) of the Civil Procedure Code (CPC). This argument is also well corroborated by the silence of the Civil Code (CC) on matters capable of being arbitrated and stipulation for arbitrability of plethora of civil matters here and there in various substantive laws of the country. Hence, it may be concluded that except for the inarbitrability of administrative contracts which has been around for over sixty years, there was a possibility to determine the arbitrability or

[37] Belgium, Italy, Netherlands, and Sweden are among the countries which adopted this approach.
[38] Section 1030ff of the German ZPO and Article 582ff of the Austrian Code on Civil Procedure

inarbitrability of other civil matters on a case-by-case basis for the judiciary. Surprisingly, however, the new proclamation has come up with areas at least not explicitly excluded from the ambit of arbitrable matters for the last over sixty years through adopting the listing approach. This is an indication of retrogression rather than being an indication of progression especially if it is seen in light of the global trend toward increasing the domain of arbitrable matters.

The second exclusionary rule applied by the new law is the legislative exclusion under Article 7 (10). The Proclamation leaves room for other laws to make other matters inarbitrable. This is an open-ended discretion that enables the law-maker to list as many non-arbitrable matters as possible in any law that is going to be issued. The inclusion of this provision may potentially be a threat to the general policy of arbitration by creating uncertainty as to what matters are arbitrable and what matters are not. It leaves a wide room for the government to have long arms on arbitrability of matters.

The other volatility created by the new law is the issue of drawing its relationship with other laws. In Ethiopia, labor matters are arbitrable from the very codification history of labor law. This trend is maintained in the existing labor law too.[39] The Cooperative Societies Proclamation as well allows members of the society to resolve their differences through arbitration.[40]

Now, imagine the misnomer between these laws and the new arbitration law. Assume that parties have agreed to arbitrate their case based on these permissive laws. However, the subject matter under which the parties agreed to arbitrate overtly falls under inarbitrable subject matter by the new law in either of the exclusionary rules discussed above. Now the question is which law prevails and through which

[39] Labor Proclamation No. 1156/2019, Fed. Neg. Gaz., 25th year, No 89, Addis Ababa, 5th September, art 144(1)

[40] Cooperative societies proclamation No. 985/2016, Fed. Neg. gaz., 23th year, No 2, Addis Ababa, art 62-67

law does the arbitral tribunal/courts determine the arbitrability or otherwise of the dispute.

To add a more concrete illustration, Article 42 (3) of the E-Transaction law permitted settlement of E-Commerce disputes through arbitration in cases of failure of its settlement via an internal compliant mechanism. Now let's assume that a dispute arises between E-Commerce Operator and a consumer and the parties require settlement through arbitration. On the other side of the continuum, consumer protection disputes are out-rightly excluded from arbitrability by the new arbitration law. So, which law is going to be applied to determine arbitrability?

The same paradox was to be created with disputes emanating from administrative contracts. The Ethiopian Roads Authority, the Ethiopian Civil Aviation Agency, and the Ethiopian Privatization Agency are among the administrative bodies that can resolve disputes through arbitration.[41] Similarly, the Public-Private Partnership Proclamation empowers government agencies to enter into arbitration agreements for resolution of disputes.[42]

Conversely, administrative contracts are made inarbitrable under the new law. Had it not been for the exceptional rule under the new arbitration law that recognizes the arbitrability of administrative contracts in cases provided by the law, we may encounter the same problem raised above with labor, cooperative societies, and consumer dispute scenarios.[43] However, the arbitration law succinctly responded to such potential deadlock concerning the arbitrability of administrative contracts by inserting an exception which allows arbitrability of administrative contracts in cases provided by other laws. Again the question is, can we use the same panacea for the other cases enunciated above? At this juncture, it is vital to spotlight on the

[41] Yohannes W/Gebriel, 'Institutional Commercial Arbitration under Ethiopian Law: The Case of Chamber Arbitration Institute' (2009) 5 Business law series AAU school of law 78
[42] Public-private partnership proclamation 1076/2018, Fed. Neg. Gaz., 24th Year No. 28, Addis Ababa, 22nd February, 2018, Art. 59
[43] The New Arbitration Law (n 9) Art. 7 (7)

ISSN (Print): 2664-3979 ISSN (Online): 2791-2752
https://journals.hu.edu.et/hu-journals/index.php/hujl

discrepancy between the wordings of the Amharic and English version of the proclamation. Hence, we need to read article 7 (7) of the English version circumventing the word "***Not***" so as to take the right essence of the article.

All these stalemates tell us that the issue of arbitrability is not settled yet by the new law and is fraught with controversy. A law that hosts controversy in the determination of arbitrability is not an arbitration-friendly law at least in this respect.

The early draft provision of arbitration rules prepared by Professor Tilahun Teshome under the auspices of the then Ethiopian Arbitration and Conciliation Center, in brief, had by far adopted a better approach to the determination of arbitrability. The draft had a provision that reads: '…unless mandatorily provided by other laws, any dispute involving economic interest is arbitrable".[44] Apart from this explicit stipulation, the draft stipulates that '…any form of disagreement which may be settled through agreement and negotiation can also be arbitrable'.[45] In such a way the said draft law has provided a general guideline for determination of arbitrability while the new law has failed to do so. Whatever the motive behind it, the technique for crafting arbitrability adopted by the new law is one of the brawny failures where buries efficacy of the new arbitration law is highly unveiled.

2.2. The Extent of Party Autonomy in Arbitration-friendly Systems

Party autonomy is a ***sin qua non*** for arbitration and an arbitration agreement is an instrument majorly used to exercise party autonomy. Through this agreement, parties can exclude courts from their dispute and regulate arbitral procedures.[46] Nevertheless, like every right, party autonomy is not an unlimited prerogative.

[44] Tilahun Teshome and Zekarias keneaa, የግልግል ዳኝነት ህግ ረቂቅ አዋጅ: Ethiopian Arbitration and Conciliation Center Unofficial model law document art 6 (1)
[45] ibid art 6 (1) in tandem with art 6(2)
[46] Şeyda Dursun, 'A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an Assessment of Its Role and Extent' [2012] Yalova Üniversitesi Hukuk Fakültesi Dergisi 161

Hence, justifiable limitations can be imposed based on public policy grounds and the requisites of natural justice.[47]

One of the major aspects of arbitration to be chosen by parties in their arbitration agreement is the so called lex arbitri or the law of arbitration. When choosing the lex arbitri that governs the dispute, the parties consider the suitability of the lex arbitri.[48] To be an opted place of arbitration, states strive to come up with a suitable law of arbitration.[49] Arbitration-friendly laws are those laws that impose modest validity requirements for arbitral agreements, that allow minimal intervention in the arbitration proceedings, and that bestow a greater extent of freedom on the parties, among other virtues.[50]

The principle of party autonomy has been recognized in a plethora of international instruments[51] and national legislation,[52] and institutional rules[53] to varying extent. National arbitration laws reinforce the principle of party autonomy by stipulating do's and don'ts. However, there also exist other complementary rules of arbitration that bring life to the principle of party autonomy. The doctrine of separability preserves the autonomy of the parties by escaping the invalidation of arbitration agreements due to the invalidation of the main contracts. Overambitious scholars of

[47] Moses Oruaze Dickson, 'Party Autonomy and Justice in International Commercial Arbitration' (2018) 60 (1) International Journal of Law and Management 114

[48] Sunday A. Fagbemi, 'the Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?' (2016) 6 (1) Journal of Sustainable Development Law and Policy 202, 231 <http://www.ajol.info/index.php/jsdlp/article/view/128033> accessed 14 May 2022

[49] Alex Mawaniki, 'The Role of Legislation in Developing and Sustaining an Arbitration Friendly Seat' (2015) <https://ncia.or.ke/wp-content/uploads/2021/03/The-Role-Of-Legislation-In-Developing-And-Sustaining-An-Arbitration-Friendly-Seat.pdf> accessed 14 May 2022

[50] Dursun (n 46)

[51] The UNCITRAL Model Law on International Commercial Arbitration (1985 with amendments as adopted in 2006), (hereinafter 'The UNCITRAL Model Law') art 28, 19 (1), 5 (1) and art VI (a) and art V 1(d) of the New York Convention.

