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MAJOR PROBLEMS ASSOCIATED WITH ARBITRATION IN
ETHIOPIA

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Addis Ababa, Ethiopia

May, 2020

Declaration

I, Tensay Belayneh, declare that the thesis is my own original work. The thesis has not been submitted for a degree in any other University and all materials employed in the thesis have been dully acknowledged.

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I won!

Thumps up!

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LIST OF ABBREVIATIONS/ACRONYMS

AACCSA	Addis Ababa Chamber of Commerce and Sectoral Associations
AACCSA-AI	Addis Ababa Chamber of Commerce and Sectoral Associations Arbitration Institute
ACCP	Austrian Code of Civil Procedure.
ADR	Amicable Dispute Resolution
ART	Article
CDR	Commercial Dispute Resolution
CPC	Civil Procedure Code
ECCSA	Ethiopian Chamber of Commerce and Sectoral Associations.
ECCSA-AI	Ethiopian Chamber of Commerce and Sectoral Associations Arbitration Institute
EACC	Ethiopian Arbitration and Conciliation Center.
FDRE	Federal Democratic Republic of Ethiopia
ICC	International Chamber of Commerce
ICSID	International Center for Settlement of Investment Disputes
J	Journal
JIL	Journal of International Law
L	Law
LLM	Master of Laws
LR	Law Review
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law

USA

United States of America

ABSTRACT

The thesis found out that arbitration in Ethiopia is encircled by lack of modernity of the substantive and procedural arbitration laws as a result of which the laws are not adaptable to the demands of commercial disputes of the day. The arbitration is not also institutionalized to cope up with the demands of investors and other commercial actors. Lack of awareness of the importance of arbitration on the part of the public is also a problem. Amendment of the arbitration laws, ratification of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards, working in the promotion of importance of arbitration, and increasing the number, competitiveness and effectiveness of arbitral institutions are the solutions to the major problems.

Key Words: *Arbitration, Problems, Awareness, Institutional Arbitration.*

CHAPTER ONE

PROPOSAL OF THE STUDY

1.1. Background of the Study

“Justice must be beyond all suspicion as to the independence and impartiality of the judges, and this basic principle of justice in the court is no less fundamental in the case of justice administered by an arbitral tribunal”

Rene David, ‘Arbitration in International Trade’, (1985), p. 252

Arbitration is a voluntary and consensual process based on private procedure, which, *inter alia*, aims at avoiding problems litigations face in relation to disputes of complex nature in industrial society.¹

For arbitration to be effective, major problems surrounding the system practically, institutionally and legally should be resolved. There should be strong and well-functioning arbitral institutions, as well as modernized arbitration laws that ensure neutrality and efficiency of arbitrators and capable of responding to the ever changing modern business scenarios. Third parties’ rights in relation to arbitration proceeding should also be protected.

We have to take note that the mere fact that the parties submit disputes to be settled by arbitration does not result in the deprivation of the right to impartial and independent arbitrator.² This right is fundamental in arbitration and analogous to ‘the right to impartial and independent judge

¹ Kenneth S. Carlston, ‘Theory of the Arbitration Process’, (1952), Vol. 17(4), LAW AND CONTEMPORARY PROBLEMS, 631, and see also United Nations Conference On Trade and Development, ‘Dispute Settlement, International Commercial Arbitration, United Nations, 2005, available at www.unctad.com , accessed on January 1/2020 6.

² Christopher Koch, ‘Standards and Procedures for Disqualifying Arbitrators’, [2003], Journal of International Arbitration, 325.

universally recognized as fundamental human rights'³. An arbitration law, therefore, should include requirements that ensure the independence and impartiality of the arbitrator.

Ethiopia is not an exception in having various problems associated with arbitration. The laws that predominantly regulate arbitration in Ethiopia are the Civil Code of the 1960 and Civil Procedure Code of the 1965. The laws by themselves are problematic in that they do not go with the changing business environment since many things have changed since 1965. There are also problems associated with the absence of sufficient number of functional arbitration institutions and lack of legal framework regulating these institutions.

There are international instruments and experiences of other countries which may lend ideas on how to modernize our arbitration law and how to strengthen our Arbitral Institutions.

1.2. Literature Review

According to the renowned Arbitration Expert and Scholar Gary Born, arbitration has five distinct features: efficiency, expedition, expert based, even handed and more enforceable.⁴ Arbitration has these five better advantages over litigation proceedings.

The Article by John F. Robb came to conclude that it is advisable to assign technical experts in the case of technical and complicated mechanical patents.⁵ According to this Article, the arbitration proceeding was expeditious in terms of saving of time and expense compared to the litigation system which would have taken much more time. The very thesis of the Article is evaluating the adaptability of the arbitration procedure for settlement of patent disputes by analyzing practical arbitration cases from the USA.

³ Robert Brainer & Fabian Von Shlaberndorffa, 'Article 6 of the European Convention on Human Rights and its Bearing upon International Arbitration', [2001], *Liber Amicorum Karl Heinz Bochsteigel*, 94 and see also Rene David, *Arbitration in International Trade*, (Kluwer Law & Treaties Publishers, 1985) 252.

⁴ Andrey Gorlenko, Interview with Gary Born, (March 19, 2019) , available at <https://www.wilmerhale.com> accessed on December 10/2019.

⁵ John F. Robb, 'Arbitration Procedure Compared with Court Litigation in Patent Controversies', [1952] *LAW AND CONTEMPORARY PROBLEM* 689.

The Article by Alemayehu Yismaw stated that the Ethiopian arbitration has to be institutionalized, modernized and functional.⁶ This Article further stated that the Ethiopian arbitration laws lack ‘doctrines and standards comparable with modern international commercial practice’, they are not adaptable to the demands of contemporary domestic and international commercial arbitration. Furthermore, there are two Arbitration Centers in Ethiopia: AACCSA Arbitration Institute and Bahir Dar University Arbitration Center.⁷ More specifically, it reiterated the importance of institutionalizing the arbitration system in Ethiopia. Absence of modernized law and absence of institutions impeded the international commerce to come to Ethiopia. More elaborated method based research on the identified and specified major problems associated with arbitration in Ethiopia is the theme of this paper.

The thesis by Yared Tilahun⁸ stated that the Ethiopia arbitration law is not modernized in comparisons with UNICTRAL Model Law and concluded that the Ethiopia law lacks modernization more specifically in the area that allows ordinary courts to intervene in the arbitral process.

Zekarias Keneaa’s Article⁹ emphasizes on the formation of arbitral tribunals and disqualification, removal, resignation and replacement of arbitrators. However, the Article did not respond to whether the existing law has sufficient requirements that ensure neutrality, discipline and efficiency of the arbitrators.

This paper is, therefore, going to study the major problems associated with arbitration in Ethiopia on issues not covered or issues not well addressed by the literatures stated above.

⁶ Alemayehu Yismaw, ‘The Need to Establish a Workable, Modern, and Institutionalized Commercial Arbitration in Ethiopia’, [2015], Haramaya LR, 37.

⁷ *ibid*, 56.

⁸ Yared Tilahun, ‘Analysis of the Existing Ethiopian Arbitration Law in Light with the UNICTRAL Model Law on Arbitration’, (LLM Thesis, University of Addis Ababa 2018).

⁹ Zekarias Keneaa, ‘Formation of Arbitral Tribunals and Disqualification and Removal of Arbitrators under Ethiopian Law’, (2007), Vol. 21, J Ethiopian L, 138.

1.3. Statement of the Problem

The effectiveness of arbitration is evaluated against the existence of modern legal framework and well-functioning institutions. Furthermore, qualified human resource is important. However, there are major problems associated with the law's adaptability to modern day business disputes and compatibility to the technical and complicated commercial feature of the disputes. The arbitration law does not have strong provisions that ensure efficiency and proficiency of arbitrators. The laws do not have sufficient provisions regulating the establishment and conduct of Arbitration Centers. We have only four functional Arbitration Institutions/Centers to a population of more than 100 million people. Three of them are at a very early stage of development.

The Ethiopian enterprises have resorted to foreign Arbitration Centers, such the ICC, in an effort to resolve disputes with their foreign business partners. This is caused by absence of well-functioning and suitable International Arbitration Center in Ethiopia. The suitability of Ethiopian arbitration laws to investors is also questionable. There are also problems attributed to the absence of sufficient legal framework on the protection of rights of third parties in arbitration proceedings.

1.4. Research Questions

1. Is the existing arbitration law in Ethiopia adaptable to the settlement of highly technical and commercial disputes in the areas such as: investment, and construction? Is contract enforcement scheme in the country suitable for the cases emanating from these and similar other areas?
2. Does the existing arbitration law sufficiently ensure the neutrality and efficiency of arbitrators? Do we have clear legal provisions on the requirement of disclosure of facts that might result in lack of impartiality and independence of arbitrators?
3. Does Ethiopia have sufficient arbitration institutions/centers to resolve commercial disputes?
4. Does Ethiopia have sufficient legal framework to establish Arbitration Institutions/Centers and regulate the conduct of arbitration institutions/centers?
5. Does the Ethiopian arbitration system embody mechanisms for the protection of the rights of third parties in arbitral proceedings?

1.5. Research Objectives

The study is conducted with the following objectives:

1. To examine the relevancy of modernizing the arbitration law of Ethiopia with the view to make it sufficient enough to resolve business disputes of the day
2. To examine the existence of sufficient arbitration institutions in Ethiopia and whether there is legal framework regulating the establishment, operation and conduct of arbitration centers in Ethiopia
3. To examine whether the existing arbitration law is enough to ensure neutrality and efficiency of arbitrators
4. To analyze whether the Ethiopian arbitration system is responsive to the rights of third parties in arbitral proceedings
5. To make recommendation to tackle the identified major problems associated with arbitration in Ethiopia.

1.6. Significance of the Study

The paper will look into the major legal, institutional and practical problems associated with arbitration in Ethiopia and put forward recommendations to tackle the major problems. Hence, the paper is going to contribute to the future amendments of arbitration laws in Ethiopia and it will also make recommendation to tackle the major practical and institutional problems. This would enable stakeholders to emphasize on the recommendations made to alleviate major problems in arbitration. It will also be informative to the stakeholders working in the area of arbitration. It will also be useful for further research.

1.7. Scope of the Study

The scope of the whole study is limited to the major legal, institutional and practical problems associated with arbitration in Ethiopia. However, detail analysis of the entire problem in relation to arbitration in Ethiopia is out of the reach of the study. The major problems, as singled out in the research questions, will be within the reach of the research and the scope is limited to answering these questions and related relevant issues.

1.8. Methodology

The research is a mixed research involving both doctrinal and empirical studies. The research employs both primary and secondary data sources. Therefore, relevant laws, regulations, books,

articles, conference papers, and thesis are collected and analyzed. Interview with relevant informants would be employed. Relevant court cases and accessible arbitral awards are also analyzed. Observations are also going to be employed in few circumstances.

Experiences of some selected countries will be looked for whenever it is found relevant. Furthermore, selected international instruments will be used to analyze the status of Ethiopian arbitration law in selected areas. Generally, qualitative analytical approaches are employed to a larger extent.

1.9. Limitation of the Study

The first limitation is difficulty of getting access to detailed materials related to major problems associated with arbitration in Ethiopia. It also became very hard to access some materials available only on online payment basis. However, I did my best to get the possible materials available.

