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MAKING ETHIOPIA ARBITRATION FRIENDLY: APPRAISAL OF THE 2021 ARBITRATION LAW

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Making Ethiopia Arbitration Friendly: Appraisal of the 2021 Arbitration Law

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Declaration

I hereby Declare that this thesis is my original work and that all sources used are properly identified and acknowledged.

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Acknowledgment

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Abstract

The place of arbitration as a suitable forum for Commercial dispute resolution has acquired prominence before the arbitration community. Attributed to its venerable virtues of flexibility, relative certainty, promptness, and efficiency, commercial arbitration offers the best commercial dispute resolution regime. Arbitration as a consensual out-of-court dispute resolution mechanism has also played an equivalent role in the settlement of plethoras of civil matters in addition to commercial discourses. To harvest all the benefits of arbitration, nation-states are in a stiff competition in the journey of becoming a reputed arbitration-friendly seat. Ensuring the right legal environment is an inescapable condition in this journey. Ethiopia is labeled as countries with under developed tradition of arbitration due to legal and institutional plights encircling the institution of arbitration. The Ethiopian arbitration regime as it is regulated by the Civil Code and Civil Procedure Code was signposted as a reason for under developed tradition of arbitration in the country. To linkup the truck of arbitration-friendly systems, Ethiopia has recently introduced its new arbitration law in the year 2021. Now, everyone's eye is on this law expecting its impact in making Ethiopia a hub of commercial arbitration. With the grand objective of assessing the role of the new Ethiopian arbitration law in making Ethiopia an arbitration-friendly seat, this paper has examined the progresses of and challenges posed by the new law in light of rudimentary and contemporary rules and principles of arbitration. The paper finds that Ethiopia has stepped an inch toward arbitration friendliness through the ordinance of the new law with critical concerns yet to be improved.

List of Acronyms

ADR	Alternative Dispute Resolution
CC	Civil Code
CPC	Civil Procedure Code
DRM	Dispute Resolution Mechanism
FDI	Foreign Direct Investment
ODR	Online Dispute Resolution
UNCITRAL	The United Nations Commission on International Trade Law

Chapter One
Introduction

1.1. Background of the Study

Ethiopia's liberal economic policy supplemented by the effects of globalization and the advancement of IT has proliferated the volume of foreign direct investment (FDI), transnational transactions, and national business exchange. It is an incontrovertible allegation that Ethiopia should keep this economic caffeine and unfold further opportunities to alleviate the multifaceted economic and social crisis caused by the recent violence.

A path toward such action is the creation of enabling environment for the business community who are the real actors in the arena. The need for realization of a certain and predictable dispute resolution mechanism (DRM) will come at the forefront in this regard, as uncertainty about DRM creates a barrier to local business transactions and cross-border trade and investment.[1] Attributed to its venerable virtues of flexibility, relative certainty, promptness, and efficiency,[2] arbitration, compared to litigation, arguably offers a better commercial dispute resolution regime. Arbitration as DRM has also played an equivalent role in the settlement of plenty of civil matters. Hence, today, arbitration as a private system of DRM has become the prevalent norm.[3]

To harvest all the benefits of arbitration, nation-states are in a stiff competition in the journey of becoming an arbitration-friendly seat. Ensuring the right legal environment is an essential, though not sufficient, condition in this journey.[4] Thanks to the UNCITRAL model law, national frameworks have changed dramatically in recent years.[5]

Ethiopia, long after the advent of relatively modern arbitration rules through the instrumentality of the civil code (CC) and the civil procedure code (CPC), remains outside

[1] Petra Butler, 'International Commercial Arbitration Put to the Test in the Commonwealth' (2020) 51 Victoria University of Wellington Law Review 357 <https://ojs.victoria.ac.nz/vuwlr/article/view/6608> accessed 15 December 2021

[2] 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 December 2021

[3] Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008) <https://www.cambridge.org> accessed 14 December 2021

[4] 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 December 2021

[5] 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 December 2021

the camp of countries with arbitration-friendly systems.[6] The old Ethiopian arbitration regime was criticized for its incomprehensiveness and being sketchy.[7] The ideas and concepts inculcated in the procedural and substantive laws governing arbitration are far from being clear.

Ethiopia has recently revitalized its arbitration laws to become a hub of international commercial dispute resolution. Hence, it is a necessity of time to examine the progresses of and challenges posed by the new arbitration law in the journey of becoming an arbitration-friendly seat.

1.2. Statement of the Problem

The legal and institutional lacunas are among the factors frequently signposted as a reason for the underdeveloped tradition of arbitration in Ethiopia. Among plenty of other reasons, the inadequacy of the Ethiopian arbitration laws revolves around five pillars of arbitration stipulated in the following statement of the researcher;

Expand arbitrable matters, optimize party autonomy, increase Power of the Tribunal, adopt minimal court Intervention, and a pro-enforcement approach, and thereby take the truck towards Arbitration friendliness.

The then arbitration laws neither differentiate nor define domestic arbitration vis-à-vis international arbitration except for the provisions of the CPC which regulate recognition and enforcement of foreign arbitral awards. The controversy on Arbitrability also remains unsettled yet in Ethiopia.

The old arbitration law is blamed for restricting party autonomy, particularly concerning the interpretation of arbitral submissions and enforceability of finality clauses. It is also reputable for empowering arbitral tribunals with reduced power by failing to fully recognize the principle of competence-competence, Separability, and permitting early court intervention to the extent of stretching wider judicial review power. The CPC has been criticized for long for its anti-enforcement approach to foreign arbitral awards. This all is an attempt to enunciate a few of the multifaceted problems circumventing the Ethiopian arbitration regime.

Being cognizant of the aforementioned legal limitations as barriers in the journey to be made towards arbitration friendliness, Ethiopia has recently overhauled its arbitration law. Now,

[6] 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 November 2021

[7] 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 November 2021

everyone's eye is on this law expecting its impact in making Ethiopia a hub of commercial arbitration. There are queries that whether the new arbitration law has made a progression or retrogression in rectifying the dearths in the hitherto existing laws on arbitration. Hence, it is a necessity of time to examine whether the new law takes Ethiopia to the camp of an arbitration-friendly system or merely left as to where we stand before. Triggered by this, the study strives to examine the progresses brought by this new arbitration law and the role of those advancements in making Ethiopia an arbitration-friendly state. Furthermore, it digs out the dearths of the new arbitration law in light of modern arbitration rules and principles.

1.3. Research Questions

1.3.1. Basic Research Question

What role does the new arbitration law play in making Ethiopia an arbitration-friendly state?

1.3.2. Specific Research questions

A. Do the arbitration and conciliation working procedure proclamation introduce new rules and concepts of arbitration that make Ethiopia an arbitration-friendly state?
B. Are the newly introduced rules and concepts (if any) adequate to make Ethiopia a country having an arbitration-friendly legal system?
C. What are the implications of the progresses and the inadequacies of the new law on the overall arbitration stance of Ethiopia?

1.4. Objectives of the Study

1.4.1. General Objectives

To examine the role of the new Ethiopian arbitration and conciliation working procedure proclamation in making Ethiopia an arbitration-friendly state

1.4.2. Specific Objectives

A. To search for new arbitration-friendly rules and concepts introduced (if any) by the Ethiopian arbitration and conciliation working procedure proclamation
B. To check the adequacy of the newly introduced rules and concepts of arbitration (if any) for making Ethiopia a country having an arbitration-friendly legal system
C. To infer the implications of the progresses and the inadequacies of the new law on the overall arbitration stance of Ethiopia

1.5. Research Methodology

To attain the objectives listed above and to address the research questions, the research has employed a qualitatively approached doctrinal legal research methodology. It provides a systematic exposition of the rules governing arbitration in the new Ethiopian arbitration law and analysis the relationship between each rule. The research steps further to intensively evaluate the dearths of the new Ethiopian arbitration law and recommend changes to rules found inadequate.

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.[8] In related work, Fekadu Petros has made use of these essential and optimal requirements to elaborate on the difference between election, contract, and adjudication as institutions of dispute resolution.[9] Taking insight from the approach of these authors, the writer of this paper has identified 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. Having these standards, the author has passed through two major phases to develop the whole body of the material. He first attempted to set fundamental and optimal barometers for the determination of arbitration friendliness of a certain law. Ultimately, these barometers inter-se are recycled to measure the arbitration friendliness of the new Ethiopian arbitration law.

1.5.1. Sources and Methods of Data Collection

Relevant primary data is obtained from statutory materials. Secondary data is collected from published and unpublished materials on the subject area such as; law books, journal articles, and other professional publications. Hence, the research is conducted under the document review method of data collection.

1.5.2. Techniques of Data Analysis and Interpretation

The corpus of data obtained is analyzed by the document analysis technique to give sound meaning to the subject matter under study.

1.6. Literature Review

Scholarly writing on arbitration in Ethiopia, though not all, revolves around five pertinent subject matters of arbitrability, the role of courts, party autonomy, power of the arbitral

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

[9] 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 November 2021

tribunal, and enforcement aspects that play a great role in the determination of arbitration friendliness.

In his old-aged contribution, Zekarias Keneaa (Associate Prof.) has succinctly articulated how the determination of arbitrability remains an ache in Ethiopia. He has posed the problem that Ethiopian laws lack adequate guidelines for the determination of arbitrability.[10] 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.[11]

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 has stressed 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.[12] Other writers such as Alemnewu,[13] Brihanu,[14] and Diguma[15] have also well-articulated the existence of maximal court intervention and quested 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, reaming silent on the principle of Separability, and adopting a restrictive interpretation of problematic arbitration clauses.[16]

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 country's

[10] Zekarias (n 2)
[11] 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 November 2021
[12] Feyissa (n 6)
[13] 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 November 2021
[14] 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 November 221AD.See Also Birhanu Beyene 'The Degree of Courts Control on Aritration Under Ethiopian Law: Is It to the Right Amount?' (2012) 1 (1) <https://www.ajol.info/index.php/olj/article/view/82422/72576> Acessed 25 November 2021
[15] 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 November 2021
[16] 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 November 2021

goodwill as an arbitration-friendly. They give due regard to enforcement of foreign arbitral awards except for the work of Birhanu that attempted to expound enforcement of domestic awards.[17] Writers like Fekadu[18] and Tecklehagos[19] have revealed 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.