[52] For instance, the principle of party autonomy is reflected in the 1996 English arbitration act by allowing parties to agree on manner of settlement of their dispute subject to public interest exception under S 1 (b)

[53] The rules of international chamber of commerce have also embedded such principle here and there among which the right to choose the applicable law is one

arbitration used to call this principle the principle of autonomy of arbitration clause.[54] Restricted judicial review and finality of arbitral awards will also enhance party autonomy by limiting court intervention to the proper extent and enforcing the rendered award. An interpretation of doubtful arbitration agreements as to their existence, validity, scope, and inconsistent and uncertain arbitral agreements in favor of arbitration is also taken as pro-arbitration approach which reinforces party autonomy.[55]

As stated above under this section, an arbitration agreement is the main tool through which parties exercise their freedom to arbitrate. Whatever restrictions imposed on the manner of making, form, extent, and other aspects of this agreement will have a direct effect of limiting party's autonomy.

The new Ethiopian arbitration law begins to regulate this agreement by rectifying the blurry usage of the term "arbitral submission" under the CC to indicate, while it suggests otherwise, both arbitration clauses (***Clouse Compromissoire***) and arbitral submission (***act de Compromise***). Now, the nomenclature of this fundamental contract in arbitration is replaced by an inclusive term called "arbitration agreement" under the new law.[56]

Among the areas through which unwarranted restrictions can be imposed on party autonomy is the issue of validity requirement and interpretation of arbitration agreements. To begin with the first, the CC and CPC (Civil Procedure Code) require, in addition to the general contract requirement, the capacity to dispose the right

[54] Phillip Landolt, 'The Inconvenience of Principle: Separability and Kompetenz-Kompetenz' (2013) 30 Journal of International Arbitration 511 https://kluwerlawonline.com/journalarticle/Journal+of+International+Arbitration/30.5/JOIA2013033> accessed 15 March 2022

[55] Hossein Fazilatfar, 'Adjudicating "Arbitrability" in the Fourth Circuit' (2020) 71 South Carolina Law Review 741

[56] The New Arbitration Law (n 9) art 2 (1)

without consideration to enter into an arbitration agreement. This requirement of special capacity is now given a mortal blow by the new proclamation.

The old Ethiopian arbitration laws also impose stringent requirements on the form required for an arbitration agreement. The civil code requires contracts made with respect to immovable property, guarantees, insurance, and administrative contracts to be made in written form, being supported by special document signed by all parties and attested by two witnesses.

These stringent conditions are also given a mortal blow by the new Proclamation. Under the new law, making written agreement will only suffice to have a valid arbitration agreement. A more liberal model law approach is adopted by considering agreements made orally, through conduct, and any other means as satisfying written requirement if they are recorded, signed by all parties, and two witnesses later on. The same holds for electronic agreements as long as they are accessible for future use (adoption of the principle of functional equivalence for electronic contracts).[57] In short, parties are at more liberty to conclude an arbitration agreement under the new law.

The CC had implied effect of limiting party autonomy by providing a restrictive interpretation of arbitration agreements.[58] Under the CC, any doubt regarding the existence, validity, and scope of the arbitration agreement was to be resolved in favor of judicial adjudication rather than arbitration. This would be like re-inviting consensually ousted courts to the disputes of the parties. Such rules are not part of the new law.

The place of party autonomy can also be weighed against proscription or permission of the law to insert finality clauses or contractually extended grounds of review. These two concepts have contrasting effects in the sense that while the finality clause

[57] Ibid Art 6

[58] Civil Code of the Empire of Ethiopia, Proclamation No 165 of 1960, Neg. Gaz. year 19, No. 25, May 1960 (herein after "Ethiopian Civil Code") Art. 3329

brings finality of the award once and for all, contractual extension of grounds of review subjects the award for further review.

In the old Ethiopian laws, the freedom of parties to insert finality clauses and their impacts on restraining review of judgments has been a contentious issue both in-laws and the court cases of the country.[59] One cannot also find an easy answer for the question as to whether the law permits contractual expansion of grounds of review under the old laws. In this respect, the new law, however, has demonstrated a progress by bestowing on the parties the right to insert a finality clause which would avoid the possibility of review of the award by the cassation bench of the Supreme Court.[60] The new law is generously liberal in that it allows the insertion of finality clauses that restrict the right of parties to set aside the award.[61] Parties are also given the right to expand avenues of review through an agreement to appeal.[62]

The other avenue for the recognition of the principle of party autonomy is the permissive and mandatory rules of the new law. The new Ethiopian arbitration law is more liberal as it grants wide discretionary power to parties. These discretionary powers are usually stipulated through the use of phrases like "unless otherwise agreed" or "may" throughout the body of the Proclamation. Accordingly, parties are granted the discretionary right to determine the number of arbitrators, procedures of appointment, procedures of objection against appointments, and quest for interim measures. They are also endowed with the right to object to the appointment of arbitrators with certain procedural prerequisites.

Furthermore, they have the right to remove arbitrators and agree on the procedures for the appointment of a substitute arbitrator. They can potentially restrict the power

[59] *National Motors Corporation vs. General Business Development* (2009) Federal Supreme Court Cassation Bench File No.21849 Ethiopian Bar Review report (2009) 3 (1) 149. See also *Beherawi Maeden Corporation vs Danee Driling* (2011) 10 Federal Supreme Court Cassation Bench 350
[60] The New Arbitration Law (n 9) Art. 49 (2)
[61] ibid Art. 50 (1)
[62] ibid Art. 49 (1) and (3)

of the tribunal to issue orders of interim measures. They have the right to request the court to order interim measures. Parties can also determine the rules of procedure to be applied by the tribunal. The right of parties to choose the place and language of arbitration is also duly recognized by the new law. They can also determine the form of proceedings whether to be made orally or with written arguments.

Apart from prescribing those permissive rules, the new law has also contained certain mandatory rules. In domestic arbitration, parties do not have the right to choose the substantive law to be applied to the case.[63] Furthermore, though the law prescribes the right to choose the law applicable to the arbitration agreement and the proceedings, their choice cannot be enforced if the chosen law is impossible on its own or violates the mandatory provisions of the new law.[64]

Besides those do's and don'ts enunciated in the above discussion, the new law has incorporated other rules of arbitration which reinforces the principle of party autonomy one way or another. The doctrine of competence-competence, separability, non-restrictive interpretation, limited judicial review, and pro-enforcement approach adopted by the new law, would have a big impact on realization of the principle of party autonomy.

2.3. The Power of Arbitral Tribunals in Modern Arbitration Systems

The principle of competence-competence, separability, and approaches to the interpretation of arbitration agreements are the main mirrors that reflects the extent of power granted to arbitral tribunals.