CHAPTER TWO

ARBITRATION IN GENERAL: CONCEPTUAL UNDERPINNINGS

2.1. Brief Overview of the Notion of Arbitration

Arbitration dates back to the ancient Egypt and Greek Civilizations as a mode of dispute settlement mechanism preceding litigation.¹⁰ Commercial arbitration was common to the ancient desert Caravans in Marco Polo's time, ancient Phoenicians and Greek traders.¹¹ Industrial Controversies such as terms of employment, working conditions and wages were also arbitrated in the ancient times.¹²

In modern day scenarios, the legal assumption of arbitration process is that arbitration merely derives its existence from the contractual consent and will of the disputant parties.¹³ In most relevant instances, contractual agreements between the disputants is the foundation for the inception of arbitration process. Arbitral agreements, be it in the form of arbitral submission or an arbitral clause, may contain seat of arbitration, choice of law, composition of the arbitral tribunal and other relevant elements deemed important by the parties. Arbitration can take different forms such as civil arbitration, investment related arbitration and commercial arbitration as the case may be.¹⁴

In relation to leading international instruments, the United Nations Commission On International Trade Law(UNCITRAL), is a U.N organ which is based in Vienna, and is charged predominantly with drafting model statutes and other supportive materials promoting international trade.¹⁵ The UNCITRAL made two prominent contributions to the development of international arbitration.¹⁶ The first major contribution is the adoption of the UNCITRAL Arbitration Rules, which was

¹⁰ Hailegebriel G. Feyissa, 'The Role of Ethiopian Courts in Commercial Arbitration', (2010), Vol. 4, Mizan LR, 298.

¹¹ Frank D. Emerson, 'History of Arbitration and Practice and Law', [1970], Cleveland State LR 2.

¹² *ibid.*

¹³ Carlson (n 1) 631.

¹⁴ Hailegebriel G. Feyissa (n 10) 298.

¹⁵ James H. Carter, 'The International Commercial Arbitration Explosion: More Rules, More Laws, More Books, So What?', [1994], Michigan JIL, Vol.15, 787.

¹⁶ *ibid.*

approved by the U.N General Assembly in 1976.¹⁷ The second foundational contribution is the adoption of the UNCITRAL Model Law in International Commercial Arbitration in 1985.¹⁸

The Rules have become a widely accepted rules of procedures applicable in *ad hoc* arbitration proceedings.¹⁹ Therefore, the Rules are meant to be applicable only in case of *ad hoc* arbitration proceedings. Unlike institutional arbitration, in *ad hoc* arbitration, there is no Arbitration Center to administer the case as per its own rules of procedure. The Model Law, however, is meant to govern both *ad hoc* and institutional arbitrations. These two instruments are designed to be complementary to one another and are becoming an international norm which reflect a sort of international consensus.²⁰

Ethiopia has not yet adopted the UNCITRAL Model Law, as part of her arbitration law. The incompatibility of Ethiopian arbitration law with the Model Law is going to be assessed later in this paper chapter 3. Though Ethiopia signed the ICSID Convention, it has not yet ratified and made it part of the law of the land.²¹ Ethiopian parliament is set to ratify the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards as the deliberation steps have been completed.

The UNCITRAL Model Law, the UNCITRAL Rules and the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards are considered as ‘landmarks in the development of international arbitration’ in addition to their relevance for the modernization of national arbitration systems²².

¹⁷ G.A. Res 31//98, Reprinted in 15 I.L.M 701 (1976).

¹⁸ United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration (Herein after cited as UNCITRAL), 21 June 1985, U.N.Doc.A/40/17, Annex, I, at 81-93.

¹⁹ Carter (n 15) 787.

²⁰ *ibid* 787-788.

²¹ Hailegebriel G. Feyissa (n 10) 302.

²² Daniel Alemayehu, ‘Review of Arbitration in Ethiopian Construction Industry’ (LLM Thesis, Addis Ababa University 2014) 9.

2.1.1. Arbitration and Other Modalities of Dispute Resolution

2.1.1.1. Arbitration Vs Litigation

Arbitration is one ‘variant of adjudication’²³. Arbitration is an alternative means of adjudicating disputes.²⁴ The significant difference between arbitration and litigation is that litigation involves courts in the decision of the case while arbitration involves resolution of disputes outside of the court. Arbitration, as one variant of adjudication, guarantees the right to proof and argument to the parties.²⁵ In arbitration, ‘the due process doctrine is qualified as fair hearing’²⁶. Just like litigation, arbitrators are supposed to render an explained and reasoned award.²⁷ According to Fekadu Petros, the assumptions that arbitration is more flexible, less costly, more prompt and involves more party autonomy than litigation are ‘either unchallenged ritualized thoughts or result from the mere private nature of arbitrator’s office’²⁸. This remains controversial as other literatures argue in favor of those points as distinguishing features of arbitration from litigation. I will be stating the arguments in the literatures in the upcoming sections.

Arbitration process, in most relevant respects, begins with the agreement of the parties, while litigation does not demand the consent of both parties as *sin qua non* condition for beginning the process. In arbitration, the arbitrators are in principle chosen by the parties while in litigation judges are assigned by the sovereign.²⁹

2.1.1.2. Arbitration Vs ADR Mechanisms

Conciliation, mediation, Early Neutral Evaluation, Expert Determination, Mini-Trial, Negotiation and Compromise are all the forms that fall within the category of ADR.³⁰ The acronym “ADR”,

²³ Fekadu Petros, “Underlying Distinctions Between ADR, *Shimgilina*, and Arbitration, A critical Analysis”, (2009), Vol. 1(1), Mizan LR, 109.

²⁴ Zekarias Keneaa (n 9) 137.

²⁵ Fekadu Petros (n 23) 108.

²⁶ *ibid* 110.

²⁷ *ibid*.

²⁸ *ibid* 109.

²⁹ Zekarias Keneaa (n 9) 138 and see also the Civil Code of the Empire of Ethiopia, 1960, Article 3331, Extraordinary Issue, Proc. No. 165, *Negarit Gazzeta*, 19th Year, No. 2 (herein after cited as Civil Code).

³⁰ Fekadu Petros (n 23) 116.

however, is contestable as to what it stands for. Even though many people have the opinion that it stands for “Alternative Dispute Resolution”, the ICC is of the opinion that ADR stands for “Amicable Dispute Resolution”³¹. The “Alternative Dispute Resolution” connotation was initially developed in USA when merchants looked for alternative dispute resolution other than litigation.³² The notion of “Amicable Dispute Resolution” corresponds with the ideal of assisting parties to a negotiated settlement avoiding the confusion with arbitration and also avoids the problematic question ‘to what is it alternative’?³³.

ADR, unlike arbitration which is the variant of adjudication, is rather one variant of contract.³⁴ It involves freedom of will and consent. The basic idea of freedom of contract is ‘contracting parties are rational enough to best know their interest, and make the right choice of values in the course of bargaining with each other’³⁵. Their free will and consent is the basis for contracts. It is all about willful exchange of values between the parties. It is the free will aspect of the contract as dispute resolution mechanism that distinguishes ADR from arbitration.³⁶ In ADR, as variant of contract, the parties will have every right at any stage of the process to stop the process using their free will, which is not the case in arbitration as it is adjudication. In Arbitration, the process starts by the contractual agreement of the parties. Once they submit their consent and arbitration begins, unilateral freedom of will vanishes away. In ADR, however, the freedom of will is intact until the final result is agreed between the parties. The outcome of the process is in the hands of the parties in ADR, while the outcome of the arbitration process is in the hand of the arbitrators based on the parties’ proof and argument.³⁷ Unlike arbitration, the third party in ADR does not control any part of the proceeding as a result of which the neutrality of the third party in ADR is less important than in arbitration.³⁸

³¹ *ibid* 115.

³² *ibid*.

³³ *ibid*.

³⁴ *ibid* 114.

³⁵ *ibid* 115.

³⁶ *ibid*.

³⁷ *ibid* 111.

³⁸ *ibid* 115.

Unlike arbitration, hearing, production of evidence and arguments, presentation of witnesses and cross examination of witnesses are not mandatorily required in ADR.³⁹ Furthermore, there is no mandatory requirement for fair hearing and duty to give reasoned and explained decision in ADR.⁴⁰

2.1.2. International and Domestic Arbitration

An arbitration may be deemed domestic and international based on seat, for legal persons, and residence of the parties involved in the dispute.⁴¹ Furthermore, an arbitration can be deemed domestic or international based on the nature of the transaction.⁴² Some countries make distinct rules that regulate domestic and international arbitration while some others confine to the same rules that regulate both domestic and international arbitration.⁴³

Sometimes, the issue of international arbitration involves the study of conflict of law rules which becomes more complex in Ethiopia due to the facts that there is no clear intention in our arbitration law to regulate international arbitration; we don't have conflict of law rules; and there are no practical cases related to the problem under examination.⁴⁴

Making the distinction between domestic and international arbitration is a matter of national law of the country in focus and the practice shows that different states have different laws on the subject matter.⁴⁵ The UNCITRAL Model Law, however, came up with standards to identify a certain

³⁹ *ibid* 117.

⁴⁰ *ibid* 118.

⁴¹ Anna Rizova-Clegg and Oleg Temnikov, "Bulgaria", in James J. Carter (ed), *The International Arbitration Review*, (Law Business Research Ltd 2018), 100.

⁴² Michael Teshome, 'Laws and Practice of Commercial Arbitration in Ethiopia: Brief Overview', 11, available at www.abbyssinialaw.com , accessed on 10/01/2020 and see also United Nations Conference On Trade and Development (n 1) 13.

⁴³ For instance, England, Wales, Brazil and Austria have the same rules for both domestic and international arbitration while Colombia and Cyprus have distinct rules that regulate domestic and international arbitration; one can see James J. Carter(ed), *The International Arbitration Review*, (Law Business Research Ltd 2018) on the experience of various States on this regard.

⁴⁴ Bezzawerk Shimelash, 'The Formation, Content, and Effect of an Arbitral Submission Under Ethiopian law', (1994), Vol. 17, J Ethiopian L 90.

⁴⁵ United Nations Conference On Trade and Development (n 1) 12.

arbitration as international arbitration.⁴⁶ If the parties to the agreement, at the time of the conclusion of the contract, have different States of place of business; if the place of arbitration agreed by the parties is situated outside the State in which the parties have their places of business; if the substantial part of the commercial relationship to be performed between the parties or the place with which the subject-matter of the dispute is most closely connected to a State other than the parties' place of business; and if the arbitration agreement relates to more than one country, then the arbitration is deemed international arbitration by virtue of the Model Law. Though there is no clear indication to that effect, the Ethiopian arbitration law seems to have ignored international arbitration and has been devised to serve only domestic arbitration.⁴⁷

2.2. The Tradition of Using Arbitration as a Dispute Resolution Mechanism in Ethiopia

In Ethiopia, arbitration began to take modern form since the introduction of the Ethiopian Civil Code in 1960 and the Civil Procedure Code in 1965. While the Civil Code regulates substantive issues on arbitral submissions⁴⁸, and Civil Procedure Code regulates the procedures on how to arbitrate⁴⁹.