Ultimately, we will come across shreds of literature that study the pitfalls of the Ethiopian arbitration regime in regulating a certain field of laws and those which follow a holistic approach to studying the regime. Writers like Roza, Alemu, Birhanu, and Tecklehagos have succinctly revealed the drawbacks of the Ethiopian arbitration regime concerning IP disputes, multiparty commercial arbitration, labor arbitration, and government construction dispute respectively. Writers such as Micheal,[20] Alemayehu,[21] Mehammed,[22] and Ship M. Gwok,[23] have vocalized the following rudimentary problems encircling the overall Ethiopian arbitration regime.

They have criticized the legal framework for being incomprehensive and sketchy riddled with inconsistencies. They have blamed the system for the non-institutionalization of commercial arbitration and failure to cope with emerging modern laws and practices. Lack of awareness from the business community about the nature and advantages of commercial arbitration coupled with a lack of qualified and integrated arbitrators has, per the writer's conclusion, retarded Ethiopia's move towards arbitration friendliness.

To get rid of such backwardness, Ethiopia has recently revitalized its arbitration law. Now, legal practicians, 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

[17]Birhanu Beyene, 'The Homologation of Domestic Arbitral Awards in Ethiopia' <https://www.researchgate.net/publication/256042287>> accessed 26 November 2021

[18] 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 November 2021

[19] Tecle Hagos Bahta, 'Recognition and Enforcment 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 February 2022

[20] Michael Teshome, 'Laws and Practices of Commercial Arbitration in Ethiopia: Brief Overview' Abyssinian law29<https://www.abyssinialaw.com/uploads/Arbitration%20by%20Michael.pdf>accessed 23 November 2021.

[21] Alemayehu Yismawu, (n 7)

[22] Mohamed Nure, 'The Prospect of Commercial Arbitration in Ethiopia: A Practice Oriented Study' (LLM Thesis, Addis Abeba University 2008) <http://www.aau.edu.et/library/collection/research-collection/> accessed 3 December 2021

[23] Shipi M Gowok, 'Alternative Dispute Resolution in Ethiopia - A Legal Framework' (2008) 2 African Research Review 265 <https://www.ajol.info/index.php/afrrev/article/view/41054> accessed 7 February 2022

by the new law. This work is a new approach to studying the subject matter in two prisms. For one thing, 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. For another thing, it is a pioneering work in examining the role of the new Ethiopian arbitration law in making the country an arbitration-friendly seat since only slight attempts have been made by bloggers to enunciate the changes brought up by the new arbitration law so far.

1.7. Scope of the Study

Adoption of an up-to-date and adequate legal framework is not a sufficient condition to make a country an arbitration-friendly seat. Qualified lawyers, the judiciary, executive organ, and the business community are needed to bring life to such decorated and ample law. As a result, any attempt made to examine the arbitration friendliness of a certain state 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 paper, in its attempt to inspect arbitration friendliness, is confined to, leaving aside other factors, appraisal of the new Ethiopian arbitration law. In so doing, not the whole body of the new law is explored. Only those rules and principles, as enshrined under the new law, that are deemed by the researcher as indispensable for the determination of arbitration friendliness is addressed.

1.8. Organization of the Study

The paper contains four chapters and the first chapter is devoted to introducing the study. The background, the problem statement, the research questions, objectives, methodology, literature review, and delimitation of the scope make the content of the introduction. The second chapter deals with the general conceptual underpinnings of arbitration and the basic attributes of pro-arbitration regimes. The researcher attempted to set the barometers against which arbitration friendliness can be measured in this chapter. The third chapter introduces the readers to the new Ethiopian arbitration law by analyzing the novel pro-arbitration rules and concepts. Furthermore, it reveals the dearths of the new law and enunciates the implications of the progresses and the limitations of the new law on the overall arbitration stance of Ethiopia. Eventually, the paper ends up by stipulating concluding remarks and the ways forward.

Chapter Two

Conceptual Underpinnings of Arbitration and Basic Attributes of Pro-Arbitration Regimes

2.1. Defining Features of Arbitration

Nowadays, there is a transformation from resolution of disputes through government-controlled mechanisms to slightly regulated out-of-court DRM.[24] Arbitration takes the predominant slab in this transformation. The Primacy of Arbitration has been growing tremendously due to its predictability, confidentiality, flexibility, inexpensiveness, and timely disposal of cases.[25]

From a critical look at the definition of arbitration provided by the New York Convention,[26] the UNCITRAL Model Law[27], and the basics of arbitration discoursed by arbitration scholars, we can vividly point out the following essential features of arbitration;

Consent constitutes the foundational basis for any arbitration. While official judges in state courts receive their decision-making power from the state, an arbitrator's power derives from the consent of parties involved in a particular dispute.[28] In the absence of consent, there would be no arbitration.[29] The consent to arbitrate manifests itself in the form of an arbitration agreement. An arbitration agreement encompasses both the notion of arbitration clause and arbitral submission. Arbitration clause is used when parties refer a future potential dispute to be settled through arbitration in an underlying contract. Whereas, arbitral submission is consent reached between parties to arbitrate their dispute after the occurrence of a dispute.

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[24] Wuraola O Durosaro, 'The Role of Arbitration in International Commercial Disputes' (2014) 1 International Journal of Humanities Social Sciences and Education 1 <https://www.arcjournals.org/pdfs/ijhsse/v1-i3/1.pdf> accessed 13 December 2021

[25] Carolyn L Dessin, 'Arbitrability and Vulnerability' (2012) 21 (2) Temple Political and Civil rights Law Review 349, 349 para 1

[26] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Adopted 10 June 1958, Entered into force 7 June 1959 United Nations) 330 UNTS 3

[27] UNCITRAL Model Law on International Commercial Arbitration (1985 with amendments as adopted in 2006). (UNCITRAL Model Law) art 7 (1)
<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671_ebook.pdf> Accessed 10 December 2021

[28] 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
<https://academic.oup.com/arbitration/article-abstract/12/2/137/273800> accessed 9 February 2022

[29] Of course, there are exceptional cases in which an arbitration may emanates from the law mandatorily in absence of consent from the parties

To escape from the risk of washing their dirty linen in public, parties usually forego courts in favor of arbitration. When parties agree to arbitration, they remove their relationships and disputes from the jurisdiction of courts unless some justified grounds invite their intervention.[30] Arbitration is most often manipulated by parties. Hence, as every contract between parties is a private matter between them, so too the arbitration agreement is private between the parties.[31] Thus, party autonomy is the ultimate power determining the forum, structure, system, and other details of the arbitration.[32] Arbitration usually ends in providing final and binding awards by a third-party arbitrator that can be coercively enforced against the unsuccessful party or its assets[33] subject only to limited grounds for challenge in courts.[34]

With this backdrop on the conceptual underpinnings of arbitration, the task of setting the standards for the determination of arbitration friendliness of a certain arbitral law is now in order. To do that, the researcher has identified two levels of standards against which arbitration friendliness can be weighed. These are the fundamental standards and the optimal standards. The fundamental standards are those defining concepts and rules of arbitration without which the institution of arbitration will fail in its original purpose of inauguration. The optimal standards are those contemporary rules and concepts of arbitration that raises the institution of arbitration to the perfect level of realization.

2.2. Setting the Barometers for the Determination of Arbitration Friendliness

We do not have a hard and fast rule on the proper barometers for determining arbitration friendliness. However, we can incontrovertibly point out some standards as indicators of arbitration-friendliness from practices and principles which have acquired a high level of acceptance among the arbitration community. These practices and principles can be found in the works done by international working groups,[35] national arbitration legislation, and

[30] Julian D M Lew, Loukas A Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International BV 2003) <https://libproxy.berkeley.edu/login?qurl=http%3A%2F%2Fwww.kluwerarbitration.com%2Fbook-toc.aspx%3Fbook%3DTOC_Lew_2003_V05_V06IBA> accessed 4 March 2022

[31] ibid 3 para 3

[32] ibid 3 para 4

[33] ibid

[34] Gray B Born, *International Arbitration: Law and Practice* (Kluwer Law International 2012) <http://www.kluwerlaw.com> accessed 3 July 2021

[35] 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 an international arbitration

international arbitration conventions.[36] Though not stands on equal footing with the above one, 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.[37]

2.2.1. Fundamental Standards for the Determination of Arbitration Friendliness

2.2.1.1. Determination of Arbitrability in Modern Arbitration Laws

The term arbitrability can be understood from two perspectives, these are Subjective arbitrability ("***Ratione personae***" notion) and objective arbitrability ("***Ratione Materiae"*** notion).[38] Subjective arbitrability refers to the capacity of parties to enter into an arbitration agreement.[39] Objective arbitrability is used to describe disputes amenable to arbitration.[40]

Beneath every restriction on arbitrability there exist one solid justification.[41] The central theme behind the non-arbitrability of certain disputes is the fear that society will be injured by the arbitration of disputes with public interest element.[42] There is a perception that only a court could correctly interpret matters involving public concern and give effect to them per the intention of the national parliament.[43]

States have adopted different approaches in crafting their arbitrability provision in national laws. From a close inspection of various national laws, we can reveal 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.[44]

Some other states have adopted the approach of inalienable right for arbitrability.[45] Inalienable rights, among other rights, relate to questions of personal status and capacity, divorce, or judicial separation that majorly contains non-economic interests.[46] However, according to some state laws that follow the inalienable rights approach, some non-monetary