2.3.1. Separability and Competence-Competence

Separability and Competence-Competence originated as a response to state indifference and hostility towards arbitration at the early time.[65] These principles

[63] ibid Art. 41 (4)
[64] ibid Art. 10
[65] Landolt (n 54) 512

ensure arbitration efficiency by prohibiting parties from engaging in dilatory behavior of taking cases to court to delay the arbitration proceeding despite the existence of an agreement to arbitrate[66]and reduce early state interference in the arbitration proceedings.

Per the principle of separability, an arbitration clause is deemed to have a separate existence from the main contract in which it is contained. Accordingly, since the fate of the arbitration clause does not depend upon the fate of the main contract, it may survive the invalidity of the underlying contract.[67] Had it not been for this principle, an arbitration clause will not survive the invalidation of the main contract and the arbitrators will lose their source of power. The ordinance of this principle in national arbitral laws will endow the arbitrator with the power to hear any dispute concerning the main contract including a dispute on the very existence, validity, and termination of the main contract without the risk of losing their jurisdiction in case they ruled for invalidation of the main contract.[68] Separability has attained universal acceptance as a pro-arbitration policy and is included in the UNCITRAL model law and other national legislations.[69]

Ethiopia has fully overhauled its anti-arbitration stance concerning the principles of Separability, Competence-Competence, and interpretation of arbitration agreements

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[66] Giulia Carbone, 'Interference of the Court of the Seat with International Arbitration, The Symposium' (2012) 2012 Journal of Dispute Resolution 217 <https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1128&context=jdr> accessed 14 March 2022

[67] Jack Tsen-Ta LEE, 'Separability, Competence-Competence and the Arbitrator's Jurisdiction in Singapore' (1995) 7 Singapore Academy of Law Journal 421 <https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=1574&context=sol_research> accessed 14 March 2022

[68] After deciding for invalidation of the main contract arbitrators will still have the jurisdiction to decide on the consequence of invalidity of the main contract per the principle of Separability

[69] Ilias Bantekas and others, *UNCITRAL Model Law on International Commercial Arbitration (a Commentary)// Competence of Arbitral Tribunal to Rule on Its Own Jurisdiction* (Cambridge University Press 2020) <https://www.cambridge.org/core/books/uncitral-model-law-on-international-commercial-arbitration/competence-of-arbitral-tribunal-to-rule-on-its-own-jurisdiction/5F8AC21C368EBD1D10F1D6B01BD03929>accessed 15 May 2022

which have had a serious effect in determining the scope of the power of arbitral tribunals. In relation to the principle of separability, the old Ethiopian law is silent on the principle of Separability. The new arbitration law has avoided all the uncertainty on the doctrine of Separability by clearly recognizing the principle under Article19 (1). Currently, per the new law, an arbitral tribunal has a secured power of ruling on the objection directed towards the validity of the main contract without fear of losing its jurisdiction.

While Separability maintains the jurisdiction of the tribunal by rescuing from an attack due to the invalidity of the main contract, the doctrine of Competence-Competence in its turn serves the same purpose by conferring the tribunal with the power to rule on any challenges made to the arbitration agreement itself.[70] As a result, it is said that the doctrine of Competence-Competence perches at the vanishing point of Separability.[71]

Owing to the principle of competence-competence, an arbitrator who performs in an arbitration-friendly environment will have the power to rule on the existence and validity of the arbitration agreement, the scope of the arbitration agreement and queries relating to waiver, lapse of time and constitution of the arbitral tribunal.[72] Objections on these points may be raised either before the arbitral tribunal or regular courts. Based on the place where the objection to jurisdiction is raised and the responses to the objections, the principle of competence-competence has two aspects i.e., positive competence-competence and negative competence-competence.[73]

[70] LEE (n 67) 422

[71] Seda Özmumcu, 'The Principle of Separability and Competence – Competence in Turkish Civil Procedure Code No. 6100' (2013) 45 Annales XLV 263 263 <https://dergipark.org.tr/en/pub/iuafdi/issue/726/7824> accessed 13 March 2022

[72] John J Barceló, 'Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective' (2003) 36 Vanderbilt Journal of Transnational Law 1115 <https://is.muni.cz/el/law/jaro2008/SOC026/um/5444470/Clanek.pdf> accessed 14 March 2022

[73] ibid

If the objection is raised before a tribunal and the law endorses the principle of Positive competence-competence, the arbitrators will have the power to continue with the proceedings to rule on their jurisdiction including the objections relating to the validity and existence of an arbitration agreement.[74] Conversely, if the objection is raised before the tribunal and the law has not endorsed the principle of Positive Competence-Competence, the arbitrator shall discontinue the proceeding and refer the objection to the court for lack of jurisdiction to rule on its jurisdiction.[75]

If the objection is raised before ordinary courts, the response of the court depends on the extent of negative competence-competence recognized. If the law endorses the highest form of negative Competence-Competence, the court shall decline jurisdiction and refer the matter to arbitrators for determination without making any assessment of the validity of the objection.[76] The highest form of negative Competence-Competence is adopted by countries like France that are well known for their pro-arbitration policy.[77] If the law endorses the slightest form of negative Competence-Competence, the court shall decline jurisdiction and refer the matter to arbitrators after making a minimal (prima facie) scrutiny of the validity of the objection.[78] Thus, it should be noted that, in the absence of the doctrine of negative competence-competence in the law, the court is empowered to make a full investigation of the validity of the objection without referring the matter to the tribunal.

In brief, the recognition of Competence-Competence in its dual aspect is seen as a rule of convenience designed to reduce unmeritorious challenges to an arbitrator's jurisdiction.[79] It is an anti-sabotage mechanism that saves arbitration from being

[74] Gerese (n 22) 29-30
[75] ibid
[76] ibid
[77] Barceló (n 72) 1124
[78] Gerese (n 22)
[79] LEE (n 67) 424

derailed before it begins.[80] Today, the right of arbitrators to rule on their own jurisdiction is incontrovertibly made part of the well-established doctrine and practice in international arbitration.[81]

As it is mentioned above in this section, Ethiopia has fully overhauled its anti-arbitration stance in relation to the principle of Competence-Competence. The regulation of positive competence-competence in the old Ethiopian laws claimed to be defective on three counts. First and foremost, the power of the tribunal to rule on its jurisdiction depends on the authorization of parties.[82] Second, even the authorization shall not grant the tribunal, the power to decide on the existence and validity of arbitration clauses.[83] The third and the strange approach was that the provisions of arbitral submission relating to the jurisdiction of arbitrators need to be construed narrowly.[84]

The new Proclamation repairs this defect by allowing the tribunal to rule on its jurisdiction including the existence and validity of the arbitration agreement irrespective of the consent of the parties. The power of the tribunal also includes the power to rule on the objection raised on the scope of the agreement.[85] The ruling of the tribunal on its jurisdiction is not final as it can validly be objected to the First Instance Court within one month from the date of the ruling. In the meantime, parallel proceeding will be held since the law allows the tribunal to continue proceeding and render an award.[86] In this instance, allowing courts to review the decision of the tribunal on its own jurisdiction is an essential intervention that reduces the tendency of the tribunal to assume jurisdiction on each dispute submitted

[80] William W Park, 'The Arbitrability Dicta in First Options vs. Kalpan: What Sort of Kompetenz-Kompelenz Has Crossed the Aliamic?' (1996) 12 Arbitration International 137

[81] Alan Uzelac, 'Jurisdiction of The Arbitral Tribunal: Current Jurisprudence and Problem Areas Under The UNCITRAL Model Law' (2005) 8 International Arbitration Law Review 154 <http://www.academia.edu/910696/> accessed 15 May 2022

[82] Ethiopian Civil Code (n 58) art 3330 (1 and 2)

[83] ibid art 3330 (3)

[84] ibid art 3329

[85] The New Arbitration Law (n 9) Art. 19 (1 and 3)

[86] ibid Art. 19 (5 and 6)

to them. Nevertheless, the possibility of parallel proceeding will have the effect of costing arbitrators and the parties if the court finally rules against the jurisdiction of the tribunal. The author insists that the more efficient option is to allow courts to order a stay of arbitral proceeding to avoid unnecessary cost, labor, and time for arbitrators and the parties.