Customary dispute resolution based on customary laws is the most prevalent practice in Ethiopia.⁵⁰ These customary laws, rules, methods, and procedures which are largely unwritten are the 'organic and living law' of the indigenous business community of Ethiopia.⁵¹

Shimgilina, *Gilgil*, *Yezemed Dagninet* and *Irq* are Amharic terms used under Ethiopian legislations as if they connote ADR and arbitration.⁵² The law itself is contributing to the confusion by using four of the Amharic terms in different legislations to represent arbitration.

⁴⁶ UNCITRAL, Articles 1(3) and 1(4)

⁴⁷ Bezzawerk Shimelash (n 44) 90.

⁴⁸ Civil Code, Articles 3325- 3346.

⁴⁹ The Civil Procedure Code of the Empire of Ethiopia, 1965, Articles 315-319 and 350-357, Extraordinary Issue, Decree No. 52, *Negarit Gazzeta*, 25th Year, No. 3 (Herein after Cited as Civil Procedure Code).

⁵⁰ Alemayehu Yismaw (n 6) 40.

⁵¹ *ibid*.

⁵² Tecle Hagos Bahta, 'Adjudication and Arbitrability of Government Construction Disputes', (2009), Vol. 3(1), *Mizan LR*, 31 and also see Fekadu Petros (n 23) 121.

Most nations and nationalities in Ethiopia have dispute resolution mechanism that corresponds to *Shimgilina*.⁵³ *Shimgilina* across various communities share commonality of providing services that correspond to modern terms such as arbitration, conciliation, mediation and compromise.⁵⁴ According to literatures, in all systems that correspond to *shimgilina*, elders initiate dispute resolution, they conduct hearing, party presentation of a certain sort, they finally render morally binding decisions and compromise and they receive no fee for their service.⁵⁵ Such traditional dispute resolution schemes remain controversial as to whether they qualify to be called arbitration in the strictest sense of the term or not.

Therefore, *shimgilina*'s congruence with the modern concept of arbitration has to be evaluated. The procedures followed in arbitration proceedings are nearly similar to the procedures in regular court litigations in Ethiopia.⁵⁶ However, arbitral proceedings are not required to fully comply with regular court proceedings and flexibility is involved. In addition to decision making according to normative systems governing law, 'most *lex arbitri* regulations allow decision making according to *ex aequo et bono* (principles of equity and fairness)'.⁵⁷ *Shimgilina* looks to have similarities with the *ex aequo et bono* arbitration. However, in *ex aequo et bono* arbitration, the equity and fairness applies to the substantive aspect of resolution of the dispute without affecting the procedural standards.⁵⁸ *Shimgilina* disregards both substantive and procedural laws making the outcome not enforceable arbitration award. However, the two coincide when *shimgilina* follows proper procedural rules stipulated in the law. When they coincide, the award given by the *Shimagles/Arbitrators* will be enforced like court judgement as per Article 319 of the CPC.

⁵³ *Shimgilina* connotes a dispute resolution by the elderly in the Ethiopian community. The *Shimgilina* status is acquired, *inter alia*, by the age, wisdom and social status of the person in question. See Fekadu Petros(n 23) 123.

⁵⁴ *ibid*.

⁵⁵ *ibid* 123-124.

⁵⁶ See Gebru Kore V. Amadeyiu Federeche, (Federal Supreme Court 2003) Cassation File No. 52942 and Article 3345 of the Civil Code and Article 317(1) of the Civil Procedure Code.

⁵⁷ Alexander J. Behlolavek, 'Application of Law in Arbitration, *Ex Aequo et Bono* and Amiable Compositetor', (2013), 25, available at www.arbitrationlaw.com, accessed on 01/01/2020.

⁵⁸ Fekadu Petros (n 23) 128.

The current acceptable Amharic word to represent modern arbitration is *Gilgil*. Most of the recent Proclamations and AACCSA-AI Rule employed the term *Gilgil* to refer to arbitration in the modern day sense of the term.⁵⁹ We also see that Federal Supreme Court Cassation Bench Decisions use the term *Gilgil/ግልግል*.

Generally in Ethiopia, practical recent developments are indicative of an increased interest towards arbitration as a dispute settlement scheme.⁶⁰ Detail issues relating to current situation may be dealt with in the upcoming sections.

2.3. Why Arbitration is Preferable in Ethiopia and Elsewhere

Arbitration is a preferred mode of dispute resolution for a number of reasons. It enables the parties to avoid litigation and decision by biased and unfriendly foreign court in the case of international commercial disputes.⁶¹ Second of all, arbitration enhances the possibility of presenting ones dispute to learned and experienced experts.⁶² The parties are at liberty to choose the arbitrators that preside over the arbitral proceeding or they can choose the authority who assigns the arbitrators. Furthermore, arbitration provides for greater flexibility of procedure which results from compromissory clause itself, or from the procedures by Arbitral Institutions, or from the decisions made by arbitrators within scope of their authority.⁶³ Arbitration keeps the businessmen's secret intact. The dispute is not supposed to be heard in public unlike litigation. In relation to expense, however, as the individual circumstances vary, there is a probability, not certainty, of a reduced cost in arbitration.⁶⁴ Arbitration has an easier possibility of enforcement across national boundaries, unlike enforcement of a foreign court judgement.⁶⁵ This is one reason that international commercial arbitration is now popular in the world.⁶⁶ For instance, Under The New York

⁵⁹ *ibid.*

⁶⁰ Daniel Alemeyehu (n 22) 47.

⁶¹ Alan Redfern and Marthin Hunter, *Law and Practice of International Commercial Arbitration*, (London Sweet & Maxwell 2005) 1-5 and see also Richard J. Graving, 'The International Commercial Arbitration Institutions: How Good Are They Doing?', (1989), *Am. U. J. INT'L L. & POL'Y*, Vol. 4 324.

⁶² Graving (n 61) 324.

⁶³ *ibid.*

⁶⁴ *ibid.*

⁶⁵ *ibid.*

⁶⁶ United Nations Conference On Trade and Development (n 1) 16.

Convention of the 1958, the USA is bound to 77 other countries on mutual recognition of foreign arbitral awards, which is not the case to litigation judgements.⁶⁷

2.3.1. Technical and Commercial Issues

Resolution of disputes which are technical in nature is often best served by special knowledge or expertise on the part of the decision maker.⁶⁸ Very often, judges in litigation do not have such technical expertise, and they must call and rely on expert witness evidence. However, arbitration would rather pave the way for the parties an opportunity to secure the services of an individual experienced in a technical area in question, or one who has knowledge of the commercial norms relevant to a particular business field.⁶⁹

Businessmen may settle disputes through negotiation or compromise which don't demand the involvement of neutral third parties. But this does not work if the relationship between the parties have already been strained resulting in mistrust between the businessmen.⁷⁰ This would necessitate the intervention of third party to resolve the dispute. Conciliation by third party may not fit the dispute as their decision is not binding unless agreed otherwise. Litigation is the other option. However, litigation has problems related to backlog of cases and it takes long time to get judgement and problem of corruption, which is often referred to as 'palm greasing'.⁷¹ Furthermore, judges in litigation do not often understand business disputes as they are not specialists only in business area of law.⁷² Even though it is not perfect, arbitration is the other better option left to the businessmen in dispute.⁷³ Arbitration becomes the only option, without alternative, when the dispute is international in nature, when dispute is technical and complex like in petroleum operations, or large construction projects, or where the dispute involves large amount of money.⁷⁴

⁶⁷ Graving (n 61) 319.

⁶⁸ Why use Arbitration, Dispute Resolution Series, Practice Module 4, Produced by Dispute Prevention and Resolution Series Department of Justice, Canada, available at www.justice.gc.ca accessed on 10/01/2020.

⁶⁹ *ibid.*

⁷⁰ Bezzawerk Shimelash (n 44) 93.

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ *ibid* 94.

⁷⁴ *ibid.*

However, it is undeniable that it is not easy to find arbitrators who are acquainted with knowledge in the field and the legal principles involved.⁷⁵ Due to these reasons disputes in the construction industry, investment, international trade, banking and insurance are often better resolved through arbitration.

In Ethiopia, arbitration is the preferred scheme of dispute resolution due to knowledge of the arbitrators in the dispute, arbitration keeps the smooth relationship between the disputing parties, arbitration is expedient and less expensive, parties have opportunity to choose arbitrators and Institutions, and arbitration is adaptable to the nature of the dispute.⁷⁶ Though public courts have been the main source of justice in the Country since 1940's, public courts have congestion and backlog of cases, and are not accessible, follow strict procedures, are time consuming and costly, are unpredictable and uncertain, conduct trial publicly, are not independent and they are corrupt.⁷⁷ Furthermore, they obviate animosity and enmity between the parties.⁷⁸ Businessmen do not want disputes to be exposed to the public as that affects their business and they don't want to have animosity with their customers or their business partners. Therefore, arbitration is preferable to the business communities than litigation.

⁷⁵ *ibid.*

⁷⁶ Daniel Alemayehu (n 22) 49.

⁷⁷ Alemayehu Yismaw (n 6) 40.

⁷⁸ *ibid.*

CHAPTER THREE

MAJOR PROBLEMS ASSOCIATED WITH ARBITRATION IN ETHIOPIA

3.1. Lack of Modern Substantive and Procedural Arbitration Laws

3.1.1. Brief Overview of the Ethiopian Arbitration Laws

FDRE Constitution under article 34(5) recognizes adjudication of disputes of a personal nature in accordance with customary or religious laws with the consent of both parties. Disputes of a private commercial nature, family and labor can be adjudicated through customary law. Communities can form an arbitration forum to resolve disputes of a private nature which arise among members of the community. Arbitration is, therefore, constitutionally recognized means of adjudicating private and family law related disputes.

In Ethiopia, arbitration is predominantly regulated by the Civil Code provisions, Articles 3325-3346, and the CPC provisions, Articles 244(2)(g), 315-319, and Articles 350-357. Furthermore, Article 461 of the CPC provides the conditions for enforcement of arbitral awards as part of execution of decrees. Furthermore, Chambers of Commerce Establishment Proclamation 341/2003 may be mentioned as additional source of law regulating arbitration. Commercial Code Article 647((3), Revised Family Code Articles 118-122 and 288, Proclamation No. 550/2007 Articles 6(7) and 28, Proclamation No. 197/2000 Article 9(4) and Proclamation No. 372/2003 Article 13(4)(c) are also among the legal provisions making reference to arbitration. International Conventions ratified by Ethiopia and Bilateral agreements to which Ethiopia is a party could be sources of law employed to regulate arbitration.⁷⁹

Under Ethiopian arbitration law, arbitral submissions are contracts that are supposed to fulfil substantive and formality requirements. The requirements of consent, capacity and object are relevant substantive requirements to be fulfilled.⁸⁰ In relation to form, the arbitral submission is

⁷⁹ FDRE Constitution, 1995, Article 9(4), Extraordinary Issue, Proclamation No.1., *Fed. Neg. Gaz.*, 1st Year, No. 1.

⁸⁰ See Articles 3325-3328 and 1676(1) of the Civil Code.