[36] Robin Oldenstam and Kristoffer Löf, *Best Practice in International Arbitration* (Universitetforlaget Oslo 2015) <https://www.mannheimerswartling.se/en/our-people/kristoffer-lof/pdf> accessed 15 December 2021
[37] ibid
[38] Bernard Hanotiau, 'The Law Applicable to Arbitrability' (2014) 26 Singapore Academy of Law Journal 874
[39] ibid
[40] ibid
[41] Andrew Rogers, 'Arbitrability' (1992) 1 Asia Pacific Law Review 1 <https://www.tandfonline.com/doi/full/10.1080/18758444.1992.11787959> accessed 23 December 2021
[42] Beata Kozubovska, 'Trends in Arbitrability' (2014) 1 (2) IALS Student Law Review 20 <https://sas-space.sas.ac.uk/5615/> accessed 23 December 2021
[43] Rogers (n 41) 2
[44] Belgium, Italy, Netherlands, and Sweden are among the countries which adopted this approach
[45] Sofia Elena Cozac, 'Arbitrability of Disputes and Jurisdiction of Arbitrators'' [2018] Rev Stiinte Juridice 231
[46] ibid

claims can still be arbitrable if parties are capable of concluding a compromise upon the matter in dispute.[47] Some other states deploy the "listing approach" by enumerating matters which are considered inarbitrable.[48] In a nutshell, in deciding arbitrability, each state may tail it following its own economic and social policy.[49] Both the UNCITRAL Model law and the New York Convention have made lack of arbitrability a ground for refusal of enforcement of an award.[50] The gradual decline of judicial hostility towards arbitration has brought an expansion of the domain of arbitrable matters.[51]

2.2.1.2. The Place of the Principle of Party Autonomy in Arbitration-Friendly Systems

Party autonomy is a ***sin qua non*** for arbitration and an arbitration agreement is a wheel that reflects the operation of the principle of party autonomy. Through this agreement, parties can exclude courts from their dispute and regulate arbitral procedures.[52] Nevertheless, like every right, party autonomy is not an unlimited prerogative. Hence, justifiable limitations can be imposed based on public policy grounds and the requisites of natural justice.[53]

Usually, either the law chosen by the parties (Lex Arbitri) or the law of the place of arbitration (Lex Loci Arbitri) governs the arbitration proceeding.[54] When choosing the Lex Arbitri that governs their dispute parties consider the suitability of the Lex Arbitri.[55] To be an opted place of arbitration states strive to come up with a suitable law of arbitration.[56] Arbitration-friendly laws are those laws that impose modest validity requirements for arbitral agreements, those that allow minimal intervention in the arbitration proceedings, and those

[47] Article 1030(1) of the German ZPO and Article 582(1) of the Austrian Code on Civil Procedure
[48] See Italian Rules of Civil Procedure art 806, Switzerland Federal act on Private international law art 177
[49] 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 December 2021
[50] New York Convention (n 26) art V (2) (a)
[51] Harshad Pathak and Pratyush Panjwani, 'Mandatory Rules and the Dwindling Restraint of Arbitrability' (2018) 5 NLUD Student Law Journal 282
[52] 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 <https://www.semanticscholar.org/paper/A-Critical-Examination-of-the-Role-of-Party-in-and-Dursun/4e1ad8f215789b1891066c0c1671a719a80e3616> accessed 14 February 2022
[53] Moses Oruaze Dickson, 'Party Autonomy and Justice in International Commercial Arbitration' (2018) 60 (1) International Journal of Law and Management 114 <https://www.emerald.com/insight/content/doi/10.1108/IJLMA-12-2016-0184/full/html> accessed 14 February 2022
[54] Dursun (n 52)
[55] 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 February 2022
[56] 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 February 2022

which bestow a greater extent of freedom on the parties among other virtues.[57]Since it contains certain mandatory rules[58] which are required to be applied irrespective of the choice of parties, the Lex Arbitri has a significant impact on determining the extent of party autonomy. The principle of party autonomy has been recognized in a plethora of international instruments[59] and national legislation,[60] and institutional rules[61] to varying extent.

National arbitration laws reinforce the principle of party autonomy by stipulating do's and don'ts. However, there 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 arbitration used to call this principle "the principle of autonomy of arbitration clause".[62] Restricted judicial review and finality of arbitral awards will also enhance party autonomy by ousting courts from the dispute and enforcing the rendered award. Adopting minimal court intervention and a pro-enforcement approach also serves the same purpose. 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.[63]

2.2.1.3. Increased Power of Arbitral Tribunals as an Indicator of Arbitration Friendliness

The principle of Competence-Competence, Separability, and approaches to the interpretation of arbitration agreements are the main mirrors that demonstrate the extent of power granted to arbitral tribunals.

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[57] Dursun (n 52)

[58] There are certain rules of the law of arbitration which required remaining intact. Many lex arbitri followed the UNCITRAL model law approach in delimiting these mandatory rules. For instance, article 7 (2) of the model law that requires arbitration agreement to be in writing, art 18 which deals with equal treatment of parties and opportunity of presenting cases and art 24 (2) & (3), 32 (1), (3), (4) are some of the areas which provides mandatory rules under the model law

[59]UNCITRAL Model Law (n 27) art 28, 19 (1), 5 (1) and articles VI (a) and V 1(d)

[60] 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)

[61] 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

[62] 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 December 2021

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

Separability and Competence-Competence

Separability and Competence-Competence originated as a response to state indifference and hostility towards arbitration at the early time.[64] These principles 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[65] and reduces 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.[66] 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.[67] Separability has attained universal acceptance as a pro-arbitration policy and is included in the UNCITRAL Model Law and other national legislation.[68]

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

[64] Landolt (n 62) 512

[65] 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/jdr/vol2012/iss1/9> accessed 14 December 2021

[66] 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/sol_research/575> accessed 14 December 2021

[67] 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

[68] Ilias Bantekas and others, *UNCITRAL Model Law on International Commercial Arbitration (a Commentary)// Competence of Arbitral Tribunal to Rule on Its Own Juisdiction* (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>accessed15 February 2022

the arbitration agreement itself.[69] As a result, it is said that the doctrine of Competence-Competence perches at the vanishing point of Separability.[70]

Glory to this principle 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, queries with the constitution of the tribunal, and quests on the waiver and lapse of time.[71] 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.[72]

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.[73] 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.[74]

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.[75] The highest form of negative Competence-Competence is adopted by countries well known for their pro-arbitration policy.[76] 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.[77] Note that in the absence of the doctrine of negative Competence-Competence in the law, the

[69] LEE (n 66) 422
[70] 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 December 2021
[71] 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 December 2021
[72] ibid
[73] Solomon (n 16) 26-30
[74] ibid
[75] ibid
[76] Barceló (n 71) 1124
[77] Solomon (n 16)

Court is empowered to make a full investigation of the validity of the objection without referring the matter to the tribunal.

In a nutshell, 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.[78] It is an anti-sabotage mechanism that saves arbitration from being derailed before it begins.[79] 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.[80]

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 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 tribunal from losing jurisdiction on the subject matter objected to.

2.2.1.4. Minimal Court Intervention and Pro-Enforcement Approach as a Pool Factor for Being an Arbitration-Friendly Seat

Court Intervention

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.

It has become a common trend in arbitration that courts are invited to intervene in certain critical points to increase the efficacy of the arbitration. Courts are usually there to determine the existence of an arbitration agreement, to assist the implementation of the arbitration agreement via appointing, removing, or replacing an arbitrator, to order an injunction on

[78] LEE (n 66) 424
[79] Park (n 28) 138
[80] 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 February 2022

proceedings brought in breach of an agreement to arbitrate, to issue interim measures, and to review and enforce the award.[81] Nowadays, court intervention is appropriate and justified almost in all jurisdictions in different degrees and contexts. Nevertheless, to avoid unwarranted intervention, national arbitration laws well stipulated and fettered extents and instances of court intervention.[82] Usually, arbitration instruments provide a prohibitive nonintervention principle that seeks to limit Court intervention only to cases explicitly provided by the law.[83]

Modern arbitration laws are cynical about the wide court intervention in general and unrestricted judicial review of awards in particular since 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.[84] The limited extent of judicial review of an award is one of the strongest virtues which makes France the most favorable place for arbitration.[85]

There are three scenarios in which judicial review of arbitral awards can be drugged into the scene of arbitration. These are; legally prescribed grounds of judicial review and judicially and contractually extended grounds of review.[86] More often than not, the law aspires to regulate the arbitration process by prescribing limited grounds for judicial review of arbitral awards. Accordingly, depending on their ordinance in national arbitral laws, we do have three avenues for judicial review of awards. The first one is the avenue of setting aside. Through this procedure, courts declare awards null and void if they find grounds for setting them aside as stipulated by the national arbitral law. The second avenue is the mechanism of refusal through which courts resist enforcement of an award due to the existence of legally prescribed grounds. The third resort is the mechanism of review through an appeal procedure.

Intending to build an arbitration-friendly environment recently, some states have abolished the review of arbitral awards through appeal process.[87] Even those who upheld avenues of

[81] Carbone (n 65)
[82] Alemnew (n 13)
[83] Article 5 of the UNCITRAL model law and section 1 (c) of the English Arbitration Act of 1996
[84] Aparna D Jujjavarapu, 'Judicial Review of International Commercial Rbitral Awards by National Courts in the United States and India' (University of Georgia 2007) <https://digitalcommons.law.uga.edu/stu_llm/82> accessed 10 December 2021
[85] Kenneth-Michael Curtin, 'Redefining Public Policy in International Arbitration of Mandatory National Laws' (1997) 64 Defense Counsel Journal 271
[86] Katherine A Helm, 'The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?' (2006) 61 (4) Dispute Resolution Journal 16' (2006) 61 Dispute Resolution Journal 16 <https://arbitrationlaw.com/library/expanding-scope-judicial-review-arbitration-awards-where-does-buck-stop-dispute-resolution> accessed 10 December 2021
[87] Mohamed (n 22) 47

appeal have stipulated stringent conditions for its application.[88] Some others have created an appellate second tribunal to review the award rendered by the lower tribunal. Hence, a party agitated with the decision of the first tier of the tribunal may appeal to the second tier of the arbitral tribunal.[89] In the UNCITRAL Model Law, the only form of recourse against an award is the avenue of setting aside.[90] Thus, today the most suitable environment for arbitration is an environment in which an arbitral award is made final and binding with limited grounds of review.[91]

Despite legally prescribed grounds, the judiciary can also expand its review power by introducing additional grounds of review than those expressed by the law. Finally, less often, parties may also establish their standards of judicial review by their agreements.