Furthermore, there was not notion of negative Competence-Competence under the CC concerning objection to the existence and validity of the arbitration agreement. Hence, under the old law, the court shall make full scrutiny of the objection with no parallel proceeding by the tribunal. The same holds, under the old system, for objections other than the validity and existence of arbitration agreement so long as the parties do not authorize the tribunal with the power to rule on its own jurisdiction.

The new law, however, distilled this anti-arbitration stance by introducing negative competence-Competence through imposing on the court the duty to refer to arbitration, upon request of one of the parties, whenever cases covered by an arbitration agreement are brought to it. However, the court can still review the objection if the agreement is void and becomes ineffective.[87] In short, the new law has bestowed an arbitral tribunal with increased power by fully recognizing Competence-Competence in its dual aspects and the principle of Separability.

2.3.2. Interpretation of Arbitration Agreements

Different approaches are adopted by different legal systems in interpreting defective arbitration agreements. Some states follow the restrictive interpretation of arbitration clauses compared to other contractual provisions and resolve any doubt in an arbitration clause against the jurisdiction of arbitrators. This in turn will have the effect of ousting arbitrators from assuming jurisdiction. Others follow the neutral interpretation of arbitration clauses like any other contractual clause following fundamental rules of interpretation. Some others adopt the principle of liberal

[87] ibid Art. 8 (1 and 2)

interpretation. Liberal interpretation provides for a more liberal interpretation of arbitration clauses than other contractual clauses to resolve any doubt in favor of the arbitrator's jurisdiction. Liberal interpretation rescues the arbitral tribunal from losing jurisdiction on the subject matter objected to.

One area of the old Ethiopian arbitration law that unduly restricted the power of the arbitral tribunal was the requirement of restrictive interpretation that seeks for resolution of doubtful arbitration clauses against the jurisdiction of arbitrators. Such a call for application of restrictive interpretation cannot be found under the new law. Hence, even if the new law doesn't stipulate any provision on the interpretation of arbitral agreements, the liberal interpretation approach seems to be the logical way we are left with. This can be inferred from the deliberate abolition of restrictive interpretation ordained by the old law and the pro-arbitral tribunal stance of the new law manifested in the recognition of the principle of competence-competence, separability, and the general principle of nonintervention of courts adopted under article five.

A further area that demonstrates the extent of power granted to the tribunal in addition to liberal interpretation, separability and competence-competence principles is the normative basis through which the tribunal is allowed to decide on the merit of the case. The CC and CPC authorized the arbitrators to rule according to "principle of law" and "law" respectively.[88] Though deciding which law, the CC or the CPC, prevails is not the concern of this article, settlement of dispute based on the "principle of law" empowers the arbitrator with wide power than settlement per a certain "law".[89] The CC grants very liberal power for arbitrators to decide based on principle of law without the need for prior authorization of parties.

[88] Ethiopian Civil Code (n 58) art 3325 (1) and The Civil Procedure Code of the Empire of Ethiopia, Decree No. 52 of 1965, Neg. Gaz. Extraordinary issue No. 3 of 1965 Addis Ababa 1965 (herein after "Ethiopian Civil Procedure Code"), Art. 317 (2)

[89] Tesfay 'Normative Basis' (n 17) 341

Coming to the new law, it requires arbitrators to rule on the merit of the case following the substantive law chosen by the parties. In this respect, the new law reduces power of the tribunal in two prisms compared to the CC. On one hand, the applicable normative base is reduced from "a national general principles of law" to a certain "substantive national law" chosen by the parties. This confines the tribunal's decision only to those principles incorporated in the substantive law of the chosen country and doesn't allow it to go beyond and apply principles of laws that are not incorporated in that chosen law. On the other hand, the application of substantive law is subject to the choice of parties, unlike the CC which allows application of principles of laws irrespective of choice of the parties. In default of choice of parties, article 41 (3) of the new law allows the tribunal to apply a substantive law close or relevant to the subject matter of the dispute. In case the normative base is chosen by the parties, that specific choice refers to the substantive law of that country not the conflict of laws rule.[90] A more limitative stand of the new law can also be discerned from the fact that neither the tribunal nor the parties are allowed to choose the normative basis for decision in cases of domestic arbitration and accordingly the Ethiopian laws apply out rightly.

On the other side of the spectrum, the new law increases the power of the tribunal through permitting decision in accordance with equity or known commercial practice upon authorization of the parties or applicable law.[91] This assertion remains intact if the decision in accordance with equity is perceived in the stronger sense of equity. As per the stronger perception of equity, arbitrators are allowed to correct the injustice created by the rigid nature of the general and abstract rules when they are applied to a concrete factual situation in disregard to the law. Conversely, in the weaker perception of equity, the judge is directed to employ equity when the law is silent or vague concerning some aspects of the concrete case without ignoring the

[90] The New Arbitration Law (n 9) Arrt. 41 (2)
[91] ibid

principles set by the law.[92] Thus, an arbitrator that has been empowered to decide based on equity perceived in the stronger sense wields wider power than an arbitrator who is empowered to decide based on "principles of law" or "law".[93]

At this point, this article emphasizes on the following queries: What does authorization to rule in accordance with equity imply in the new law? Does the authorization refer to equity in the stronger perception or weaker perception? In other words, does it mean power to act as an ***amiable compositeur*** or ***ex aequo et bono*** or both?

2.4. Minimal Court Intervention as a Pool Factor for being an Arbitration-friendly Seat

Though arbitration is required to be independent and liberal, some judicial oversight is unavoidable due to plenty of public policy grounds and the inability of an arbitration institution to stand alone by and of itself. Courts usually assist the implementation of the arbitration agreement via appointing, removing, or replacing an arbitrator, to order an injunction on proceedings brought in breach of an agreement to arbitrate, to issue interim measures, and to review and enforce the award.[94]

These days, court intervention is appropriate and justified almost in all jurisdictions in different degrees and contexts. Nevertheless, to avoid unwarranted intervention, national arbitration laws stipulate the extents and instances of court intervention.[95]

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[92] António Sampaio Caramelo, 'Arbitration in Equity and Amiable Composition Under Portuguese Law' (2008) 25 Journal of International Arbitration 569 <https://kluwerlawonline.com/journalarticle/Journal+of+International+Arbitration/25.5/JOIA2008044> accessed 13 14 March 2022

[93] Seyoum Yohannes Tesfaye, *International Commercial Arbitration: Legal and Institutional Infrastructure in Ethiopia* (1st edition, European Year Book of International Economic Law Monographs 2021) 12, 93-116

[94] Carbone (n 66)

[95] Dessie (n 19)

Usually, arbitration statutes provide a prohibitive nonintervention principle that seeks to limit court intervention only to cases explicitly provided by the law.[96]

Modern arbitration laws are skeptical of wide court intervention in general and unrestricted judicial review of awards in particular, as it defeats the initial purposes of arbitration. Wide judicial review of arbitral awards blatantly runs the risk of impinging upon arbitration as an effective DRM.[97] The limited extent of judicial review of an award is one of the strongest virtues which make France a favorable place for arbitration.[98]

In the same vein with modern arbitration laws, the new Ethiopian arbitration law has adopted a prohibitive nonintervention principle which seeks to confine court intervention only to cases explicitly provided for by the law.[99] What differentiates the Proclamation from the UNCITRAL model law is that the nonintervention prohibition under the UNCITRAL Model Law applies only to matters governed by the model law. However, the nonintervention principle under the new proclamation extends to all arbitrable matters as it is governed by the Proclamation and other laws.