Note has to be taken that arbitration agreement is contract that is supposed to fulfil basic substantive and formality requirements of general provisions of contract by virtue of Article 1676(1) of the Civil Code. That includes consent sustainable at law, capacity, acceptable object and formality requirement put in place in law as provided in Article 1678.

supposed to be drawn in a form required by law to dispose without consideration the right to which the arbitral submission is concerned.⁸¹

The arbitration agreement could be to submit to arbitration existing disputes termed as *compromise* agreement or disputes which arise out of contract in the future often termed as *clause compromissoire*.⁸²

The power to appoint arbitrators is in principle given to the parties. Courts may come in *lieu* of the parties to appoint arbitrators when the parties fail to appoint arbitrators of their choice, in the agreement to arbitrate or afterwards, or when one of the parties chose one while the other party failed to appoint one.⁸³ The court is also given the authority to appoint the president of the tribunal when the appointed arbitrators fail to select the chairman either from among themselves or from outside of themselves.⁸⁴ Arbitrators can also be appointed by a third party as long as the parties have entrusted the third party to do so. For instance, arbitral institutions can be entrusted by the parties to assign arbitrators who preside over the arbitration. In the same fashion, courts may also be called up on to assign arbitrators in many other circumstances such as when a person appointed as an arbitrator refuses to accept the appointment by the one of parties, when an arbitrator dies, an arbitrator becomes incapable or when an arbitrator resigns.⁸⁵ A different stance is taken by the Civil Code when the arbitrator is disqualified or removed and the court is entitled to appoint the arbitrator without waiting for failure of the parties to appoint one.⁸⁶ The Civil Code enumerates a number of grounds for disqualifying an appointed arbitrator. The grounds include minority of the arbitrator, conviction of the arbitrator by court, unsound mind of the arbitrator, illness and absence of the arbitrator, and ‘any other reason that leaves the arbitrator with inability to discharge his functions properly or within a reasonable time’⁸⁷.

⁸¹ Article 3336(2) of the Civil Code.

⁸² Arts. 3328(1) and (2) of the Civil Code and see also Zekarias Keneaa (n 9) 141.

⁸³ See Art. 3332(3) and 3334(2) of the Civil Code.

⁸⁴ Art. 3332(3) of the Civil Code.

⁸⁵ Article 3336(1) of the Civil Code.

⁸⁶ Article 3336(2) of the Civil Code.

⁸⁷ Article 3340(1) of the Civil Code.

In relation to the procedure, it is very important that the tribunal must conduct the proceedings fairly and impartially giving full and equal opportunity to both parties.⁸⁸ The tribunal is supposed to decide based on the law unless the parties agreed otherwise.⁸⁹ The form in which arbitral award is made should also be in the same fashion as a court judgement.⁹⁰ If the award is given in writing signed by the arbitrators along with assessment of evidence and reasons and fulfilling other requirements of the law, the award is executed just like a court judgement.⁹¹ As per Article 351 of the CPC, parties are entitled to appeal to ordinary courts provided the conditions in the law are met. For instance, if equal opportunity to present evidence is not given to both parties, the court will revoke the arbitral award. An arbitral award can also be set aside as far as the conditions provided in Article 356 of the CPC are met.

3.1.2. Adaptability of the Ethiopian Arbitration Law to Technical and Commercial Disputes

3.1.2.1. Construction Disputes and Arbitration Law

The Growth and Transformation plan of the Government along with increasing growth of cities and increasing demand for housing are increasing the construction projects in Ethiopia.⁹² Due to the unique feature of construction projects, the specific period of time within which it is supposed to be completed, their nature of being handled by special groups of experts, the complicated nature of the dispute and the effect of globalization in the field of construction makes it prone to frequent disputes.⁹³ There needs to be effective and efficient means of out-of-court amicable dispute resolution scheme for the construction industry and arbitration is a preferred scheme.⁹⁴ The compatibility of the Ethiopian arbitration law should be assessed if it meets the demands of the disputes in the construction industry.

⁸⁸ Article 317(2) of the Civil Procedure Code.

⁸⁹ Article 317(2) of the Civil Procedure Code.

⁹⁰ *ibid* Article 318(2).

⁹¹ *ibid* Article 181 and 319(2).

⁹² Daniel Alemayehu (n 22) 1.

⁹³ *ibid*.

⁹⁴ *ibid* 2.

Appealing against awards and setting aside of awards are possible in a number of grounds under Ethiopian arbitration law. Accordingly, appeal is possible, *inter alia*, if the award is ‘inconsistent, uncertain, or ambiguous or is on its face wrong in law or fact’⁹⁵. Furthermore, the Cassation Bench decided that the Cassation Bench can review the award on its merit if there is fundamental error of law even though there is finality clause in the arbitral submission.⁹⁶ The Cassation Bench Judges who presided over the case are of the opinion that waiver of right of appeal and finality clause should not override the Constitution’s ambition to create uniformity of interpretation across the country by correcting fundamental error of law and Ethiopia’s ambition to be arbitration-friendly country should only be seen within the Constitution’s provisions.⁹⁷ It should not be forgotten that arbitration is a private procedure which only stands up on the will and consent of the parties. The Cassation Bench decided in another case that though parties waive their right to appeal in the arbitral submission, the award handed down by the arbitrators can still be appealable alleging that appeal is basic right.⁹⁸ As a result, courts can review the tribunal’s decision in the existence of contractual waiver of the parties to right of appeal.

As a result of the multiplicity of grounds of appeal, parties to an international arbitration seated in Ethiopia operating a major construction project may have difficulties over the finality of the award⁹⁹. The Cassation Bench further aggravated the multiplicity of the grounds of appeal by

⁹⁵ Civil Procedure Code, Article 351(a).

⁹⁶ National Mineral Corp Pvt Ltd V. Danni Drilling Pvt Ltd Co (Federal Supreme Court, 2010), Vol. 10, Cassation Bench, Civil Case No. 42239.

It is to be recalled that this decision was given by 7 judges to reverse the Cassation Decision given in Cassation Civil Case No. 21849 in which 5 judges decided that if the parties waive their right to appeal in their agreements, the Cassation Bench will not have power to review the award.

⁹⁷ Interview with Ato Almaw Wolie, Former Federal Supreme Court Judge, March 20/2020, (Addis Ababa, Ethiopia). It is to be noted that the Interviewee is one of the 7 judges who gave the above cited decision.

⁹⁸ Deragados J&P Joint Venture V Saba Construction (Federal Supreme Court, 2008), Vol. 8, Cassation Bench Civil Case No. 37678.

See the arbitral award that was made appealable at ‘Report of Arbitral Awards, Volume 3, 1-85’, and one can see the dispute is construction dispute and it involves complicated issues.

⁹⁹ Kim Rosenberg *et al*, ‘Construction Arbitration in East Africa’(2018), The Middle Eastern and African Arbitration Review 2018, available at <http://globalarbitrationreview.com-2018/1198288/construction-arbitration-in-esat-africa> accessed on January 16/2020.

ruling out any possibility for an agreement to waive the right to appeal. This will have an impact for domestic and foreign construction companies who want speedy out-of-court final resolution of their disputes by arbitration.

When one comes to the UNCITRAL Model Law, however, an award can be appealed and set aside only in few defined circumstances. These few circumstances include: invalidity of the arbitration agreement, lack of proper notice, or inability to present one's case, the dispute is outside the submission to the arbitration, incorrect composition of the tribunal, the subject matter of the dispute is not arbitrable, and the award conflicts with the State's public policy.¹⁰⁰ The current arbitration law in Ethiopia is different and wider in scope than the UNCITRAL Model Law.¹⁰¹ Based on the rulings of the Federal Supreme Court Cassation Bench, the most important departure of the Ethiopian law is that part of the law that permits review of the merit of the award in the name of appeal and further prohibition of agreement to waive appeal right. This has a direct negative repercussion in the resolution of disputes in the construction industry.

Furthermore, the CPC under Article 315 prohibits submission of administrative contracts to arbitration. Public construction contracts are administrative contracts.¹⁰² This will be an impediment to the submission of government construction disputes to arbitration. However, Federal Cassation File No. 16896/1998 decided otherwise and made administrative contracts arbitrable. The Cassation bench stated that the dispute between Illubabor Zonal Department of Education and Zemzem PLC should be submitted to arbitration as per the contractual agreement of the two parties. The Justification is based on Article 1731 of the Civil Code that provides that contracts are laws as between the parties. However, the Court's ruling looks to have been against Article 315(2) of the CPC which clearly prohibits arbitrability of administrative contracts¹⁰³. Therefore, question of arbitrability of administrative contracts, which certainly includes, *inter alia*, government construction disputes, remains controversial concern. Uncertainties are prevalent.

¹⁰⁰ See Article 34(2) of the Model Law.

¹⁰¹ Kim Rosenberg *et al* (n 99).

¹⁰² Articles 3244-3296 of the Civil Code.

¹⁰³ Tecle Hagos Bahta (n 52) 24.

Judges in State Courts are less likely to be acquainted with the same degree of expertise in the highly technical cases that come before them.¹⁰⁴ The involvement of expert witness called by the court judge has its own danger as the judge is influenced by the persuasion power of the expert than the technical merit of the case.¹⁰⁵ In construction disputes, there are possibilities for engineers or architects as well as lawyers to be assigned as an arbitrator. As a result, contract enforcement problems will also be high if the disputes are entertained via the problem-fraught litigation.

3.1.2.2. Investment and Arbitration Law

Arbitration is the preferred dispute resolution mechanism for international investors who are doing business in Africa, for it offers investors with the advantage of having their disputes determined by independent and competent arbitrators according to the rules which are predictable and flexible, with a larger possibility of easier enforcement of the final award.¹⁰⁶ Before investors decide to invest in Africa, they are giving due attention to whether the target State for investment has already become party to the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards and whether the State incorporated the Model Law on International Commercial Arbitration.¹⁰⁷

Among African countries, 36 of them are parties to the New York Convention and this provides assurance of enforcement of award from all 157 countries of the world to coming to invest in Africa¹⁰⁸. Furthermore, 11 of the African Countries have adopted the Model Law, which provides a reliable and well-structured domestic regime favorable to investors.¹⁰⁹ Ethiopia is an African country that wants to encourage investment.

¹⁰⁴ United Nations Conference On Trade and Development (n 1) 14.

¹⁰⁵ Douglas A. Stephenson, *Arbitration Practice in Construction Contracts*, (Blackwell Science Ltd, Fifth Edition 2001), 6-9,41.

¹⁰⁶ Jean Chrstopher Honlet *et al*, "Africa Overview" in James J. Carter (ed), *The International Arbitration Review*, (Law Business Research Ltd 2018), p. 9 and see Fekadu Petros (n 23) 132.

¹⁰⁷ *ibid* 9.

¹⁰⁸ *ibid* 10.

¹⁰⁹ *ibid*.

Not only is arbitration important in attracting foreign investment, it is also vital in promoting the domestic private sector investment.¹¹⁰ Therefore, modernizing the substantive and procedural arbitration laws is vital in the effort to promote foreign and domestic investment. Countries are promoting investment by adopting the UNCITRAL Model Law. This may work well to other sectors of businesses too.