Pro-Enforcement Approach of Arbitral Laws

The most venerable virtue of arbitration is the enforceability of the award. The basic and by far the most important objective of the New York Convention is to ease the enforcement of foreign arbitral awards.

The New York Convention is praised for landing a collective pro-enforcement approach by limiting grounds of review for denial of enforcement. The grounds listed under the Convention are maximum grounds for refusal of an award and no other grounds can be raised as a defense for refusal of enforcement. Conversely, the Convention allows the contracting states the freedom to apply more liberal rules for refusal of recognition and enforcement.[92] Furthermore, the Convention is reputed for making the following basic pro-enforcement changes;

It has created the presumption as to the binding nature of awards. It requires each contracting state to recognize arbitral awards as binding and enforce them.[93] Based on this obligation, it is claimed that foreign arbitral awards are entitled to prima facie right to recognition and

[88] ibid
[89] The Netherlands arbitration act of 1986 is renowned for such second tier of arbitral tribunal
[90] UNCITRAL Model Law (n 27) art 34
[91] Choong-Lyong Ha, 'The Finality of Arbitral Awards: The U.S. Practices' (2020) 30 Journal of Arbitration Studies 3<https://www.koreascience.or.kr/article/JAKO202027265524007.view?orgId=anpor&hide=breadcrumb,journalinfo> accessed 10 December 2021
[92] Emmanuel Gaillard, Gordon E Kaiser and Bejamin Siino (ed), *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 February 2021
[93] New Yrk Convention (n 26) art III

enforcement.[94] 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.[95] By eluding double exequatur, the Convention has shifted the controlling state regarding the review of arbitral awards for enforcement from the seat of arbitration to the place of enforcement.

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.[96] 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.[97] 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.[98]

2.2.2. Optimal Standards for Determination of Arbitration Friendliness

International business transactions and their resultant disputes have exhibited tremendous increases in number and bring complex issues to the world of commercial arbitration. The increase and the complexity of international commercial arbitration, to a greater extent, is the byproduct of globalization.[99] Such increase and complexity have pushed traditional methods, procedures, and ways of thinking to the periphery. It has brought a plethora of contemporary rules and practices in addition to the traditional methods to the world of arbitration.

In this section of the paper, the researcher strives to highlight on few of those contemporary developments deemed to be easily mainstreamed to the Ethiopian commercial arbitration system having regard to the distinct economic and social reality of the country. These

[94] Gaillard, Kaiser and Siino (ed), (n 92)
[95] LEE (n 66)
[96] 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 December 2021
[97] New York Convention (n 26) art v (1) and (2)
[98] Gaillard, Kaiser and Siino (ed), (n 92)
[99] Michael Malloy, 'Current Issues in International Arbitration' (2002) 15 Global Business & Development Law Journal 43 <https://scholarlycommons.pacific.edu/globe/vol15/iss1/7> accessed 23 February 2022

contemporary developments constitute part of those rules and practices of arbitration labeled as optimal standards of arbitration friendliness by the researcher.

Electronic arbitration and multiparty commercial arbitration are a few instances of recent complex developments in arbitration.[100] The growth of commercial transactions from being conducted between individuals to groups of individuals has simultaneously resulted in commercial disputes involving multiple parties. The growth of business transactions from being conducted physically to electronic commerce has increased the volume of technologically piped disputes.

The occurrences of such contemporary problems have quested the commercial Arbitration system to come up with a plenary solution. Hence, the concept of multiparty commercial arbitration and electronic arbitration[101] system comes up at the forefront as a panacea in modern arbitration laws. There is a claim that the overall commercial arbitration has to be met with services and procedures designed for online commerce and other contemporary developments.[102] Frontloading is also another contemporary development in arbitration that is aimed at promoting procedural efficiency.[103] Per this concept, the parties are required to provide initial submission with specific information about the claim and the dispute. This helps the arbitrators in establishing issues and facts central to the resolution of the dispute. Such a concept is reflected in articles 4, 5, and 20 of the 2010 revision to the UNCITRAL rules.[104] Further recent development in arbitration is the recognition ascribed to consent award. Recently the role of arbitrator as a settlement facilitator has been strongly felt to reduce the time and cost of arbitration. In this advanced role, the arbitrator encourages the parties to an amicable settlement at the preliminary hearing stage and if a settlement is reached in this way, the agreement shall be recorded as a consent award. Furthermore, the ordinance of third-party funding schemes has now become optimal standards that determine the choice for a more favorable seat of arbitration.

[100] Gelinas (n 4)
[101] Malloy (n 99)
[102] Gelinas (n 4) 5ff
[103] David Earnest and others, 'Four Ways to Sharpen the Sword of Efficiency in International Arbitration' [2013] Young ICCA Group Paper 17
<https://www.arbitrationicca.org/media/0/13630881906410/four_ways_to_sharpen_the_sword_of_efficiency_yiccgroup_paper.pdf> accessed 10 December 2021
[104] The recently updated 2012 Swiss Rules also favor the front-loading approach, wherein Article 18(3) requires that, "as a rule, the Claimant shall annex to its Statement of Claim all documents and other evidence on which it relies"

Chapter Three

Appraisal of Arbitration Friendliness of the New Ethiopian Law on Arbitration and Conciliation Working Procedure

3.1. Introduction to the New Arbitration law

Ethiopian Parliament has recently issued a new law on Arbitration and Conciliation Working Procedure.[105] The first three paragraphs of the preamble are the most relevant parts to capture the crux of the motives underlying the new law.

The first paragraph ponders the role of ADR in complimenting courts. It affirms the venerable role of ADR in complimenting the constitutionally guaranteed right of having access to justice. At this point, we are forced to be critical of the poor draftsmanship. The English version of the Proclamation has made use of the term "ADR" and "Conciliation" as two separate DRMs. Conversely, the Amharic version goes for "Arbitration" instead of "ADR" and enunciates the role of "Arbitration" and "Conciliation". Leaving aside the academic debate on the proper place of arbitration viz-a-viz ADR and normal adjudication, for the time being,[106] the Amharic version is the proper path at least in two prisms. For one thing, since the place of conciliation as part and parcel of ADR is incontrovertibly established, it is a futile attempt to deal with "ADR" and "Conciliation" separately as it is done by the drafters. For another thing, the Amharic version is more logical since the new law is ordained to regulate the working procedure of "Arbitration" and "Conciliation" as opposed to "ADR" and "Conciliation".

The second paragraph of the preamble centers on the benefits of arbitration and conciliation in resolving commercial and investment disputes sticking to their virtues of confidentiality, cheapness, less formality, and involvement of experts. The third paragraph and the most relevant purpose of the Proclamation for the subject matter under study seek to provide a general framework for clarification of arbitrability, management of arbitration proceedings, and enforcement of decisions.

[105] Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021, Negarit Gazeta, 27th Year, No. 21 Addis Abeba 2nd April 2021 (Hereinafter the Arbitration Law)
[106] For detailed understanding about the place of arbitration in ADR Please read Fekadu (n 9)

3.2. Progresses and Adequacy of the New Arbitration Law: An Inch Towards Building Arbitration Friendly System

In this section, we will try to reveal the progresses made by the new arbitration law and its adequacy to make Ethiopia an arbitration-friendly seat. In doing so, the rules and concepts enunciated in the new arbitration law will be weighed against those fundamental and optimal standards of arbitration friendliness dealt with in chapter two of this paper.

3.2.1. Unqualified Scope of Application of the New Law

Delimiting the substantive and territorial scope of application of a certain arbitral law is both an essential and difficult task in arbitration. In this regard, the UNCITRAL Model Law defines its substantive scope of application by confining it to International Commercial Arbitration.[107] Accordingly, while the definition of the term international is contained in the body of the model law, the term commercial is taken to the footnote as a guideline for local state legislation.[108]

Concerning the territorial scope of application, the Model Law has employed territorial criterion calling for the vast majority of its provisions to be applied only if the place of arbitration is in the territory of the state that adopted the Model Law. However, certain Articles of the Model Law are given universal application irrespective of the place of arbitration.[109]

Under the former Ethiopian arbitration laws, we do not find any guidelines to identify the proper scope of application of the law. I surmise that the then arbitration laws only dealt with domestic arbitrations.[110] Despite its practical application by courts to international arbitrations seated in Ethiopia,[111] their applicability to international arbitration was a controversial issue since both codes do not distinguish between domestic arbitration and international arbitration except for the CPC section on recognition and enforcement of foreign arbitral awards.[112]

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[107] The Arbitration Law (n 105) art 1 (1)
[108] ibid art 1 (3) and footnote Number two of the UNCITRAL Model law
[109] UNCITRAL model Law (n 27) art 1 (2)
[110] Bezzawork Shimelash, 'The Formation, Content, and Effect of an Arbitral Submission Under Ethiopian Law' (1994) XVII Journal of Ethiopian Law 39 <https://journals.co.za/doi/pdf/10.10520/AJA00220914103> accessed 23 November 2021
[111] Hailegebriel (n 6) 302-303
[112] Civil Code of the Empire of Ethiopia, Proclamation No 165 of 1960, Negarit Gazeta, 19th year, No. 25th, May, 1960 (Herein after "The CC") art 3325-3346 and The Civil Procedure Code of the Empire of Ethiopia, Decree No. 52 of 1965, Negarit Gazeta, Extraordinary issue No. 3 OF 1965 Addis Ababa. 1965 (Herein after "The CPC") art 315-319 and art 350-357)

Today, we do not encounter that much inconvenience in identifying both the substantive and territorial scope of application of the law. Substantively, the new arbitration law applies to "domestic" and "international" "commercial" arbitration.[113] The new law is a verbatim copy of the UNCITRAL Model Law in differentiating between domestic and international arbitration.[114] The Domestic or otherwise nature of the arbitration is determined by reference to either the nature of the transaction or the identity of the parties.[115]

An arbitration is deemed international if the principal business place of the parties is found in two different states. Arbitration is also international if the place of arbitration determined in the arbitration agreement or chosen per the arbitration agreement is located in a foreign country. The same holds if the substantial part of the obligation to be performed is in a foreign country or if the subject matter of the dispute is closely connected to a foreign country. The parties' express agreement on the connection of the subject matter of arbitration with more than one country will also turn the dispute into international arbitration.