In the new Proclamation, courts play their supportive role before the commencement of arbitral proceedings, during the arbitral proceeding, and after the rendition of awards. To begin from the first, Ethiopian courts take part in appointment,[100] removal,[101] and substitution of arbitrators,[102] priority being given to party autonomy subject to consideration of conditions listed under the law to maintain efficiency and impartiality of arbitrators. They also play their supportive role in enforcing valid arbitration agreements. Accordingly, under article 8 courts are obliged to refer to

[96] The UNCITRAL Model Law (n 51) art 5 and section 1 (c) of the English Arbitration Act of 1996
[97] Aparna D. Jujjavarapu, 'Judicial Review of International Commercial Arbitral Awards by National Courts in the United States and India' (LL.M Thesis and essays, University of Georgia, 2007)
[98] Kenneth-Michael Curtin, 'Redefining Public Policy in International Arbitration of Mandatory National Laws' (1997) 64 Defense Counsel Journal 271
[99] Common article 5 of the New Ethiopian Arbitration Law and the UNCITRAL Model Law
[100] The New Arbitration Law (n 9) Art. 12 (3) (b)
[101] ibid Art. 16 (2)
[102] ibid Art. 17 (2) in tandem with Art. 12 (3) (b)

arbitration where one of the parties' brought matters covered by arbitration to court.[103]

The same supportive role is felt during arbitration proceedings by Ethiopian courts through assisting the tribunal in taking evidence,[104] recognizing and enforcing interim measures issued by arbitral tribunals[105] and issuing court interim measures.[106] Ethiopian courts are also obliged to bring life to arbitral awards by recognizing and enforcing the award after exercising their supervisory power on it.

The supervisory role of courts is one area where the old Ethiopian arbitration laws are blamed for inviting premature judicial intervention and stretching wider judicial review power in the form of appeal and cassation review.[107] In this section, we will try to uncover the progresses brought by the new law in limiting court intervention and judicial review avenues.

Alike the CC, interlocutory judicial review of the tribunal's decision on the application objecting an arbitrator is possible in the new law. Accordingly, the decision of the tribunal on the objection submitted against an arbitrator is appealable to the First Instance Court.[108] Furthermore, the court is empowered to order suspension of arbitral proceedings until it renders decision on the objection.[109] Such an interlocutory judicial review has the risk of inviting dilatory appeal and court intervention.[110]

Ethiopian scholars were also skeptical of the recognition of appeal as an avenue for reviewing awards as it compromises the finality of awards by re-inviting courts to

[103] ibid Art. 8 (1)
[104] ibid Art. 37
[105] ibid Art. 25 (2 and 3)
[106] ibid Art. 9 in tandem with art 27
[107]Beyene 'Degree of Court's Control' (n 20). See also Feyissa (n 5)
[108] The New Arbitration Law (n 9) Art. 15 (4)
[109] The New Arbitration Law (n 9) Art. 15 (5)
[110] Feyissa (n 5)

review the award on merit.[111] Furthermore, the grounds of review listed under article 351 (c-d) of CPC extend up to turning the appellate court into a trial court.[112] The new Ethiopian arbitration law seems to have been drafted in a way to respond to this skepticism. Appeal as a form of review is abolished by the new Proclamation unless it is introduced by agreement of the parties.[113] Abolishing appeal as an avenue of review is a pro-party-autonomy and pro-finality measure taken by the new law. The new law, however, is not brave as such to fully abolish appeal mechanism as it permits contractual extension of review through appeal. Hence, parties can lodge an appeal from the award if they have an agreement to that effect. But still, we can pose the following questions concerning appeal via agreement of the parties. On what already known grounds can parties agree to appeal? Or can they list as many grounds of appeal as they wish?

A further avenue of judicial review that has been critiqued for a long under the preceding Ethiopian arbitration laws was the cassation review of awards.[114] Though there was a difficulty in establishing legal basis both in the laws of arbitral submission under the CC and CPC and the laws that establishes cassation power of the Federal Supreme Court,[115] the Federal Supreme Court Cassation Bench has been reviewing awards under the elusive notion of basic error of law even when arbitration agreements contained finality clauses.[116] Albeit the benefits and the drawbacks of retaining cassation review of award is a debatable concern, the new law has at least demonstrated progress in two respects. For one thing, it establishes a legal basis by allowing review of awards by the cassation bench. For another thing, it has made cassation review a waivable judicial review mechanism through permitting the parties to avoid it if they thought cassation review is an unnecessary intervention. In

[111] Beyene 'Degree of Court's Control' (n 20)
[112] ibid
[113] The New Arbitration Law (n 9) Art. 49 (1)
[114] Beyene 'Cassation Review' (n 20)
[115] ibid
[116] *National Mining Corporation vs Danny Driling PLC* (Federal Supreme Court Cassation Bench)

the opinion of the author, the involvement of the Federal Supreme Court's cassation bench in arbitration via review of arbitral awards will diminish hereafter in Ethiopia as the parties who have initially agreed to arbitrate to get rid of stringent court procedure will have no perceivable reason to retain the avenue of cassation review.

Setting aside is a method thought as a proper avenue that strikes a balance between parties' wish to avoid courts and permits courts' regulatory power by supervising any violation of fundamental notion of procedural justice.[117] Nevertheless, the old system failed to achieve this by inserting most of the grounds that amount to procedural irregularities under appeal while they should have been included under setting aside.[118]

The new law, however, has repaired this dysfunctional approach of the old law by swapping grounds previously enumerated for appeal to grounds for setting aside. Accordingly, the grounds listed under Article 50 (2) (c, d, and f) of the Proclamation that relates to either procedural irregularities, misconduct of arbitrators, or violation of arbitration agreement previously made grounds of appeal under Article 351 of the CPC, are now made grounds of setting aside. On the other hand, lack of capacity to conclude arbitration agreements, nullity, and voidness of arbitration agreement, expiry of the agreement, ultra-virus awards, and awards rendered in lack of jurisdiction are made grounds for setting aside under article 50 (2) (a, b, and e) of the Proclamation alike article 356 the CPC. In this way, the avenue of setting aside has now given courts the right amount of intervention and sufficient grounds for control of arbitration.

The other avenue through which Ethiopian courts exercise their supervisory role over arbitration is the procedure of objection. An objection can be made either against the award itself or against the execution of the award.[119] While objection against the

[117] Beyene 'Degree of Court's Control' (n 20) and Feyissa (n 5)
[118] Ethiopian Civil Procedure Code (n 88) Art. 351 in tandem with Art. 356
[119] The New Arbitration Law (n 9) Art. 48 in tandem with Art. 52

award comes before an application for setting aside, objection against execution of the award appears to be invoked once an application for setting aside is dismissed.[120]

The contracting party or a third party who should have been party to the arbitral proceeding and whose interest is affected by the award can object to the award.[121] If the objection is raised by the parties, the court shall remand the award to the tribunal for amendment.[122] Conversely, if the objection is raised by third parties the court may reverse or modify the award partly or wholly.[123] This response to be made for the third-party objection appears to allow courts to be intrusive and review the award on merit. Accordingly, courts will correct the award if there is a mistake in it and what will be, finally, available is the reversed or amended judgment of the court, not the award of an arbitral tribunal.