Moreover, when the Ethiopia arbitration laws are evaluated against these standards, we don't find clear provisions adopting the doctrines of separability and competence-competence. A close look at most international arbitration rules, however, indicates that they have adopted the doctrine of separability which is a trend showing a practical universal acceptance of the doctrine in international commercial arbitration.¹¹¹ The doctrine of separability provides for 'the autonomy of the arbitration agreement as a standalone and severable contract, the validity of which is not contingent up on the underlying legal relationship'¹¹². The doctrine becomes relevant in the case when there is an arbitration clause contained in the substantive agreement, termed as *clause compromissoire*.¹¹³ The doctrine of separability ensures predictability to the business community by giving effect to their desire of resolving disputes through neutral, speedy and cost effective arbitration process by avoiding court intervention.¹¹⁴ From the above it may be concluded that the doctrine of separability keeps the autonomy of the arbitration agreement which avoids the involvement of courts to decide the fate of arbitral agreements contained in a substantive contract.

In relation to the doctrine of competence-competence, the formulation of Article 3330 of the Civil Code indicates that arbitrators do not have authority to rule over their own jurisdictions except in

¹¹⁰ Fekadu Petros (n 23) 132.

¹¹¹ See for instance, UNCITRAL Arbitration Rules, Article 21, ICC Arbitration Rules of 1998, Article 6(4), American Arbitration Association(AAA) Rules of 2003, Article 15(2), Arbitration Rules of the London Court of International (LCIA of 1998), Article 23.1; China International Economic and Trade Arbitration Commission(CIETAC), Rules of 2005, Article 5(4), World Intellectual Property Organization Arbitration Rules, Article 36 as cited in Solomon Emiru, 'Comparative Analysis of the Scope of Jurisdiction of Arbitrators Under the Ethiopian Civil Code', (LLM Short Thesis, Central European University 2009).

¹¹² Angela Di Franco and Rafael Zabaglia, "Brazil", in James J Carter(ed), *The international Arbitration Review*, (Law Business Research Ltd 2018) 88.

¹¹³ Solomo Emiru (n 111) 4.

¹¹⁴ *ibid* 13.

case of jurisdictional challenges which do not relate to the validity and existence of the arbitration clause, and/or when the parties have agreed to authorize the arbitrator to rule on these other challenges. This is against the general consensus even recognized under the UNCITRAL Model Law, which provides under Article 16(1) that the arbitral tribunal is empowered to rule on its own jurisdiction, including rulings on the existence and validity of the arbitral agreement.

Furthermore, the arbitration law has clear provision that adopts restrictive interpretation of arbitral submissions. Article 3329 of the Civil Code provides for the restrictive interpretation of arbitral submissions in relation to jurisdiction of arbitrators. This is against the liberal interpretation adopted by the UNCITRAL Model Law.¹¹⁵ Liberal Interpretation favors arbitrators to have jurisdiction to entertain the dispute in cases which are controversial in relation to jurisdiction of the arbitrators.¹¹⁶

The other important issue is the issue of enforcement of domestic and foreign arbitral awards. Though the CPC provides for domestic arbitral awards to be enforced just like court judgement, the requirement of application for the homologation related to domestic arbitral award stipulated in Article 319(2) is problematic. The law does not have specification of the form and content of the homologation application, meaning of homologation, the standards and procedures of homologation.¹¹⁷ In a Federal First Instance Court case in which the researcher was a presiding judge, order of direct execution of the arbitral award was given due to lack of clarity of the homologation issue.¹¹⁸ The UNCITRAL Model Law adopts a clear standard of execution of the award as long as the conditions stated under Article 36 of the UNCITRAL Model Law are not met. The Conditions stated in Article 36 relate to the incapacity of the parties, invalidity of the arbitration agreement under the applicable law, lack of proper notice of appointment of arbitrator, awards out of the scope of the arbitral submission, the composition and arbitral process not compatible with the arbitral submission and other clear conditions entertained by the application of the party against whom the award is given. The standards apply both to domestic and foreign arbitral awards. The CPC is, however, ambiguous in relation to the requirement of homologation

¹¹⁵ UNCITRAL, Article 16(1).

¹¹⁶ Alemayehu Yismaw (n 6) 43.

¹¹⁷ *ibid* 44.

¹¹⁸ Federal First Instance Court, Kolfe Bench, Civil File No. 106088.

to execute domestic arbitral awards. In relation to foreign arbitral awards, enforcement in Ethiopia is conditional up on reciprocity as stipulated in Article 461(1)(a) of the CPC. Foreign arbitral awards will be enforced only if the party proves that there is reciprocal duty of that other State to enforce awards from Ethiopia. One of the ways to prove reciprocity is existence of treaty and Ethiopia signed such a treaty only with the Republic of China and ratified the same by Proclamation Number 1007/2017 on June 7/2017.¹¹⁹ This would be repugnant to the interest of the business community in Ethiopia as there is no certainty of enforcement of foreign awards even though sufficient property is available in Ethiopia for enforcement. The ratification of the 1958 New York Convention for the Enforcement of Foreign Arbitral Awards by the Ethiopian Parliament is set to made as soon as the Parliament comes into normal operation after the problem due to Covid-19 pandemic and the whole process of deliberation steps have already been finalized.¹²⁰ If approved, that changes the whole scenario related to enforcement of foreign arbitral awards in Ethiopia. The Convention does not have requirement of reciprocity. The Convention becomes part of the law of the land if the Convention is ratified by the Parliament and as soon as the Ratification Proclamation is made public in *Negarit Gazzeta*. However, the problems attributed to domestic awards' execution remains intact unless the country adopts the UNCITRAL Model Law which treats both types of awards in the same standard.

In the arena of international transactions, in which Ethiopia may get involved, certainty and predictability are very important in ensuring confidence in the business relationship.¹²¹ However, the Ethiopian arbitration law does not guarantee certainty and predictability. Arbitration is believed to play a central role by providing independent, competent, impartial, effective and efficient dispute settlement mechanism, which is supposed to be neutral from the national jurisdiction of any Country.¹²² However, the existing arbitration laws are not modernized and have contradictions

¹¹⁹ Mesfin Tafesse, 'Ethiopia's Ratification of the New York Convention', available at www.africalegalnetwork.com , accessed on March 3/2020.

¹²⁰ Interview with Mesker Tariku, Civil Justice Administration Directorate Director at Federal Attorney General, April 23/2020, (Addis Ababa, Ethiopia).

The interviewee defended the ratification of the Convention before the Parliamentary Law and Justice Standing Committee representing Attorney General.

¹²¹ Solomon Emiru (n 111) 60.

¹²² *ibid*.

with the UNCITRAL Model Law Provisions. The laws enacted in 1960s are not compatible with the current development of the business and investment scenario. The Ethiopian arbitration laws do not go with modern day standard laws like the UNCITRAL Model Law.

Generally, the outdated arbitration laws in Ethiopia are not responsive to the modern demands of the business community. The technical and commercial features of some disputes demand the case to be resolved through arbitration. Enforceability of the award across jurisdictions also encourages investors to rely on arbitration process. However, the foreign award enforcement has been a major problem until today and Ethiopia is yet to ratify the New York Convention for the Enforcement of Foreign Awards in the near future. However, the country has not yet adopted the UNCITRAL Model Law. This makes the existing Ethiopian arbitration law non-adaptable to technical and commercial disputes which may include construction, investment, international trade, banking and insurance.

3.1.3. Problems of the Arbitration Law Relating to Ensuring Neutrality, Efficiency and Disciplinary Standards of Arbitrators

3.1.3.1. Disclosure and Disqualification Standards for Neutral Arbitration

Although the Civil Code enumerates a number of grounds for disqualifying an arbitrator, independence and impartiality are much more important grounds than the rest of all other grounds.¹²³

Though the law does not have clear definition, partiality can be defined as bias or prejudice of the arbitrator either towards one of the parties or the issues in dispute.¹²⁴ The bias or prejudice the arbitrator is suspected of can be the result of the relationship between the arbitrator and one of the parties or with the issue in dispute. The arbitrator may have quarreled with one of the parties or may have prior knowledge of the facts of the dispute which may affect the neutrality of the arbitrator. Partiality is more abstract than independence in that it is in the mind of the arbitrator the bias or prejudice exists and that is difficult to measure.¹²⁵ Independence, on the other hand, is about

¹²³ Zekarias Keneaa (n 9) 172.

¹²⁴ *ibid* 160.

¹²⁵ *ibid* 161.

the relationship between an arbitrator and one of the parties.¹²⁶ The relationship can take a form of ‘past business relations, an existing business relations, future business relations, employer-employee relations, lawyer-client relations, consanguinal or affinal family relations and love affair relations’¹²⁷. A party appointing his brother as arbitrator does not expect the brother to be neutral in the process and outcome of the case. Impartiality and independence are not the same, but both are instruments of ensuring neutrality of the arbitrator in the process and outcome of the case.

Some writers like Rene David hold the opinion that the party appointed arbitrator can be partisan to the party that appoints him/her provided that the other party has appointed his/her own.¹²⁸ However, David emphasizes that concealment and dishonesty are forbidden.¹²⁹ Article 3340 of the Civil Code does not prohibit a partisan arbitrator but also does not have disclosure requirement. This opens up the way for concealment and the resulting dishonesty to have a wider room in the arbitration process. Even if we accept the possibility for partisan arbitrator, we can’t tolerate the concealment and dishonesty that result from the opportunity. The same writer David argues that independence and impartiality are supposed to exist in arbitral tribunal in the same standard as the requirement for judges of courts.¹³⁰ A partisan judge is not possible at all in courts. The same argument should be forwarded to disallow partisan arbitrator. This should apply to party appointed arbitrators too. The Civil Code impliedly prohibit the other party to seek the disqualification of the arbitrator appointed by the other party on the ground of partisanship to the party that appointed the arbitrator.¹³¹ The law is thus less interested in ensuring the neutrality of the arbitrators for any reason that can be mentioned. Experiences of other countries may show the same trend¹³², but we

¹²⁶ *ibid* 165.

¹²⁷ *ibid* 165-169.

¹²⁸ David (n 3) 255.

¹²⁹ *ibid* 255.

¹³⁰ *ibid* 252.

¹³¹ See Arts. 3340(2) and 3341 of the Civil Code. The cumulative reading of the two provisions indicate that the other party cannot apply for the disqualification of the party appointed arbitrator on the ground of partiality. Surprisingly enough, it allows the party that appointed the arbitrator to apply for the disqualification of the arbitrator appointed by himself. It is not clear why the other party is forbidden and the possible victim of the bias of the arbitrator is not allowed to apply to avoid the harm that may be caused by the arbitrator in question.

¹³² David (n 3) 255.

can see that ensuring neutrality is not the primary goal of the Ethiopian arbitration law. The policy reason that is given primacy looks ensuring equality of the parties to appoint partisan arbitrators. Ethiopian law, however, provides undue influence of one party against the arbitrator and acquisition of interest in the outcome of the case by the arbitrator are grounds to appeal.¹³³ It is meaningless to allow a partisan arbitrator to stay on duty which, at end of the day, is a ground for appeal to have the arbitral award given by the partisan arbitrator quashed.

The above controversies are not applicable to arbitrators appointed by the agreement of the parties or by third party. Any of the parties can apply for the disqualification of the arbitrator, appointed by the agreement or by third party, where there are circumstances casting doubt upon his impartiality or independence at any time before the giving of the award and as soon as the applying party knew the circumstance.¹³⁴

A closer look at UNCITRAL Model Law Articles 12 and 13 indicates partisan arbitrator is not possible and if the arbitrator is proved to be partisan at any stage of the proceeding, he/she shall be challenged.