One critical issue to be noted at this point is that though the substantive application of the new law is limited to Commercial Arbitration and the term "Commercial" is given a broader definition as it is referred by the footnote to Article one of the UNCITRAL Model Law[116] it does not render other civil disputes inarbitrable unless expressly excluded under Art 7 of the Proclamation. A shallow understanding of article 3 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 criteria under the new law refers only to international arbitrations as opposed to domestic arbitrations. The term commercial is used under Article 3 and definitional Article of the new law only to give effect to commercial reservation adopted by Ethiopia while ratifying the New York Convention.

The new law applies the criterion of strict territoriality in delimiting its spatial reach for domestic arbitration and international arbitration seated in Ethiopia.[117] Hence, the parties cannot agree to apply foreign arbitration law in purely Ethiopian domestic arbitration and international arbitrations seated in Ethiopia. Conversely, certain provisions of the new law

[113] The Arbitration Law (n 105) art 3

[114] Both instruments employ the combined objective and subjective criteria to determine the international or otherwise domestic nature of arbitration and steps further by authorizing the parties to determine the nature of the arbitration

[115] Article 4 of the arbitration Law in tandem with art 1 (3) and (4) of the UNCITRAL model law

[116] Article 1 (1) and art 2 (7) of the Arbitration Law in tandem with the footnote number two of the UNCITRAL model law

[117] The Arbitration Law (n 105) art 3 (1)

have been endowed with universal application irrespective of the place of arbitration similar to the UNCITRAL Model Law.[118]

Such adoption of the criterion of strict territoriality is an encroachment on the autonomy of the parties to choose the Lex Arbitri suitable to their dispute.[119] In modern arbitration rules, the Lex Arbitri comes into operation as a default rule prescribing a set of procedures for the conduct of arbitration in that territory if parties have not made other arrangements through their agreement.[120]

Commencing from the early international view as it is manifested in the Geneva Protocol on Arbitration Clauses to the modern international instruments, notably, UNCITRAL Model Law,[121] the arbitral proceedings shall be governed by the law of the seat of arbitration. Nevertheless, the law of the seat of arbitration is resorted to as the procedural law governing the case only in the absence of choice of parties.[122]

Sadly, the new Ethiopian Arbitration Law does not give a lee-way to parties to choose procedural law governing their dispute for all domestic arbitration and international arbitration having their seats in Ethiopia. This can be inferred from the absence of the "Unless otherwise agreement" stipulation in article 3 (1) of the Proclamation and the mandatory language of "Shall" in lieu of the permissive language of "May" in the same Article. Such unwarranted restriction on the party's freedom will inevitably push parties not to choose Ethiopia as a seat of arbitration. The modern trend is towards detachment of arbitration process from the parochialism of national laws and regulated instead by the agreement of the parties at least as a matter of primary resort.[123]

In a contradictory way, Article 10 (1) of the Proclamation authorizes parties to choose the arbitration law which governs the arbitration proceedings. A search for a solution to this misnomer between Article 3 and Article 10 of the Proclamation forces us to differentiate

[118] ibid 3 (2) and (3)
[119] Parties usually opt for standard institutional arbitral rules such as international chamber of commerce, London Court of International arbitration or ad hoc rules like that of UNCITRAL model law
[120] Alastair Henderson, 'Lex Arbitri, Procedural Law, and The Seat of Arbitration: Unravelling the Laws of the Arbitration Process' (2014) 26 Singapore academy of law journal 886 <https://www.semanticscholar.org/paper/%27Lex-arbitri%27%2C-procedural-law-and-the-seat-of-the-Henderson/6d07616ba95451dfaf6dbdf3dec18dcc5ce86792> accessed 8 March 2022
[121] Article 2 of the Geneva Protocol and art 1 (2) in tandem with art 19 (1) of the UNCITRAL model law. The vast provisions of the model law will apply to the case if the place of the arbitration is in the territory of this state
[122] The New York Convention too, while applying the territorial criteria for its scope, recognizes the possibility that a state might allow the parties to subject an arbitration to a procedural law different from the law of place of arbitration
[123] Henderson (n 120) 893

between internal and external aspects of Lex Arbitri. The Lex Arbitri includes provisions that regulate three interrelated and simultaneously exclusive matters.[124] The first aspect of Lex Arbitri regulates matters internal to the arbitration such as the composition and appointment of the tribunal, requirements for arbitral procedure and due process, and formal requirements for an award.[125] The second aspect of Lex Arbitri regulates the external relationship between the arbitration and the court concerned with both the supportive and supervisory role of courts.[126] The third aspect of Lex Arbitri regulates the broader external relationship between arbitration and the public policy of the seat of arbitration such as arbitrability and fundamental societal values.[127]

Understanding the restriction imposed on parties not to choose the procedural law by Article 3 of the proclamation as only referring to the external aspect of Lex Arbitri seems the only panacea to be drawn for the misnomer. This is in accord with the trend followed by the Model Law and countries that adopted the Model Law. Per this trend, parties are given the right to derogate the law of arbitration or the right to opt out the Lex Arbitri as the law governing the arbitration proceeding as long as that derogated or opted out rule is not of mandatory application. Such an understanding is also justified by sub-article 3 of Article 10 which makes parties' choice of the law applicable to the arbitration agreement and the proceedings inapplicable where such agreement is impossible to implement on its own or where it violates a mandatory provision of the law.

Hence, the writer of this paper poses the following pacifying interpretation for the apparent contradiction created between Article 3 and Article 10 of the new Proclamation. My take is that under the new Proclamation parties are authorized to choose the arbitration law of their choice as the law governing the arbitration proceeding for disputes of any nature (whether domestic or international) as long as that chosen law is concerned only with the internal aspect of Lex Arbitri to the exclusion of the external aspect. If parties have chosen the arbitration law in its external aspect as the law governing the arbitration proceeding, such choice will not be enforced as it violates the mandatory provision of the new Proclamation per Article 10 (3) of the Proclamation since matters regulated by the external aspect of lex arbitri by their nature are areas left for state monopoly due to public policy considerations.

[124] Henderson (n 120) 887-888
[125] ibid
[126] ibid
[127] ibid

3.2.2. Determination of Arbitrability under the New Arbitration Law

The Ethiopian arbitration regimes before the new law were blamed for lack of general guidelines for determination of arbitrability.[128] Some scholars argued that only the general principle of public policy lay the ground for determination of arbitrability.[129]

The matter is worsened by the stipulation of inarbitrability of administrative contract under the CPC and express provision for arbitrability of a plethora of disputes in other parts of the CC, the Commercial Code, Maritime Code, and other substantive laws of the country.[130]

The new arbitration law, however, has demonstrated relative progress in the determination of arbitrability compared to the old system. Nevertheless, if one has critically examined the new law's approach toward determination of arbitrability, he can conclude that the law has not brought a plenary correction to the problem and there still remain issues to be resolved.

The 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 three avoidance rules adopted by the new law which eventually have the effect of creating chaos in the identification of arbitrable matters in Ethiopia.

The first avoidance rule is the outright subject matter exclusion adopted commencing from sub-articles 1-8 of Article 7. The writer is highly skeptical 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 purely public interests nor pure economic concerns. They involve both matters of public concern and individual economic interest. Now the question is, is it a wise approach to outrightly and unconditionally exclude these matters from 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" or "Economic Interest" approach and thereby leaving room for the judiciary or the arbitral tribunal to determine the arbitrability on a case-by-case basis.

Such an outright exclusion of certain subject matters from the ambit of arbitrability through the listing approach has narrowed the domain of arbitrable matters. The hitherto existing laws on arbitration in Ethiopia, in this regard, have at least left a possibility for arbitration of civil

[128] Zekarias (n 2) 117
[129] Tilahun Teshome, 'The Legal Regime Governing Arbitration in Ethiopia: A Synopsis' (2007) 1 Ethiopian Bar Review 117, 125
[130] ibid 127-13

matters not explicitly deemed inarbitrable by law. Accordingly, it may be argued that 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 CPC. This argument is also well substantiated by the silence of the Civil Code 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 including the Civil Code. 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 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 advancement especially if it is seen in light of the global trend toward increasing the domain of arbitrable matters as discussed in chapter two of this paper.

The second avoidance 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 it is going to issue. 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 third avoidance rule is the administrative dispute exclusion under Article 7 (9). The Proclamation denies arbitrability of any administrative dispute for which a special tribunal is established by law. This formulation has its share in eroding the arbitrability policy of the existing international trend. For instance, in the arbitration community, while the existence and validity of IP disputes are made inarbitrable other aspects of IP disputes are highly and efficiently arbitrable.[131] In Ethiopia, since IP disputes have separate IP tribunal, they are completely made inarbitrable as per the words of the new arbitration law. The same holds for

[131] William Grantham, 'The Arbitrability of International Intellectual Property Disputes' (1996) 14 Berkeley Journal of International Law 173 <https://lawcat.berkeley.edu/record/1115585> accessed 10 December 2021

labor disputes since the labor relation board is endowed with the power to entertain parties' disagreements and collective labor disputes.[132]

The other volatility created by the new law is the issue of drawing its relationship with other laws. Let me put a pre-cursor before delving into determining such a relationship.