The final avenue for review by the court is a refusal to execute/enforce the award. Such refusal may be made by the court in response to objections made against execution of the award or an application for recognition and enforcement of arbitral awards. Ethiopian courts may refuse to execute domestic awards if and only if the grounds listed under Article 52 are fulfilled. The same grounds of objection with that of the grounds for setting aside are provided under article 52 except for the grounds under article 52 (2) (f). Effect-wise, both an application for setting aside and an objection against execution results in setting aside of the award and lefts the parties with an outstanding dispute yet to be resolved. Finally, Ethiopian courts may refuse to enforce foreign arbitral awards on the grounds listed under Article 53.

2.5. Pro-enforcement Approach of Modern Arbitral Rules

The basic and by far the most important objective of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter The New

[120] ibid Art. 48 in tandem with Art. 52 (1)
[121] ibid Art. 48 (1) and (2)
[122] ibid Art. 48 (3)
[123] ibid Art. 48 (4)

York Convention) is to ease the enforcement of foreign arbitral awards.[124] The New York Convention is praised for landing a collective pro-enforcement approach by limiting grounds of review for refusal of enforcement. The grounds listed under the Convention are maximum grounds for refusal of enforcement and no other grounds can be raised as a defense for refusal. Conversely, the Convention allows the contracting states the freedom to apply more liberal rules for refusal of recognition and enforcement.[125] Furthermore, the Convention is reputed for making the following basic pro-enforcement changes;

The Convention has created the presumption as to the binding nature of awards. It has also required each contracting states to recognize arbitral awards as binding and enforce them.[126] Based on this obligation, it is claimed that foreign arbitral awards are entitled to *prima facie* right to recognition and enforcement.[127] Another groundbreaking achievement of the New York Convention is the change it has brought by avoiding double exequatur. Before the Convention, as per the double exequatur requirement, an award has to be rubber-stamped by courts of the seat of arbitration before it is enforced elsewhere.[128] The Convention has also endowed courts of enforcement with discretionary power to recognize and enforce awards even in instances where the grounds for refusal are established.[129]

[124] Petros 'The Convention on the Recognition and Enforcement' (n 24)
[125] Emmanuel Gaillard, Gordon E Kaiser and Bejamin Siino (eds), *The Guide to Challenging and Enforcing Arbitration* (Publisher David Samuels, 2nd edn 2021) <https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition> accessed 23 May 2022
[126] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Adopted 10 June 1958, Entered into force 7 June 1959 United Nations, hereinafter 'New York Convention') 330 UNTS 3, Art. III
[127] Gaillard, Kaiser and Siino (eds) (n 125)
[128] LEE (n 67)
[129] Fifi- Junita, 'Pro Enforcement Bias' Under Article V of the New York Convention in International Commercial Arbitration: Comparative Overview' (2015) 5 Indonesia Law Review 141 <https://scholarhub.ui.ac.id/ilrev/vol5/iss2/3> accessed 10 March 2022

In principle, recognition and enforcement is refused only at the request of the party against whom the enforcement is sought except in certain cases in which the court may refuse enforcement by its own initiative.[130]

The more favorable right concept inculcated under Article VII of the Convention is also another indicator of pro-enforcement bias of the Convention. Per the more favorable right provision, enforcement-seeking party may rely on a more favorable domestic law or treaty in addition to what the Convention stipulates. As contracting states continue to modernize their arbitration laws to make their jurisdictions more arbitration-friendly, an increasing reliance by national courts on this more favorable notion is to be expected.[131]

Regarding the enforcement of arbitral awards in Ethiopia, with the ratification of the New York Convention[132] and the issuance of the new arbitral law, currently, there are multiple rules governing the enforcement regime. To begin from enforcement of domestic awards and international awards rendered in Ethiopia, unless the enforcement is objected on grounds listed under article 52 of the proclamation, the awards are given first-hand right for enforcement by article 51 upon application for execution. Thus, under the new law unlike its older counterpart, it is not necessary to homologate domestic awards before their enforcement for the reason that the new law requires only an application for execution of awards as opposed to an application for homologation under Article 51 of the new proclamation.

The multiplicity of enforcement regimes is felt more when it comes to foreign arbitral awards as opposed to domestic awards due to the ramifications of the commercial reservation made by Ethiopia while acceding to the New York Convention. One critical issue at this point is that though the substantive scope of application of the new law is limited to commercial arbitration and the term

[130] New York Convention (n 126) Art. v (1) and (2)
[131] Gaillard, Kaiser and Siino (eds) (n 125)
[132] Convention on the Recognition and Enforcement of Foreign Arbitral Awards Ratification Proclamation No. 1184/2020, *Federal Negarit Gazeta*, 26th Year No. 21

"Commercial" is given a broader definition as it is referred by the footnote to Article one of the UNCITRAL model law,[133] this does not render other domestic civil matters inarbitrable unless expressly excluded under Art 7 of the proclamation. A shallow understanding of Article three of the proclamation may lead someone to conclude that the new law's application is confined to 'commercial' arbitration of both domestic and international nature. Nevertheless, the limitation of 'commercial related' criterion under the new law refers only to international arbitrations as opposed to domestic arbitrations. The term "Commercial" is used under Article three and the definitional article of the new law only to give effect to commercial reservation adopted by Ethiopia.

Accordingly, a foreign award creditor can opt for a more favorable regime between Article 53 of the proclamation or the New York convention for enforcement. However, this holds only for enforcement of commercial-related foreign arbitral awards as the application of the terms of the new proclamation is limited to only international commercial arbitration due to commercial reservation.

Now, the unsettled issue is the fate of enforcement of foreign non-commercial arbitral awards. The perceivable way out in this regard is only to resort to article 461 of the CPC as it applies to both commercial and civil arbitral awards even though it is repealed by the new proclamation. Less of that, the recognition and enforcement of foreign arbitral awards on civil matters will remain up in the air unless the conditions for their enforcement are set out by legislative dispensation in the foreseeable future.

The other avenue that multiplies the enforcement regime of a foreign award in Ethiopia is the reciprocity reservation. As the application of the New York convention is limited only to commercial awards rendered in countries of contracting states, foreign arbitral awards made in non-convention (non-contracting) states

[133] ibid Art. 1 (1) and Art. 2 (7), in tandem with the footnote number two of the UNCITRAL model law

cannot be enforced through the New York Convention. The way out for the enforcement of such non convention award is two-fold. One is to resort to article 53 (2) of the new proclamation for enforcement of non-convention foreign commercial awards. The other is to resort to article 461 of the CPC for enforcement of non-convention foreign civil awards. The variation in the date of entry into force of the New York Convention in Ethiopia has also opened a room for application of different enforcement regimes of foreign arbitral awards.[134]

Yet, without making difference between domestic and foreign awards, arbitral awards in Ethiopia have now prima facie entitlement to enforcement as opposed to the old laws. Article 51 (1) of the Proclamation recognizes the binding nature of both domestic and foreign awards and yells for their enforcement subject to the fulfillment of certain conditions stipulated under the law. Thus, now in Ethiopia awards are enforceable in principle not as an exception as it was under the old laws.