In relation to disclosure requirement, in the recent decision by the Supreme Court of Austria, there was an interesting question on whether failure to disclose facts giving rise to impartiality or independence would constitute sufficient ground to challenge the arbitrator.¹³⁵ The Supreme Court, after making reference to the IBA Guidelines on Conflict of Interest in International Arbitration as the Common International standard, decided that it constitutes sufficient ground if the arbitrator failed to disclose ‘in a culpable way or in very extreme cases’¹³⁶. The California Ethics Standards for Neutral Arbitrators provides mandatory and automatic disqualification if the arbitrator fails to make the required disclosure.¹³⁷ Furthermore, the American Arbitration Associations Code of Ethics for arbitrators in commercial disputes requires to disclose any financial or personal interest

¹³³ Article 351(d) of the Civil Procedure Code.

¹³⁴ See Arts. 3340(2), 3342(1) of the Civil Code.

¹³⁵ Austrian Supreme Court, 5 August 2014, docket numbers 18 ONc 1/14 p and 18 ONc 2/14 K, cited in Jean Christopher Honlet *et al* (n 106), 58.

¹³⁶ *ibid*.

¹³⁷ Marrick T. Rossein & Jeniffer Hope, ‘Disclosure and Disqualification Standards for Neutral Arbitrators: How Far to Cast the Net and What is Sufficient to Vacate Award’, (2007), Vol. 81, St. Johns LR, 205.

in the outcome of the case.¹³⁸ More importantly, the UNCITRAL Model Law under Article 12(1) requires the arbitrator to disclose facts giving rise to doubts as to his/her impartiality and independence before appointment and subsequently after appointment. However, the Ethiopian arbitration law does not have disclosure requirement provision.

The disclosure requirement serves two basic purposes. The first one is it ensures the tribunal's neutrality and second of all, it helps the parties to assure arbitrator's neutrality and serves them as one evidence to prove that they did not know the circumstance that might give rise to partiality of the arbitrator at the time of his/her appointment.

Furthermore, the Ethiopian arbitration law does not have specified conditions and procedures for resignation by arbitrators. This, in some way, relates to the disclosure requirement in that the law should have specified the disclosure requirement before appointment as an arbitrator and should have specified the condition as one ground of resignation after appointment. This is because both disclosure requirement and resignation are applicable by the free will of the arbitrator and the difference is the time at which the arbitrator acts. But the law is silent about the issue of the grounds and procedures for resignation.

3.1.3.2. Efficiency/Qualification of Arbitrators

The EACC and AACCSA-AI are said to have been well posited institutions to appoint efficient arbitrators on behalf of parties as the two institutions had rosters of competent arbitrators.¹³⁹

‘Any other reason that leaves the arbitrator with inability to discharge his functions properly or within a reasonable time’ are grounds for disqualification of arbitrators under Ethiopian arbitration law¹⁴⁰. Reasons such as detention or imprisonment, fulltime otherwise engagement in other duties, personal or family problems can be grounds for disqualification within the meaning of the law.¹⁴¹ Even though not specifically mentioned, qualification can be associated with competence of the arbitrator to dispose the dispute properly and within a reasonable period of time within the meaning of the law. Every layman incidentally appointed as arbitrator by the choice of the parties should

¹³⁸ *ibid* 204.

¹³⁹ Zekarias Keneaa (n 9) 146.

¹⁴⁰ Article 3340(1) of the Civil Code.

¹⁴¹ Zekarias Keneaa (n 9) 159.

be disqualified based on these grounds. If the parties knowingly selected the arbitrator, such opportunities to challenge arbitrators should be limited. However, the law does not have strict precision on whether professional competence is expected. As has been stated time and again, arbitration is a preferable mode of dispute resolution to commercial and technical disputes. Commercial and technical issues demand a special proficiency of the arbitrator on the technical and commercial feature of the dispute.

As per Article 4(2) of the Rule of procedure of the EACC, the arbitrator in the arbitrators list is supposed to be highly qualified person in his profession along with proved competence and experience. Arbitrator should uphold rule of law and should also be ‘reputed in dispute resolution skills’¹⁴². Since arbitrators appointed this way are highly experienced persons with greater level of competence and high moral charisma, the outcome of the arbitration is supposed to be reasoned arbitral award. However, if the parties choose and appoint their own arbitrators, the quality of the decision may be jeopardized. The Rule of the procedure went beyond what is provided in the law demanding the arbitrator in the list to be competent, experienced and qualified in his profession.

The UNCITRAL Model Law provides under Article 12(2) that if the arbitrator ‘does not possess qualification agreed to by the parties’, the arbitrator may be challenged. We find no clear provision in our arbitration laws having such clear ground of challenge on the question of qualification. Furthermore, the Model Law in Article 14 provides that ‘if an arbitrator becomes *dejure* or *defacto* unable to perform his functions’ and if there is controversy over the inability, the court shall decide on the termination of the mandate. More important here is that the *dejure* or the *defacto* inability can be associated with professional competence to decide the disputed subject matter. The Ethiopian law does not have such a precision on the subject.

3.1.3.3. Disciplinary Standards for Arbitrators

As per Article 4(2) of the Rule of Procedure of the EACC, the arbitrator should be a person who ‘commands high esteem and moral standing in the community’. What would happen if the arbitrator is later discovered to be not a person of high esteem and moral standing after being appointed. This is not clearly regulated in the Rule and the arbitration law does not have anything

¹⁴² The 2005 Rules of Arbitration of the Ethiopian Arbitration and Conciliation Centre (herein after cited as Arbitration Rule of the EACC), Article 4(2).

to say about the minimum disciplinary standard expected of an arbitrator and as to how complaints related to discipline are to be presented and to whom such complaint may be presented. Arbitration is an adjudication in which the arbitrator will give binding arbitral award. This power has a lot to do with the constitutional right of access to justice specified under Article 37 of the FDRE constitution.¹⁴³

Arbitration Institutions, at least, may come up with their own rules to regulate some aspects of disciplinary standards. After all, the law does not clearly oblige the institutions to have such rules. The problem comes to be more apparent in *ad hoc* arbitrations which do not have their own rules of procedure to conduct arbitration. Had the law had specified framework of standards, it would have been applicable to *ad hoc* arbitration, and would have served as a framework to the Rules designated by the Institutions. In Ethiopia, there has to be framework law regulating the conduct and misconduct of the Arbitral Institutions and arbitrators too.¹⁴⁴ Acceptance of complaints relating to misconduct of arbitrators and Arbitral Institutions should be given to a body neutral to the government.¹⁴⁵

The first attempt to stop the EACC's function of facilitation of arbitration began by the high officials of the government who alleged that there were misconducts in the institution/center and by the arbitrators.¹⁴⁶ The high officials arbitrarily and unofficially ordered the closure of the service of arbitration by the Center without having the response and evidence of the EACC personnel.¹⁴⁷ This kind of arbitrary act further necessitates the existence of framework law on how to deal with

¹⁴³ As part of adjudication, in principle the arbitrator gives binding and final arbitral award at the end of the day. This is beyond court decisions which are, at least, appealable on merit to a higher level court. If we have disciplinary framework standard to judges of courts, for stronger reason, we have to have framework disciplinary standards for arbitrators as part of an effort to guaranty the right of access to justice.

¹⁴⁴ Interview with Ato Bezzawerk Shimelash, Arbitrator at AACCSA-AI and Attorney-at-law, March 9/2020, (Addis Ababa, Ethiopia).

The interviewee confirmed to the researcher that he presided over 15 cases as a sole arbitrator and as one arbitrator composing tribunals.

¹⁴⁵ *ibid.*

¹⁴⁶ Interview with W/ro Haregewoin Ashenafi, Executive Director of the EACC, February 27,2020, (Addis Ababa, Ethiopia).

¹⁴⁷ *ibid.*

the conduct of arbitrators and the Institutions/Centers as well. This ensures the proper conduct of the arbitral process and it avoids the arbitrary interference from the officials of the government on allegation of misconduct.

3.2. Lack of Modern, Well-functioning and Sufficient Arbitration Institutions

3.2.1. General Overview

To date there are not sufficient well-organized and functional arbitral institutions that promote the use and practice of arbitration in Ethiopia.¹⁴⁸ Where there are no contemporaneously organized arbitration machinery or established rules of procedure, it becomes far easier to the disputing parties to choose litigation over arbitration.¹⁴⁹

In USA, although institutional arbitration found foothold in Chambers of Commerce as early as 1768 in New York and 1794 in New Haven, 1801 in Philadelphia, they were not effective for a long time owing to absence of public education of importance of arbitration.¹⁵⁰ The change in 1920s was manifested by ‘modernizing the arbitration law, systematic planning, organization of machinery, cultivation of spirit of arbitration, and construction of foundation of knowledge’¹⁵¹.

This experience of USA in the early development of arbitration tells us that the mere existence of institutions does not suffice unless it is coupled with modernizing the law, enhancing public awareness of the institutions and working in the development of knowledge and awareness of arbitration.

Furthermore, these days parties to international transactions often times decide venue of international arbitration on the basis of factors such as ‘nationality of various interested entities, the governing law, and the language of the contract’¹⁵². Parties, however, choose USA in many cases because of the convenience of doing business there and absence of fear of any improper home field advantage.¹⁵³ Hospitality of the forum to international arbitration, with judicial support

¹⁴⁸ Bezzawerk Shimelash (n 44) 4.

¹⁴⁹ Emerson (n 11) 3.

¹⁵⁰ *ibid* 5.

¹⁵¹ *ibid* 6.

¹⁵² Carter (n 15) 794.

¹⁵³ *ibid*.

of arbitration with no undue interference, being the factor, USA has a well-deserved reputation as one of the favorable sites of arbitration.¹⁵⁴ In Ethiopia, let alone the hospitality issue, we don't even have sufficient number of arbitration centers, and the existing ones operate in very small circle. Ethiopia has AACCSA-AI, the Bahir Dar Arbitration Center, not yet actively operating, the Arbitration Institute of the Ethiopian Chamber of Commerce and Sectoral Associations, which is at infant stage of development, and the resuscitated EACC.¹⁵⁵ We don't have arbitration institutions and centers in the rest of regions to date. Beyond regions, we have to develop arbitration centers that extends to entertain international trade disputes.

3.2.2. Institutional vs ad hoc Arbitration

Putting clear dichotomy between institutional and *ad hoc* arbitration is not an easy task even in the existing literatures. Institutional arbitration is when an arbitration is 'administered by specialist arbitral institution under its own rules of arbitration'¹⁵⁶. Institutional arbitration comes into effect when the parties choose an institution to administer the arbitration proceeding.¹⁵⁷ It is to be noted, however, that the Ethiopian Civil Code and CPC don't have express definition for institutional arbitration.

There is constitutional recognition to cultural institutions to resolve disputes of private and family nature in Ethiopia. The law does not have any prohibition to entrust a dispute to be resolved by institutions chosen by the parties. For instance, parties are at liberty to entrust resolution of their dispute by a certain law firm choosing arbitrators from among the members of the firm¹⁵⁸. However, the state policy reflected in the prohibition of the EACC from providing arbitration service indicates that the state policy does not allow arbitration to be submitted to institutions unless clear permission is granted from itself or established by clear law. In a manner that supplements the above idea, in an interview with Ato Yohannes W/gebriel, the interviewee stated

¹⁵⁴ *ibid.*

¹⁵⁵ Girmachew Nigussie, 'Commercial Arbitration and Accommodation of Third Parties in Ethiopia', (LLM Thesis, University of Addis Ababa 2018) 51.