In Ethiopia, labor matters are arbitrable from the very codification history of labor law. This trend is maintained in the existing labor law too.[133] The Cooperative Societies Proclamation also allows members of the society to resolve their differences through arbitration.[134]

Now, imagine the misnomer between these laws and the new arbitration law. Assume parties 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 three avoidance rules discussed above. Now the question is which law prevails and through which 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 requires to settle through arbitration. On the other side, consumer protection disputes are outrightly excluded from arbitrability by the new arbitration law. Which law are we going to apply 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.[135] Similarly, the Public-private Partnership Proclamation empowers government agencies to enter into arbitration agreements for resolution of disputes.[136]

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

[132]Labor Proclamation No. 1156/2019, Federal Negarit Gazeta, 25th year, No 89, Addis Ababa, 5thSeptember, art 144 (2), 145 and 148 (1) (a)
[133] ibid art 144(1)
[134] Cooperative societies proclamation, 2016, neg. gaz. Proclamation 985, 23th year, no 2, Addis Ababa art 62-67
[135] 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
[136] The public-private partnership proclamation, 2018, neg. gaz. Proclamation no. 1076, 24th Year No. 28 ADDIS ABABA 22nd Feburary, 2018 art 59

administrative contracts in cases provided by the law, we may encounter the same problem raised above with labor, cooperative societies, and consumer dispute scenarios.[137] However, the arbitration law succinctly responded to such potential deadlock concerning the arbitrability of administrative contracts by inserting an exception. Now the question is, can we use the same solution for the other cases stated above?

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 prepared by Professor Tilahun Teshome under the auspices of the then Ethiopian Arbitration and Conciliation Center, in a nutshell, 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".[138] Apart from this explicit stipulation, the draft stipulate that any form of disagreement which may be settled through agreement and negotiation can also be arbitrable.[139] Whatever the motive behind it, the technique of determining arbitrability adopted by the new law is one of the brawny failures where the buries efficacy of the new arbitration law is unveiled.

3.2.3. The Place of Party Autonomy under the New Law

An arbitration agreement is the main tool through which parties exercise their freedom to arbitrate. Whatsoever restrictions imposed on the manner of making, form, extent, and other aspects of this agreement will have a direct effect of limiting party autonomy.

The new 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".[140]

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

[137] The Arbitration Law (n 105) art 7 (7), there exist a discrepancy between the Amharic and English version at this point

[138] Tilahun Teshome (Prof.) and Zekarias keneaa (Associate Prof.), ግልግል ዳኝነት ህግ ረቂቅ Ethiopian Arbitration and Conciliation Ceneter Unofficial model law document art 6 (1)

[139] ibid art 6 (1) in tandem with art 6(2)

[140] The Arbitration Law (n 105) art 2 (1)

the first, the CC and CPC require, in addition to the general contract requirement, the capacity to dispose the right without consideration to enter into an arbitration agreement. This requirement of special capacity is now dropped by the new Proclamation. As a result, we have to look, to determine the capacity to arbitrate, into substantive legal provisions of the relevant subject matter in addition to the general contract capacity requirement.[141]

The old Ethiopian arbitration laws 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 now 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, by 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). In a nutshell, 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 for a restrictive interpretation of arbitration agreements. 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. We will not, however, come across such rules in the new law.

The extent 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 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

[141] Tilahun (n 129) 132-133

of the country.[142] We 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.

The new law has made a progress in this respect 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.[143] 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.[144] Parties are also given the right to expand avenues of review through an agreement to appeal.[145]

The other avenue where we can search 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 phrase "unless otherwise agreed" or "May" term 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 of the tribunal to issue orders of interim measures. They have the right to request the court to order interim measures. With all its controversies on the scope of the right, 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 contained certain mandatory rules. In a purely domestic arbitration parties do not have the right to choose the substantive law to be applied to the case. Furthermore, though the law prescribes the right to choose the law applicable to the arbitration agreement and the proceedings, their choice cannot be

[142] *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
[143] The Arbitration Law (n 92) art 49 (2)
[144] ibid art 50 (1)
[145] ibid art 49 (1) and (3)

enforced if the chosen law is impossible on its own or violates the mandatory provisions of the new law.

Besides those do's and don'ts, 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 soon to be discussed, would have a big impact on realization of the principle of party autonomy.

3.2.4. Power of Arbitral Tribunal under the New Law

Ethiopia has fully overhauled her anti-arbitration stance concerning the principles of Separability, Competence-Competence, and interpretation of arbitration agreements which have a serious effect in determining the scope of the power of arbitral tribunals.

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). Now, per the new law, an arbitral tribunal has a secured power of ruling on the objection direct towards the validity of the main contract without fear of losing its jurisdiction.

The regulation of positive Competence-Competence in the old Ethiopian laws claimed to be defective on three counts [146] First and foremost, the power of the tribunal to rule on its jurisdiction depends on the authorization of parties.[147] Second, even the authorization shall not grant the tribunal the power to decide on the existence and validity of arbitration clauses.[148] The third and the strange approach was that the provisions of arbitral submission relating to the jurisdiction of arbitrators need to be construed narrowly.[149]

The new Proclamation has repaired 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. Thus, the new arbitration law recognizes the first component of positive Competence-Competence which covers quests as to the existence, validity, and scope of the arbitration agreement.[150]

[146] The CC (n 112) art 3329 in tandem with art 3330
[147] ibid art 3330 (1 and 2)
[148] ibid art 3330 (3)
[149] ibid art 3329
[150] The Arbitration Law (n 92) art 19 (1 and 3)

As to the time of ruling on jurisdiction, the new law allows the tribunal to rule on the issue as a preliminary objection or together with the decision on the merit.[151] The first option can be discerned from the requirement of the law which seeks the parties to raise objections against the material jurisdiction of the tribunal before the hearing on point of substance as a preliminary objection.[152] The second option can also be discerned from the provision of the law which allows the tribunal to accept late submission of an objection concerning material jurisdiction or the scope of its jurisdiction.[153]

The ruling of the tribunal on its jurisdiction is not final since it can validly be objected to the First Instant Court within one month from the date of the ruling. In the meantime, parallel proceeding will be there since the law allows the tribunal to continue proceeding and render an award.[154] 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 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 researcher believes 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.

There wasn't notion of negative Competence-Competence under the CC concerning objection to the existence and validity of the arbitration agreement. Hence, 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 distilled this anti-arbitration stance by introducing negative Competence-Competence by 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.[155]

Influenced by the New York Convention and the UNCITRAL Model Law, the Proclamation doesn't draw a line after which courts should not entertain challenges relating to the jurisdiction of an arbitral tribunal. Hence, such challenges can be entertained by the court at

[151] ibid art 19 (2 and 4)
[152] ibid art 19 (2)
[153] ibid art 19 (4)
[154] ibid art 19 (5 and 6)
[155] ibid art 8 (1 and 2)

any time, both before and after the constitution of the tribunal, so long as the condition of voidness and ineffectiveness is fulfilled. This fact is demonstrated by the provision of the Proclamation which allows parallel proceeding on jurisdictional disputes relating to void and ineffective agreements.[156] In a nutshell, the new law bestowed on an arbitral tribunal increased power by fully recognizing Competence-Competence and the principle of Separability.

Another area of the old Ethiopian arbitration law that unduly restricted the power of the tribunal was the requirement of restrictive interpretation. This interpretation reduces the power of the tribunal by resolving controversies relating to arbitration agreements in favor of the court as opposed to the arbitral tribunal. Even if the new law doesn't stipulate any ruling on the interpretation of arbitral agreements, a more liberal interpretation 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. This can be further justified by the fact that major pro-arbitration jurisdictions and most countries that have adopted the UNCITRAL Model Law used either liberal interpretation or neutral interpretation.[157]

As one manifestation of the increased power of the tribunal, the new law empowered an arbitral tribunal with discretionary power to issue order of interim measures upon request of one of the parties or on its own initiative.[158] The tribunal is also guaranteed with the power to issue orders of precautionary measures to ensure the implementation of the order of interim measures.[159]

A further area that demonstrates the extent of power granted to the tribunal 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.[160] Though deciding on which law, the CC or the CPC, prevails is not the scope of this research, settlement of dispute based on the "principle of law" empowers the arbitrator

[156] ibid art 8 (3)
[157] Solomon (n 16) 55-56
[158] The Arbitration Law (n 105) art 20
[159] ibid art 21
[160] The CC (n 112) art 3325 (1) and The CPC (n 112) art 317 (2)

with wide power than settlement per a certain "law".[161] The CC grants very liberal power for arbitrators to decide based on principle of law without the need for prior authorization of parties.

The new law 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 the power of the tribunal in two prisms compared to the CC. On one hand, the applicable normative base is reduced from "anational 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 not incorporated in that chosen law. On the other hand, the application of even that limitative chosen 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) allows the tribunal to apply a substantive law close or relevant to the subject matter of the dispute. If the normative base is chosen by the parties, that specific choice reefers to the substantive law of that country not the conflict of laws rule.[162]

The 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 purely domestic arbitration and accordingly the Ethiopian laws apply out rightly.

On the other side, the new law increases the power of the tribunal by permitting decision in accordance with equity or known commercial practice upon authorization of the parties or applicable law.[163] 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 of 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 principles set by the law.[164] Thus, an arbitrator that has been empowered to decide based on equity understood

[161] 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 <https://www.ajol.info/index.php/mlr/article/view/153595> accessed 23 November 2021
[162] The Arbitration Law (n 105) art 41 (2)
[163] ibid art 41
[164] António Sampaio Caramelo, 'Arbitration in Equity and Amiable Composition Under Portuguese Law' (2008) 25 Journal of International Arbitration 569

in the stronger sense wields wider power than an arbitrator who is empowered to decide based on "principles of law" or "law".[165]

At this point, the writer just wants to draw your attention to the following queries. What does authorization to rule in accordance with equity imply in the new law? Does it refer to equity in the stronger perception or weaker perception? Does it mean power to act as an ***amiable compositeur*** or ***ex aequo et bono*** or both? This is something to be clarified by the judicial application of the law in the future.

An empowerment to decide based on known commercial practice also grants wider power to the tribunal than decision-based on "principle of law" or "law" so long as that specific practice has not become a general principle of law or incorporated into national law.[166]

3.2.5. The Role of Courts under the New Arbitration Law

3.2.5.1. Supportive Role of Courts

Since the supportive role of courts in arbitration is a universally accepted notion with no contestation, we do not need to dwell on it. In this part of the paper, the writer will only give the reader a flashlight of areas under which the new law calls for the supportive role of courts.