To say a few words on the grounds for recognition and enforcement under the new proclamation, courts shall enforce awards except for the existence of conditions listed under Article 53 (2) of the Proclamation. The said article has enumerated exhaustive tests of non-enforceability. Despite their similarity in some respects, the tests of non-enforceability under the new Proclamation are not coextensive with the tests of non-enforceability listed under the UNCITRAL model law. The test of existence of valid arbitration agreement under the new law is comparable with article 36 (1) (a) (I) of the Model Law which speaks about the incapacity of parties and invalid arbitration agreement. Paragraph two of Article 53 (1) (b) of the new law is also comparable with Article 36 (1) (a) (IV) of the Model Law. However, the difference between the two in this regard is the fact that the propriety of the constitution of the arbitral tribunal under the Model Law is measured against the law

[134] For detailed understanding on the multiplicity of the current Ethiopian enforcement regime please see Tecle Hagos Bahta, 'The Ratification of the New York Convention in Ethiopia: Towards Efficacy and Avoidance of Divergent Paths' (2021) 15, 2 Mizan Law Review 493 <http://dx.doi.org/10.4314/mlr.v15i2.6> accessed 26 July 2022

of the seat of arbitration subject to party autonomy. Party autonomy takes precedence over the law of the seat of arbitration. Conversely, under the new Proclamation, while parties are given the freedom to tail the tribunal per their whim, that choice of parties is not prioritized here to determine the propriety of the constitution of an arbitral tribunal, instead, reference is made directly to the law of the seat of arbitration.

Article 53 (1) (c) of the new law which speaks about the unenforceability of awards has no comparable grounds under the Model law. Article 53 (1) (d) of the Proclamation is also comparable to Article 36 (1) (a) (II) of the Model law except for use of different language regarding equal treatment of parties. The requirement of arbitrability as a test for non-enforcement is also consonant with the Model law in this regard. The requirement of public policy, morality, and security under the Proclamation can also be subsumed under the public policy ground of the Model law. The author cannot see the logic for treating public policy, morality, and security separately here under the new law while the very nature of public policy may very well contain public security and public morality.

To step into convention awards, their enforcement shall be regulated by the New York Convention.[135] Before directly gauging to Convention awards, we need to dwell on the declarations and reservations made by Ethiopia while acceding to the Convention. Through reciprocity and commercial declaration made according to Article I (3) of the New York Convention, Ethiopia restricted its duty under the Convention only to the recognition and enforcement of awards made in the territory of a contracting state and to differences arising out of contractual or legal relationship deemed commercial in Ethiopia.[136] Accordingly, Ethiopia has no obligation to recognize and enforce awards made in countries that have not ratified the convention. Consequently, awards rendered in some countries with which Ethiopia has a significant economic relationship like Eritrea, Somalia, and South Sudan will not be

[135] The New Arbitration Law (n 9) Art. 53 (1)
[136] The Ratification Proclamation (n 132) Art.2 and 3

enforced under the convention.[137] Furthermore, the application of the convention is limited only to commercial-related matters enunciated under the definitional article of the new Proclamation. A further restriction is imposed on the Convention award as the Convention applies only to arbitration agreements and arbitral awards made after the accession of Ethiopia to the Convention.[138] Finally, the prima facie right to enforcement of the convention award is subject to exceptional grounds of refusal listed under article V of the Convention which is compatible with the grounds under the Model Law discussed above.

A pro-enforcement bias of the new Proclamation is manifested in absence of the requirement of ***double exequatur*** commencing from articles 51 – 53 as well. Accordingly, an award creditor who seeks to enforce the award in Ethiopia is required to present only the arbitration agreement, the original award/authenticated copy of it, and a translated award where it is given in a language different from the language of the court.[139] Hence, an award need not be rubber-stamped by courts of the seat of arbitration before it is enforced in Ethiopia. Furthermore, since awards are enforceable in principle the burden of proof of the existence of any of the grounds of refusal lies on the award debtor who opposed the enforcement.

In the end, the query of whether the new law applies only to matters concerning recognition and enforcement to the exclusion of an application for recognition alone remains unsettled yet. Despite the improvements made by addressing recognition together with enforcement under the headings of section eight, there is no specific provision in the new Proclamation governing recognition of awards alone. What is the fate of defensive awards which demand only recognition?[140] Can courts simply

[137] Tesfaye 'International Commercial Arbitration' (n 93) 205-230
[138] New York Convention (n 126) Art. 3
[139] The New Arbitration Law (n 9) Art. 51
[140] Defensive awards are those awards in which the award creditor seeks only their recognition so as to block any attempt to initiate fresh proceedings on issue already decided by the award.

extend the grounds for refusal or grant of recognition and enforcement to cases involving recognition alone?

3. The Contemporary Notion of Multiparty Arbitration as an Optimal Barometer for Arbitration Friendliness

The task of addressing the entire contemporary notions of arbitration and assessing the adequacy of their incorporation in the Ethiopia's new arbitration law is not within the scope of this article as it requires a separate study. However, in this section of the article, the author attempts to give glimpses of the concept of multiparty arbitration as a contemporary notion. This particular notion constitutes part of the rules and concepts of arbitration labeled as the optimal standards of arbitration friendliness by the author. The justification for such a separate assessment of multiparty arbitration amongst several other contemporary notions, in this study, lies on its paramount importance for the current Ethiopia's economic, political and social realities.

The proliferation of happenings in Ethiopia's construction industry, the recently adopted measures for total and partial privatization of state-owned companies, as well as the unavoidability of multiparty disputes and multiparty arbitration owing to the interdependence of international commerce and globalization has strongly influenced the author's choice for the separate scrutiny of the challenges and prospects of multiparty arbitration under the new law. All those underscored Ethiopia's reality would inevitably invite multiparty disputes which call for the facilitation of full implementation of multiparty arbitration,[141] inspiring this particular write-up in contribution for the facilitation.

Intervention and/or joinder, consolidation and appointment of arbitrator/s are the basic '***instruments'*** (emphasis added) recognized in the realm of international

[141] Alemu Balcha, 'The Place of Multiparty Commercial Arbitration under Ethiopian Arbitration Law' (2020) 9 Oromia Law Journal 114, 144 – 148 <https://www.ajol.info/index.php/olj/article/view/202838> accessed 23 February 2022

arbitration so as to provide a panacea for the complexities of multiparty arbitration. The upcoming few paragraphs of this article attempts to unveil the progresses and the troubles of the new Ethiopian arbitration law in regulating the above mentioned instruments of multiparty arbitration.

Multi-party arbitration as a contemporary notion adjoining complex commercial transaction was not given proper attention under the old Ethiopian arbitration laws.[142] Seen in light of the above mentioned basic instruments of multi-party arbitration, the new arbitration law too does not comprehensively and fully addresses the conundrums encircling the subject matter.

Joinder and interventions are a seemingly different mechanism both dealing with participation of non-signatory third parties to the existing arbitration proceedings. The necessity of intervention arises incases when non signatory third party seeks to intervene in arbitral proceedings to assert its right vis-à-vis one or all of the other parties that are signatories to the arbitration agreement. Whereas, the issue of joinder arises in cases when one of the signatory party to the arbitration agreement seeks to add a non-signatory third party either raising an indemnity claim in connection with the claimants claim or raising any other claim against such third party. Once it's firmly established that intervention and joinder of third parties has become a matter of necessity, the fundamental query relates to when and how to introduce third parties in an already commenced arbitration proceedings.

To commence with intervention as a first instrument, a third party whose interest could be affected by the award may intervene in the proceeding before an award is rendered upon submission of application to that effect and consent of the contracting parties.[143] The submission of application for intervention and consent of the parties are made conditions for authorizing intervention. Now the plight arises with respect

[142] ibid 136 - 142
[143] The New Arbitration Law (n 9) Art. 40 (1)

to the '***consent requirement'*** (emphasis added) and the ***'temporal limitation'*** (emphasis added) within which the authorization for intervention would be possible under the new law.