¹⁵⁶ Nigel Blackaby, Constantine Partasides, Alan Redfern, Marthin Hunter, '*Redfern and Hunter on International Arbitration*' (5th edition, Oxford University Press 2009) 54.

¹⁵⁷ Michael Teshome(n 42) 13.

¹⁵⁸ Fekadu Petros (n 23) 127 and see also Zekarias Keneaa (n 9) 146.

that the EACC was not counterpart of the AACCSA-AI alleging that the latter is the only legally established arbitration institute.¹⁵⁹ However, it is to be noted that only legally empowered institutions to undertake institutional arbitration are entitled to come up with their own rules to administer arbitration.¹⁶⁰

3.2.3. Arbitral Institutions in Ethiopia

3.2.3.1. AACCSA-AI

The Addis Ababa Chamber of Commerce and Sectoral Association Arbitration Institute had drawn up its own rules of arbitration and mediation manifesting the coming into effect of institutional arbitration and mediation in Ethiopia.¹⁶¹

Currently, it operates under the revised Arbitration Rules of AACCSA-AI¹⁶² which contains 29 Articles. The rules of procedure regulate, *inter alia*, procedure of initiation of arbitration proceedings.¹⁶³ The arbitration proceeding is in motion when the claimant submits the arbitration agreement of the parties in writing which may contain arbitrator appointing authority, number of arbitrators, place and language of arbitration. The claimant is supposed to fulfil all other requirements provided in the rules which includes advance payment to the Institute. The respondent will have 45 days to respond to the claim by the applicant.

Composition of the arbitral tribunal is also regulated in the Rules. If the parties do not agree on the number of arbitrators, the institute's Rule provides for a tribunal of three arbitrators. The number may be reduced to sole arbitrator having regard to the complexity and other circumstances of the dispute. Therefore, complexity of the case is in point to determine the number. In the case of having three arbitrators, each party chooses one and the party appointed arbitrators appoint the third and the chairperson of the tribunal. If the parties fail to appoint their respective party appointed

¹⁵⁹ Interview with Ato Yohannes W/Gebriel, Director of AACCSA-AI, February 25/2020, (Addis Ababa, Ethiopia).

¹⁶⁰ Fekadu Petros (n 25) 127.

¹⁶¹ Tilahun Teshome, 'The Legal Regime Governing Arbitration in Ethiopia: A synopsis' (2007), Vol. 1(2), Ethiopian Bar Review 140.

¹⁶² AACCSA-AI Arbitration Rules, 2008.

¹⁶³ *ibid* Articles 6,7 and 8.

arbitrators, or if the appointed arbitrators fail to appoint the chairman, or if the parties fail to appoint the sole arbitrator within 20 days, the Institute will appoint one.

The issue of impartiality and independence of the arbitrators are also regulated.¹⁶⁴ Accordingly, the Rules provide that the Institute has to confirm the arbitrator's impartiality and independence. The arbitrators are also required to confirm impartiality and independence in the standard form which is nearly similar to disclosure requirement. Furthermore, parties will have opportunity to comment on the impartiality and independence of the arbitrators.

Right to equality and full opportunity to present their own case is stipulated in Article 17 of the Rules. The tribunal decides the language and place of the proceeding unless the parties agree otherwise.¹⁶⁵

The cost of the arbitration proceeding includes: fees and expenses of arbitrators, expenses related to the administrative process, fees paid to and expenses incurred by experts if any, and other relevant costs incurred by the parties for the arbitration.¹⁶⁶ There is arbitrator's fee and administrative service fee schedule attached to the Rules. If the Institute finds it important, it may determine arbitrator's fee at lower or higher level than the scale provided in the schedule attached.

Currently, the Institute is functional and it, *inter alia*, gives arbitration service, educate the public about arbitration through electronic and print media, it trains different professionals, including engineers, auditors and accountants, towards enabling them to be efficient arbitrators.¹⁶⁷ Industrial Parks Council of Ministers Regulation No. 417/2017 Articles 29(3) and 29(4) made reference to the Addis Ababa Chamber of Commerce and Sectoral Associations as a body entitled to appoint arbitrators, when the parties fail to do so, related to industrial park disputes.

According to the AACCSA Annual Report of 2017, the AACCSA-AI entertained 54 commercial related cases annually. Though much more is expected, the Institute is in a position of giving arbitration service.

¹⁶⁴ *ibid* Articles 12 and 13.

¹⁶⁵ *ibid* Articles 19 and 20.

¹⁶⁶ *ibid* Article 30.

¹⁶⁷ Interview with Ato Yohannes (n 159).

3.2.3.2. The EACC

Ethiopian Arbitration and Conciliation Centre(EACC) was established by a group of private lawyers in 2004 with an intention to create additional institutional platform for alternative dispute resolution scheme.¹⁶⁸ The Centre used to provide arbitration and mediation services on commercial, labor, construction and family disputes.¹⁶⁹ The service was provided in Addis Ababa and there was plan of expanding the service to Regional States as a plan of making the service accessible countrywide.¹⁷⁰ There was an actual attempt to open regional office at Arba Minch.

Ethiopian Arbitration and Conciliation Centre had to suspend its arbitration service.¹⁷¹ High government officials from the then Ministry of Justice are said to have prohibited the EACC from providing service of arbitration while its permission to work on promotion and public education of arbitration and mediation remained intact.¹⁷² W/ro Haregewoin further stated that there was prohibition of conduct of arbitration service in their arbitration room and the officials advised them to work on education and promotion only. The Director stated that prohibition was lifted unofficially on condition that only volunteer arbitrators carry out arbitration with no fees. When volunteer arbitrators got registered and made themselves ready for operation, the Charities and Societies Proclamation came into effect and the Center was prohibited from operating arbitration in a letter sent to the Ministry of Justice from the Prime Minister Office. The letter is said to have made reference to Proclamation No. 621/2009 of the Charities and Societies Proclamation. The letter was not given to the Director and the researcher is unable to get access to the said letter. Until the closure, the Ethiopian Arbitration and Conciliation Centre used to operate under modern Rules of arbitration and had entertained cases involving foreigners.¹⁷³

¹⁶⁸ Tefera Eshetu and Mulugeta Getu, 'Ethiopian Arbitration and Conciliation Centre', (2012), available at www.abbyssinialaw.com, accessed on January 26/2020 and See Daniel Alemayehu (n 22) 11.

¹⁶⁹ *ibid*

¹⁷⁰ *ibid*

¹⁷¹ Hailegebriel G. Feyssa (n 10) 305 and also See Fekadu Petros (n 23) 126 and Daniel Alemayehu (n 22) 11.

¹⁷² Interview with W/ro Haregewein (n 146).

¹⁷³ Hailegebriel G. Feyssa (n 10) 305, and see *ReEthiopian Privatization Agency v Atilla Yildirim*, Report of Arbitral Awards, Vol. 1, available at EACC Library.

The Arbitration Rules of the Centre

The Centre had its own Rules of arbitration, Arbitration Rules 2005, which contained 43 Articles. As per Articles 10 and 11 of the Rules, parties are at liberty to determine the number and the procedure of appointment of arbitrators. This makes the Rule flexible in every relevant respects. However, while the parties are at liberty to determine the number and procedure of appointment, they cannot set aside mandatory provisions of the law.

Objective

From the brochures that were prepared and disseminated by the Center, Providing less costly, speedy dispute resolution and reducing backlog of cases on the courts are among the objectives of the Center.¹⁷⁴ More importantly, the Center aimed at providing, *inter alia*, arbitration by providing various expertise to resolve commercial disputes.¹⁷⁵ Furthermore, the Center also aimed at giving services to construction, contract, labor, tort, inheritance, and family disputes and providing ADR training for potential arbitrators and conducting research on arbitration, mediation, and conciliation and disseminating the research findings to the public as part of the effort to educate the public about the importance of the service¹⁷⁶.

All arbitrators at the Center were qualified lawyers and experts in other fields and parties would be given an opportunity to select their arbitrators from among the list provided by the Centre.¹⁷⁷ Where a case demanded foreign arbitrator, the Centre would make arrangement so that desired foreign arbitrator would entertain the case.¹⁷⁸

Neutrality and Impartiality

Articles 12(1), (2) and (3) of the EACC Rules deal with neutrality and impartiality issues. But the problem is Article 11 of the Rules allowed the parties to be at liberty to choose any body as arbitrator, which logically includes even their relatives, which would affect the neutrality of the

¹⁷⁴ Tefera Eshetu and Mulugeta Getu (n 168).

¹⁷⁵ *ibid.*

¹⁷⁶ Interview with W/ro Haregewoin Ashenafi (n 146).

¹⁷⁷ Tefera Eshetu and Mulugeta Getu (n 168).

¹⁷⁸ *ibid.*

arbitrators. The only remedy comes after the arbitrator is appointed as arbitrator and as per Article 13(2) of the Rules, parties can apply for the disqualification of arbitrators when the arbitrator has acted partially in favor of the party that appointed him/her. This is partly attributed to the absence of prior disclosure requirement in our arbitration law and the law's problem in ensuring neutrality.

3.2.3.3.1. The New Effort to Bring EACC into Operation

The researcher observed the EACC office facilities for arbitration proceedings. Seat of three arbitrators, seats for the parties, seats for witnesses and for transcriber are available. Library is also available. Yet, the Center has not begun giving full arbitration service.

The Center used to conduct seminars, fund research papers on ADR/Arbitration schemes, and prepare moot arbitration in Universities. The difficulty with the EACC is that it did not begin full operation sooner than later due to financial problem.¹⁷⁹ If governmental and non-governmental actors assist them financially, they may begin full arbitration operation within a short time to come and will provide additional platform of arbitration to business communities in Ethiopia and abroad. Before the Center stopped arbitration service, the Center had received funds from Canadian International Development Agency(CIDA), Swedish International Development Cooperation(SIDA), Initiative Africa, French Embassy and Japan Embassy.¹⁸⁰

3.2.3.3. The legal Framework Governing the Arbitral Institutions

The ECCSA and AACCSA are established by virtue of Chambers of Commerce and Sectoral Associations Establishment Proclamation No. 341/2003. Settling disputes by arbitration is indicated as one function of the Associations in Articles 5(6), 15(3), 19(3) and 27(1)(e) of the Proclamation. There is nothing specified in the Proclamation other than indication that arbitration could be one function of the Associations. There is no guideline on how the Associations function as arbitrators.

Articles 7, 14 and 27 of the Proclamation envisage the establishment of national, regional and city/wereda chambers of commerce in Ethiopia. Among these chambers of commerce, the AACCSA-AI is established and is giving arbitration service to the business community. The ECCSA-AI is established and under infant stage of development. No other Chamber of Commerce

¹⁷⁹ Interview with W/ro Haregewoin Ashenafi (n 146).

¹⁸⁰ Tefera Eshetu and Mulugeta Getu (n 168).

in Ethiopia is being reported as giving such institutional arbitration service. The AACCSA is member of the ECCSA as per Article 7(4) of the Proclamation. Therefore, the Proclamation envisages the existence of a number of chambers of commerce that provide arbitration service to the business community at large. The absence of chambers of commerce giving arbitration service in regions and cities as envisaged in the Proclamation manifests, *inter alia*, the shortage of the Arbitration Institutions in Ethiopia.