The new law has adopted a prohibitive nonintervention principle which seeks to confine court intervention only to cases explicitly provided for by the law.[167] What differentiates the Proclamation from the 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 Proclamation extends to all arbitrable matters as it is governed by the Proclamation and other laws too.

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[168] removal,[169] and substitution of arbitrators[170] priority being given to party autonomy subject to consideration of conditions

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<https://kluwerlawonline.com/journalarticle/Journal+of+International+Arbitration/25.5/JOIA2008044> accessed 13 December 2021

[165] 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

[166] Seyoum (n 161)

[167] Common article 5 of the arbitration law and the UNCITRAL model law

[168] The Arbitration Law (n 105) art 12 (3) (b)

[169] ibid art 16 (2)

[170] ibid art 17 (2) in tandem with art 12 (3) (b)

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 arbitration where one of the parties brought matters covered by arbitration to court.[171]

The same supportive role is felt during arbitration proceedings by Ethiopian courts through assisting the tribunal in taking evidence,[172] recognizing and enforcing interim measures issued by arbitral tribunals[173], and issuing court interim measures.[174] Ethiopian courts are also obliged to bring life to arbitral awards by recognizing and enforcing the award after exercising their supervisory power on it.

3.2.5.2. Supervisory Role of Courts

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.[175] 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 an application objecting to the appointment of an arbitrator is possible in the new law. Accordingly, the decision of the tribunal on the application objecting to the appointment of arbitrator is appealable to the First Instance Court.[176] Such an interlocutory judicial review has the risk of inviting dilatory appeal and court intervention.[177] Further, the court is empowered to order suspension of arbitral proceedings until it renders decision on the objection.[178]

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 review the award on merit.[179] Furthermore, the grounds of review listed under Article 351 (c-d) of CPC extend up to turning the appellate court into a trial court.[180] 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

[171] ibid art 8 (1)
[172] ibid art 37
[173] ibid art 25 (2 and 3)
[174] ibid art 9 in tandem with art 27
[175] See Birhanu Degree of Courts Control (n 14) and Hailegebriel (n 6)
[176] The Arbitration Law (n 105) art 15 (4)
[177] Hailegebriel (n 6)
[178] The Arbitration Law (n 105) art 15 (5)
[179] Birhanu Degree of Courts Control (n 14)
[180] ibid

abolished by the new Proclamation unless it is introduced by agreement of the parties.[181] 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 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 system of Ethiopia was the cassation review of awards. 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,[182] 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.[183] 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 and allows the parties to avoid it if they thought Cassation review is an unnecessary intervention. In the opinion of the researcher, the involvement of the Federal Cassation bench in arbitration via review of arbitral awards will diminish hereafter in Ethiopia since 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 thought of as a proper avenue that maintains parties' wish to avoid courts and permits courts' regulatory power by supervising any violation of fundamental notion of procedural justice. [184] 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.[185]

[181] The Arbitration Law (n 105) art 49 (1)
[182] Birhanu Cassation Review (n 14)
[183] *National Mining Corporation vs Danny Driling PLC* (Federal Supreme Court Cassation Bench)
[184] Birhanu Degree of Courts Control (n 14) and Feyissa (n 6)
[185] Article 351 in tandem with article 356 of the CPC

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 Article50 (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.

Based on the reasons for applying to set aside, courts will render either of the following remedies. The court may set aside the award if the subject matter of the dispute is inarbitrable or if the recognition and enforcement of the award amounts to a violation of public morality, public policy, or national security.[186] The court may also suspend the award for not more than 60 days.[187] The court may remand, in lieu of setting aside, the case to the tribunal by suspending the award wholly or partially.[188]

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.[189] While objection against the 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.[190]

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.[191] If the objection is raised by the parties, the court shall remand the award to the tribunal for amendment.[192] Conversely, if the objection is raised by third parties the court may reverse or modify the award partly or wholly.[193] This response to be made for the third-party objection appear to allow courts to be intrusive and review the award on merit. Accordingly, courts will correct

[186] The Arbitration Law (n 105) art 50 (4)
[187] ibid art 50 (5)
[188] ibid art 50 (6)
[189] ibid art 48 In tandem with art 52
[190] ibid art 48 in tandem with article 52 (1)
[191] ibid art 48 (1) and (2)
[192] ibid art 48 (3)
[193] ibid art 48 (4)

the award if there is a mistake in it and what we finally have is the reversed or amended judgment of the court not the award of an arbitral tribunal.

The final avenue for review by 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. Though the applicability of Article 51 of the Proclamation regarding the execution of arbitral awards is extended to both domestic and foreign awards, the Proclamation regulates the enforcement of domestic and foreign awards separately under Articles 52 and 53 respectively. Accordingly, the court 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 Article52 (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. We will come back to this issue in the next section.

3.2.6. The New Arbitration Law: Is it in Favor of Enforcement of Arbitral Awards?

Old Ethiopian laws on arbitration have given little concern for enforcement of domestic awards as there was only one sub-article that speaks about it. The CPC under Article 319 (2) requires execution of domestic award upon application for homologation. It doesn't, however, stipulate when courts deny or grant application for homologation and eventually decide in favor of execution or refuse to execute.

Coming to foreign awards, while foreign awards under the New York Convention are entitled to prima facie right to recognition and enforcement, their enforcement under Article 461 of the CPC was made conditional on the fulfillment of all the grounds stipulated therein. The wording of Article 461 of CPC is framed in an anti-enforcement approach in the sense that foreign arbitral awards in Ethiopia were enforceable only exceptionally, not as a rule.[194] The query whether the CPC article applies only to matters concerning recognition and enforcement to the exclusion of an application for recognition alone was also a point of dispute.[195] In what follows we will enunciate the progresses brought in this regard by the new law.

[194] Hailegebriel (n 6)
[195] Hailegebriel (n 6) 329-330

With the ratification of the New York Convention in March 2020 by the Ratification Proclamation No. 1184/2020 and the issuance of the new arbitral law, we have multiple rules governing the enforcement regime in Ethiopia. To begin from enforcement of domestic awards and international awards rendered in Ethiopia, unless their enforcement is objected to on grounds listed under Article 52 of the Proclamation, they are given first-hand right for enforcement by Article 51 upon application for execution. Thus, it is not necessary to homologate domestic awards before their enforcement for the reason that the new law only requires an application for execution of awards as opposed to an application for homologation under Article 51. Such is evident from the list of requirements stipulated for the execution of awards under Article 51.

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 non-retroactive application, reciprocity, and commercial reservation made by Ethiopia while acceding to the New York Convention. The very first option for an award creditor who seeks enforcement of a foreign award is recursing to the New York Convention pursuant to Article 53 (1) of the Proclamation. 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 commercial matters due to commercial reservation under Article 3 of the new Proclamation.

Now, the worrisome issue is what would be 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 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 venue which multiplies the enforcement regime of a foreign award in Ethiopia is the reciprocity reservation. Since 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 states can not be enforced through the New York Convention. The way out for enforcement of such an 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 regimes of enforcement of foreign arbitral awards.[196]

Without making difference between domestic and foreign, arbitral awards in Ethiopia have now prima facie entitlement to enforcement. 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. The same duty is imposed on states by the New York Convention. Furthermore, courts shall enforce the awards except for the existence of grounds of refusal of enforcement under each rule. Thus, now in Ethiopia awards are enforceable in principle not as an exception.

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 listed tests of non-enforceability that include reciprocity, the award being rendered based on an invalid arbitration agreement, awards rendered by a tribunal not duly constituted per the laws of the seat of the award, unenforceability of the award under Ethiopian law, unequal treatment of parties in getting heard in the proceeding, in appointing arbitrators, and presenting their evidence, inarbitrability of the subject matter under Ethiopian law, and contravention of public policy, morality, and security of the award.

Despite the similarity in some respects, the tests of non-enforceability under the Proclamation are not coextensive with the grounds listed under the Model Law. The test of a valid arbitration agreement 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 Article53 (1) (b) is also comparable with Article 36 (1) (a) (IV) of the Model Law. However, the difference between the two is the fact that the propriety of the constitution of the arbitral tribunal under the Model Law is measured against the law 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

[196] For detailed understanding on the multipilicity of the current Ethiopian enfocment regime please see Tecle Hagos Bahta on the 'The Ratification of the New York Convention in Ethiopia: Towards Efficacy and Avoidance of Divergent Paths (2021) 15 (2) Mizan Law Review 493-522 <http://dx.doi.org/10.4314/mlr.v15i2.6>

of the constitution of an arbitral tribunal, instead, reference is made directly to the law of the seat of arbitration.

Article 53 (1) (c) which speaks about the unenforceability of awards has no comparable grounds under the Model Law. Article 53 (1) (d) of the Proclamation is 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. I cannot see the logic for treating public policy, morality, and security separately here while the very nature of public policy may well contain public security and public morality.

At this point, I want to accentuate the following grounds of refusal recognized by the Model Law but not by the Proclamation. The Model Law under Article 36 (1) (a) (III) and (V) stipulates awards not contemplated or not falling within the terms of the submission as a ground for refusal. The same holds for awards beyond the scope of the submission or not yet binding awards or suspended awards. Can we question the raison de'etre for not making those lists a ground for refusal by the Proclamation while suspended awards and awards that have not reached their final stage are made grounds of objection for execution under Article 52 (2) (f) of the Proclamation? Furthermore, what constitutes reciprocity or when is reciprocity said to be fulfilled is also a concrete question yet to be answered by the judiciary.

To step into convention awards, their enforcement shall be regulated by the New York Convention.[197] Before directly gauging 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.[198] 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 whom Ethiopia has a significant economic relationship like Eritrea, Somalia, and South Sudan will

[197] The Arbitration Law (n 105) art 53 (1)
[198] Convention on the Recognition and Enforcement of Foreign Arbitral Awards Ratification Proclamation No. 1184/2020, *Federal Negarit Gazeta*, 26th Year No. 21 art 2 and 3

not be enforced under the convention.[199] 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.[200] 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.