As to the requirement of consent, sub-article (3) of Article 40 of the proclamation erodes the intended protection of the rights of third parties to intervene in arbitration proceedings by predicating intervention upon the consent of the contracting parties. Any attempt to obtain such consent of the contracting parties is a fruitless task as parties to proceedings are usually unwilling to give their consent for intervention of third parties and this denies third parties a procedural fairness and equal treatment opportunity. Thus, under the new arbitration law, while the de-jure right to intervention is ascribed to non-signatory third parties, the de facto power rests with the principal contracting parties to the arbitration agreement. With respect to the temporal limitation for intervention, Article 40 (1) of the new Proclamation permits intervention at any time as long as the award is not rendered. This is a calamitous approach as intervention of a third party after the appointment or confirmation of the appointment of arbitrators undermines his right to equal participation in the appointment of arbitrators and thereby affects the validity and enforceability of the arbitral award.

Delving into the second instrument, Article 40 (2) of the proclamation regulates joinder of third parties albeit the usage of the term intervention. Here again, an application requesting joinder and consent of the third party are the two requirements to allow joinder. In the same vein with the instrument of intervention, the consent requirement and the temporal limitation of joinder poses an impediment to realization of the right. Alike the intervening party, it is difficult (though not impossible) for the contracting parties to obtain the consent of the third party to join the arbitration proceeding, due to the very purpose of intervention in any court or

arbitral proceedings.[144] On the other side, astonishingly, the new law has given a deaf ear to the quest of the temporal limitation within which an application for joinder can be made, while the time of joinder has a bearing effect on the overall efficacy of the arbitral award. Importantly, it determines the propriety of the appointment procedure as permitting joinder after the appointment or confirmation of arbitrator/s would hamper the joining party's right to equal participation in the appointment of arbitrator/s. Any impropriety in the appointment procedure, eventually, retards the recognition and enforceability of the award. .

At this juncture, this article seeks to spotlight on the fact that authorization of third party participation in arbitration proceedings, via intervention and/or joinder, irrespective of the consent of contracting parties goes against the consensual nature of arbitration, while its denial would harm the interest of the third parties. The 'ought to be' jurisprudential solution in this regard is a solution which strikes a balance between these two competing interests. The International Chamber of Commerce (ICC) rules of 2021 have adopted a mesmerizing balanced panacea in this regard. Article 7(5) of the 2021 ICC rules has adopted mandatory third party mechanism in the form of joinder upon order of the arbitral tribunal irrespective of the time of joinder and the consent of contracting parties. It gives the arbitral tribunal the discretion to grant a request for joinder even without unanimous consent of the parties, provided that the additional party accepts the constitution of the arbitral tribunal and agrees to the terms of reference. In exercising its discretion, the arbitral tribunal must consider all relevant circumstances prescribed under the said article.

While the new Article 7 (5) of 2021 ICC Rules could potentially be regarded as violating the principle of party autonomy insofar as it substitutes the consent of the parties with a decision of the arbitral tribunal, the factors to be considered by an

[144] The content of the New Ethiopian Arbitration Law is self-evident for the said impediment since it crystal-clearly provides 'the claim of compensation' and 'intention to hold the third party liable' as major purposes for the request of joinder under sub-article two of Article 40.

arbitral tribunal in granting a request for joinder under the same article, however, appears sufficient to ensure procedural fairness and equal treatment opportunity.

Coming to the final instruments of consolidation and appointment, the new Ethiopian arbitration Law is ignorant of both mechanisms. Article 40 and all other provisions of the new law say nothing about consolidation of parallel arbitration proceedings and hence, the only way out is to resort to article 11 of the CPC that regulates consolidation of suits based on the call for ***mutatis-mutandis*** application of CPC provisions insisted on article 79 of the new proclamation or waiting for the agreement of parties on consolidation.

The new proclamation, once more, has remained silent on the appointment of arbitrators in case of multiparty arbitration. Yet still, it has introduced a beneficial rule of joint appointment which was absent under the old regimes. Hence, it may be analogically possible to apply the Proclamation's rule on joint appointment and its default rule for the appointment of arbitrators in conventional arbitration to multiparty arbitration scenarios. Accordingly, if the dispute is purely bipolar where the parties can normally be divided into a claimant and respondent camp, it is possible to easily apply the rule of joint appointment. In the case of a multipolar multiparty dispute where the parties cannot be divided into two camps because of their divergent interest, we may analogically apply the default rule of court appointment provided under Article 12 (3) (b) of the proclamation.

4. Concluding Remarks and the Ways Forward

Owing to the proliferation of usage of arbitration as an effective commercial DRM, states are competing to avail robust arbitration law to be preferred as an arbitration-friendly seat. Ethiopia has also overhauled its arbitration rules with the view to fill the dearths of the hitherto existing laws on arbitration. The new Ethiopian arbitration law has come up with numerous arbitration-friendly gestures by increasing party autonomy and power of arbitral tribunal, reinforcing limited judicial intervention,

and a pro-enforcement approach. Despite bringing those signs of progress, some aspects of the new arbitration law have remained problematic and they seek either legal reform or strong judicial activism in their application.

The new law has contained some rules which may result in an anti-arbitration-friendly trend unless regulated and applied with caution. The interlocutory judicial review of the arbitral tribunal's decision on the application objecting an arbitrator is one plight which invites dilatory appeal. Court review of the ruling of the tribunals on its jurisdiction with a parallel arbitral proceeding may also bring dys-functionalism unless it is handled systematically. Ethiopian courts should employ a liberal interpretation of controversies relating to the arbitration agreement to avoid unnecessary court intervention despite the silence of the law in this regard. Arbitral tribunals and courts should take caution in their application of authorization to rule in accordance with equity. Both courts and tribunals should work in a way that ensures consistency while interpreting the real meaning of authorization to rule in accordance with equity. The slippery concept of public policy and reciprocity for refusal of enforcement of an award are also some of the areas which require strong judicial activism to put them to use as arbitration-friendly.

The new law has also failed to provide a general framework for the determination of arbitrable cases as it has promised. Due to this, the question how arbitrability is regulated remains contentious in many respects and severely limits the domain of arbitrable disputes. In this regard, we need a legislative solution to avoid the mess encircling the determination of arbitrable cases rather than judicial activism. The law maker must amend Article 7 of the new Proclamation in light of modern techniques of drafting rules on arbitrability. The new law has also failed to fully regulate essential instruments of multi-party arbitration as well. Especially, the consent requirement for joinder and intervention provided by the law, the incorrect temporal limitation within which an application for intervention can be made, the failure to provide the time limit within which an application for joinder can be made and the

law's failure to regulate consolidation and appointment aspect of multiparty arbitration has left the regulation of multiparty dispute yet to be overhauled. The multiplicity of enforcement regimes also requires caution so as to avoid divergent paths in application.

At the end of the day, the progresses brought by the new law will boost the place of Ethiopia as an arbitration-friendly seat. Being mesmerized by those progresses we may have an increased number of arbitration cases, a reduction of court congestion, an increase in FDI, and transnational trades among other things in the future. The vast majority of those signs of progress brought by the new law are indicators of legal advancements toward building an arbitration-friendly regime. Conversely, the quandaries of the new law presented in the paper may result in a diminishing return of arbitration friendliness though the actual effects of the progressions and retrogressions of the new law in making Ethiopia an arbitration-friendly seat is something yet to be tested in factual application of the law during the coming few years.

ISSN (Print): 2664-3979 ISSN (Online): 2791-2752
https://journals.hu.edu.et/hu-journals/index.php/hujl