Another pro-enforcement bias of the Proclamation is manifested in absence of the requirement of ***double exequatur*** commencing from Articles 51 – 53 like the New York Convention. 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.[201] 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.

To pick one final point, 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 improvements made by addressing recognition together with enforcement under the headings of section eight, we cannot find any specific provision in the Proclamation governing recognition of awards alone. What is the fate of defensive awards which demand only recognition?[202] Can courts simply extend the grounds for refusal or grant of recognition and enforcement to cases involving recognition alone?

3.2.7. Contemporary Rules and Concepts of Arbitration Vis-à-Vis the New Ethiopian Arbitration Law

The task of addressing the whole contemporary notions in arbitration and assessing the adequacy of their incorporation in the new arbitration law is not within the scope of this study as it requires a separate investigation. What we will do in this part is to introduce the reader

[199] Seyoum, International Commercial Arbitration (n 165) 205-230
[200] The New York Convention Ratification Proclamation (n 198) art 3
[201] The Arbitration Law (n 105) art 51
[202] 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. Read Tecle Hagos Bahta (n 19) for more details on this issue

to the contemporary notions incorporated in the new law and indicate the need for the introduction of some contemporary notions which are relevant to the economic and social reality of Ethiopia.

Multi-party arbitration as a notion of contemporary arbitration adjoining complex commercial transactions was not given proper attention under the old arbitration laws.[203] Intervention, joinder, Consolidation, and appointment of arbitrator/s are the basic elements of a multiparty commercial arbitration. Seen in light of these basic elements of multi-party arbitration, the new arbitration law too does not comprehensively and fully address the issue of multiparty arbitration.

To begin with intervention, 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. Thus, submission of application for intervention and consent of the party is made conditions for permitting intervention. Now the problem arises with respect consent requirement and the time within which such permission for intervention can be granted. 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. Obtaining such consent from contracting parties is a cumbersome task particularly seen in light of the purpose of intervention in any court or arbitral proceedings. As to the time of intervention, Article 40 of the new Proclamation allows intervention at any time as long as the award is not rendered. This is a calamitous approach since the 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 very essence of arbitration.

Concerning joinder, Article 40 (2) of the Proclamation regulates the issue of joinder of third parties albeit the usage of the word intervention. Here again, an application requesting joinder and consent of the third party are the two requirements to allow joinder. Again, like the intervening party, it is also unthinkable for the contracting parties to obtain the consent of a third party to join the arbitration and make him liable for their claim. The question as to the time within which an application for joinder can be made is not answered by the new law,

[203] Alemu Balcha, 'The Place of Multiparty Commercial Arbitration under Ethiopian Arbitration Law' (2020) 9 Oromia Law Journal 114 <https://www.ajol.info/index.php/olj/article/view/202838> accessed 23 November 2021

while the time of joinder has a bearing effect on the propriety of appointment of arbitrators in granting equal opportunity to the parties and thereby affects the essence of arbitration in case joinder is made after appointment/confirmation of arbitrator/s as discussed above in case of intervention.

Furthermore, Article 40 says nothing about consolidation of suits in case of multi-party arbitration and hence, the only way out is to resort to Article 317 of the CPC provision that speaks about the similarity of procedure between civil litigation and arbitration or awaiting the agreement of parties for consolidation. The new Proclamation also remains silent on the appointment of arbitrators in case of multiparty arbitration. Indeed, we may analogically apply the Proclamation's rule on joint appointment and its default rule for the appointment of arbitrators in conventional arbitration to multiparty arbitration. Accordingly, if the dispute is purely bipolar where the parties can normally be divided into a claimant and respondent camp, we can 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 appointment by the court provided under Article 12 (3) (b).

A seemingly front-loading rule comparable to Articles 4, 5, and 20 of the 2010 UNCITRAL Arbitral Rule is provided under Article 31 of the Proclamation regarding notification of arbitral proceeding, response to the notification, and representation by attorney. The recognition ascribed to consent award under Article 43 of the Proclamation is also one manifestation of the incorporation of contemporary rules.

Other most prominent contemporary developments in arbitration like the online dispute resolution (ODR mechanism) and the third-party funding scheme have not been introduced by the new law despite their relevance to the current reality of the country.

Chapter Four

Conclusion and Recommendations

4.1. Conclusion

With 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 in the old arbitration laws as regulated by the Civil Code and the Civil Procedure Code.

The new arbitration law has come up with numerous arbitration-friendly gestures by increasing party autonomy, power of the arbitral tribunal, reinforcing limited judicial intervention, and a pro-enforcement approach. The new law has increased party autonomy by avoiding the special capacity requirement to have a valid arbitration agreement and stringent formality requirements enshrined in the old legal regime. The freedom of parties under the new law extends up to the right to insert a finality clause to avoid avenues of cassation review and setting aside and the right to extend avenues of review through agreement to appeal. Further, parties are bestowed with the freedom to choose the Lex Arbitri in its internal aspect and the substantive law applicable to the merit.

The new law has raised the power of an arbitral tribunal through recognizing the principle of Separability, Competence-Competence in its fullest mode, the tribunal's power to order interim and precautionary measures, the recognition of rule in accordance with equity and commercial practice, and avoidance of restrictive interpretation of doubtful arbitration agreements. The new propitious law has adopted limited judicial intervention by inserting a prohibitive anti-intervention rule and recognizing the full power of a tribunal to rule on its jurisdiction. It has also relinquished appeal as an avenue of review, made Cassation review and setting aside a waivable alternative, and placed setting aside in the right place for supervision. A pro-enforcement approach is manifested by the new law through recognizing the binding and enforceable nature of awards and specification of limited grounds for disavowal of recognition and enforcement of awards.

Despite bringing those signs of progress, some aspects of the new arbitration law have remained problematic and seek either legal reform or strong judicial activism in their application. The new law has failed to provide a general framework for the determination of arbitrable cases as it has promised. How arbitrability is regulated remains contentious in many respects and severely limits the domain of arbitrable disputes. The seemingly

unqualified strict territorial criterion of the new law which restricts parties' freedom to choose the Lex Arbitri in its external dimension is not consonant with modern arbitration laws. The new law has failed to fully regulate essential elements of multi-party arbitration. Especially, the consent requirement for joinder and intervention provided by the law, the time within which an application for intervention and joinder can be made, and the law's failure to regulate the consolidation and appointment aspect of multiparty arbitration have left the regulation of multiparty dispute yet to be overhauled. Further, it has failed to incorporate a Third-Party Funding scheme and ODR mechanism despite their importance to the current reality of Ethiopia.

Further, the new law contains some rules which may result in an anti-arbitration friendly trend unless regulated and applied with caution. The writer is cynical of the interlocutory judicial review of the tribunal's decision on an application objecting to the appointment of arbitrators as it 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. The slippery concept of public policy and reciprocity for refusal of enforcement of an award, the determination of the actual meaning of rule in accordance with equity, and the interpretation of doubtful arbitration agreements are some of the areas which require strong judicial activism to put them to use as arbitration-friendly.

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 will have an increased number of arbitration cases, a reduction of court congestion, an increase in FDI, and transitional 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 conundrums of the new law presented in the paper will result in a diminishing return of arbitration friendliness though the actual effects of all those progresses and conundrums in making Ethiopia an arbitration-friendly seat is something yet to be tested in practice.

4.2. Recommendations

Based on the aforementioned analysis of the research and the conclusion, the writer would like to make the following recommendations:

1. The unqualified scope of application of the new law with respect to domestic arbitration and international arbitration seated in Ethiopia must be subjected to the choice of parties for its application. Hence, any legal reform to be undertaken on the new arbitration law hereafter should subject the application of the arbitration law to the prior choice of parties. By so doing the lawmaker will avoid the misnomer created between Article 3 (1) and Article 10 (1) of the Proclamation on the proper scope of application. Further, it maximizes party autonomy by allowing them to choose procedural law of their whim whatsoever the type of arbitration is. Until the realization of such legal reform, courts and tribunals should conceive the restriction imposed on parties by Article 3 (1) of the Proclamation as referring only to the external aspect of arbitration.
2. To avoid the mess encircling the determination of arbitrable cases, the lawmaker must amend Article 7 of the new Proclamation in light of modern techniques of drafting rules on arbitrability. The researcher recommends the approach taken under Article 6 of the early draft provision of arbitration prepared by Prof. Tilahun Teshome under the auspices of the then Ethiopian Arbitration and Conciliation Center for this.
3. The part of the new law that allows contractual extension of review through parties' agreement to appeal must be re-enacted in a way that explicitly stipulates limited grounds on which parties can and cannot agree to appeal.
4. It is recommended for the lawmaker to rethink and amend Article 40 of the Proclamation in a way that fully addresses all components of multiparty arbitration. Accordingly, Article 40 of the new Proclamation should be re-crafted inculcating the following points:
    A. A provision that separately regulates intervention and joinder should have to be introduced
    B. The requirement of consent of parties to the arbitration to intervene in an arbitration proceeding and the requirement of consent of a third party to join him in the proceeding provided by the new law should be relinquished

C. Parties' freedom to intervene or join arbitral proceedings should be restricted only to the period before the appointment of an arbitrator or confirmation of the appointment of an arbitrator

D. Separate provisions that regulate the appointment of arbitrator/s in both bipolar and multipolar multiparty disputes should be added to the new law. Accordingly, the approach of joint appointment of arbitrator/s for bipolar multiparty dispute and court appointment of arbitrator/s for multipolar multiparty dispute should be adopted

E. A separate provision that regulates the manner and conditions for consolidation of two or more arbitrations must be added to Article 40 of the proclamation

5. It is recommended to revitalize the new law and insert a provision that regulates the recognition aspect of an award only. Article 43 and 44 (1) of the draft arbitration provision prepared by Tilahun Teshome will serve as a real model in this regard.
6. The new Proclamation should be revisited to introduce an ODR mechanism and Third-Party Funding scheme as they are crucial contemporary arbitration rules for current Ethiopian reality
7. 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.
8. 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.

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