EACC was established after getting registered at the then Ministry of Justice as a non-profit entity, as per the Ethiopian Civil Code and Notice No. 321/1966 in August 2004.¹⁸¹ Later on the Charities and Societies Proclamation came into effect to regulate non-profit entities including the EACC. That Proclamation was one of the reasons indicated as a pushing factor for the cessation of service of arbitration by the EACC. The Repressive nature of the Charities and Societies Proclamation 621/2009 looks to have also impacted the development of Arbitration Centers in Ethiopia. Now the EACC is registered and certified to operate institutional arbitration since October 4/2019 by virtue of Organizations of Civil Societies amended Proclamation.¹⁸² Accordingly, Organizations of Civil Societies Proclamation No. 1113/2019 governs the operations of EACC. This proclamation is not as repressive as the earlier Proclamation that even resulted in the closure of service of arbitration by the EACC. Among other things, the restriction of funding by the previous Proclamation made the effective working of Societies highly cumbersome. The restriction is lifted in the new Proclamation.

3.2.3.4. The Importance of Well-Functioning Arbitral Institutions in Ethiopia

Ethiopia is supposed to create a justice system which is compatible with the interests of investors. A workable integrated private justice system that supplements public justice system helps attract investors. Persons that participate in international business transactions are not interested to appear before foreign courts and these persons see Arbitration Centers as breathing space for dispute

¹⁸¹ *ibid.*

¹⁸² *ibid.*

settlement.¹⁸³ Arbitration Centers are proven to be the most effective means of resolving investment and commercial disputes.¹⁸⁴

Development of effective, well-functioning and institutionalized arbitration will have its own contribution to the economic and other aspirations of Ethiopia in addition to meeting the desire of international investors and traders for profit, security, stability and ensuring fairness to the disputing parties.¹⁸⁵ The growth that the country has been recording continues only in so far as the country establishes efficient, modernized and institutionalized arbitration centers that complement the public justice system.¹⁸⁶

3.2.3.5. Making Ethiopia Hub of Arbitral Institutions for International Arbitration

There are hundreds of institutions across the world whose function is appointing arbitrators and to administer arbitrations.¹⁸⁷ The leading institutions are: the ICC in Paris, American Arbitration Institution(AAA) in New York, London Court of International Arbitration(LCIA) in London, Stockholm Chamber of Commerce(SCC) in Stockholm, Swiss Chambers of Commerce in Basel, Bern, Geneva, Ticino, and Zurich, and the ICSIC in Washington, D.C. ¹⁸⁸ Switzerland is a major venue of international arbitration. However, the popularity of Switzerland as a major venue of arbitration has suffered owing to the excessive judicial intervention.¹⁸⁹

There has been a growing tendency of using regional Arbitral Institutions in Africa. For instance, Cairo Regional Centre for International Commercial Arbitration in Egypt, Kigali International Centre of Arbitration in Rwanda, the LCIA-Mauritius International Arbitration Centre, the Lagos Chamber of Commerce International Centre, the Nairobi Centre for International Arbitration, and the Law Society of Kenya International Arbitration Centre along with the effort of establishing Djibouti International Arbitration Centre.¹⁹⁰ In Ethiopia, until very recently, the Addis Ababa

¹⁸³ Alemayehu Yismaw (n 6) 41.

¹⁸⁴ *ibid.*

¹⁸⁵ *ibid* 38.

¹⁸⁶ *ibid* 41.

¹⁸⁷ Graving (n 61) 328.

¹⁸⁸ *ibid.*

¹⁸⁹ *ibid* 354.

¹⁹⁰ Jean Christophe Honlet *et al* (n 106) 11.

Chamber of Commerce and Sectoral Associations Arbitration Institute and the Bahir Dar University Arbitration Center are institutionalized Arbitration Centers in Ethiopia.¹⁹¹ The ECCSA-AI has recently begun giving arbitration service. The reestablished EACC is expected to begin functional arbitration as they have got the new license of operation. However, these names do not appear in the literatures as the influential Arbitration Centers even in Africa. It is doubtful if they are influential even in Ethiopia. Where even our neighbors Kenya and Djibouti are striving to create a regional influential Arbitration Centers, Ethiopia does not even have sufficient number of well-functioning Arbitration Institutions/Centers for the business community to utilize them as dispute resolution institutions. The existing laws, more specifically the Chambers of Commerce Establishment Proclamation, envisage the existence of as many chambers of commerce that provide arbitration service as possible. However, the country has not yet established Arbitration Institutions even as envisaged in the laws. We have to establish Arbitration Institutions/Centers for the business community to utilize them as a dispute resolution scheme. Ethiopia can strengthen the existing arbitration institutions/centers to develop into an influential regional and international Arbitration Centers. Making Ethiopia/Addis Ababa hub of Arbitration Centers for international disputes would benefit the country. The Ethiopian enterprises parties to international commercial arbitration have long history of taking disputes with their foreign partners 'to renowned international Arbitral Institutions such as the International Chamber of Commerce(ICC) in Paris'¹⁹². Having well-established and credible Arbitration Centers would enable the Ethiopian Enterprises to get their disputes resolved through arbitration without going to Paris and other avenues. This would allow other Countries' nationals and Corporations to choose Ethiopia as a place of arbitration in their arbitration agreements. This cannot be achieved merely by aspiring to be, but by modernizing the existing arbitration laws, minimizing the interference of courts, coming up with stringent framework laws that ensure the independence and impartiality of the arbitrators and working on promotion.

Ethiopia can utilize its status of being seat of African Union and UN Economic Commission for Africa in the effort to be hub for arbitration in Africa and in the World. Therefore, Ethiopia should

¹⁹¹ Alemayehu Yismaw (n 6) 42.

¹⁹² Hailegebriel G. Feyssa (n 10) 304.

take advantage of being seat of international organizations for creating influential regional and international arbitration avenue.

3.3. Problems Related to the Role of Courts in Facilitating and Assisting Arbitration

We have been discussing in the preceding sections the positive and negative impact of court's involvement in arbitration. In the following section we will touch up on the points not covered yet.

In relation to interim measures, arbitration tribunals, *ad hoc* or institutional, do not have judicial power to enforce interim measures as their power emanates from the consent and agreement of the parties. For instance, in Austria, under Section 602 of the ACCP, an arbitral tribunal is entitled to ask an Austrian Court for an interim and protective measures for which the tribunal lacks authority to enforce orders. In Ethiopia, however, we don't have clear legal basis for such authorization of the court and Arbitral Institutions do not have power to enforce an interim and protective orders. The most common forms of protective and interim measures may include summoning witnesses, taking oaths, demanding the production of evidence before the tribunal, and giving injunction order when necessary. This would make our arbitration law backward and not meeting the demands of modern day business community. This may discourage the choice of investors, disputants in patent, banking and insurance, and construction disputes to resort to litigation which is not convenient to such cases which involve technicality and complexity.

We may learn from the better experience of Austria and make amendments to our laws giving the power of enforcement of interim and protective measures to the courts under application by the arbitral tribunals.

The UNCITRAL Model Law Article 27 provides clearly competent court can be requested for an order in relation to taking evidence. Article 17(H) of the Model Law provides that interim measures issued by arbitral tribunals are binding. Article 29 of the Rules of Arbitration of the EACC also provides that the tribunal may take any interim measure it deems appropriate including attachment of property and prohibition from sale of property. Tangible cases of challenge are not available and demand for court assistance can be made by the Center.¹⁹³ However, the Rule provides for court assistance only before the commencement of the arbitration proceeding as can be seen in Article 29(2). Except before commencement of the proceeding, the Rule does not have provision

¹⁹³ Interview with W/ro Haregewoin (n 146).

to demand assistance of the court in accessing evidence and enforcing interim measures. However, even the UNCITRAL Model Law calls for court assistance in times of need. The EACC might have come up with the Rule that endows it with power to issue interim measures but the problem comes when it wants to enforce orders. There is no existing law that obliges other entities/third parties to accept the interim measures given by the tribunal.

In an interview with a Federal High Court judge who wants to remain anonymous, the judge stated that judges reject applications for an interim order from arbitration tribunals alleging that there is no law that allows courts to give injunction and arrest order in relation to arbitration proceedings. In another interview, another judge claimed that there is no law that prohibits the court from giving injunction order and arrest order when demanded by the arbitral tribunals¹⁹⁴. This indicates the confusing scenario prevalent in the courts. Clear law is the solution.

3.4. The Role of Legal Professionals in including Arbitration as a Dispute Resolution Scheme in Contracts

In the development of the best system of the USA arbitration, lawyers contributed a lot by strengthening the Institutions by determining many of the policies that were made part of the rules of procedure for the tribunals.¹⁹⁵ Furthermore, lawyers began to put arbitration clauses in contracts and they also acted as arbitrators and represented their clients in the tribunals.¹⁹⁶

In Ethiopia, in contracts related to real estate and international commerce, lawyers are accustomed to include arbitration clause to resolve disputes arising out of the contracts.¹⁹⁷ However, in most other relevant instances, it is not yet a culture for lawyers to include arbitration clause in contracts in Ethiopia.¹⁹⁸ Unless much more effort by lawyers to include arbitration clause in contracts is made, the Ethiopian arbitration system will not be promoted to a higher level.

¹⁹⁴ Interview with Ato Almaw Wolie (n 97).

¹⁹⁵ Emerson (n 11) 10.

¹⁹⁶ *ibid.*

¹⁹⁷ Interview with Ato Bezzawerk (n 144).

¹⁹⁸ *ibid.*

3.5. Problems Related to Rights of Third Parties in Arbitration

Arbitration award is final and binding on the parties to the arbitration agreement. However, arbitration awards should not bind third parties who were not part of the arbitration proceeding.¹⁹⁹ An arbitration tribunal does not have any power to order joinder of third parties unless they consent to join the arbitral proceeding.²⁰⁰

Unlike litigation, in arbitration, only persons who are parties to the arbitration agreement are involved in the arbitration proceeding. The principle of ‘procedural party autonomy’ also enables parties to the arbitration agreement to limit the persons who may get involved in the arbitration proceeding.²⁰¹ Therefore, third parties who may have legal and economic interests are excluded from the arbitration proceeding and their interest is considered irrelevant to the arbitration.²⁰² Unlike litigation, arbitral tribunal’s jurisdiction to allow joinder or intervention of third parties is dependent on the will and consent of the original parties.²⁰³ However, under Article 1481 of the France National Civil Procedure Code, third parties can oppose an arbitral award²⁰⁴. The same right is accrued to third parties under Articles 356(3) and 358 of the Ethiopian CPC. This demonstrates that interest of third parties affected by arbitration proceeding may be protected by virtue of law.

3.5.1. Mechanism and Standard to get Rights of Third Parties Protected

In litigation, national procedural laws provide for the mechanism to get rights of third parties protected. A close look at many procedure laws reveals that the rights of third parties to join and intervene in a case depends on how closely the third party is interrelated to the substantive content of the dispute in question²⁰⁵. Joinder refers to the mechanism employed by one of the existing

¹⁹⁹ Michael Teshome (n 42) 10.

²⁰⁰ *ibid.*

²⁰¹ Dr. Stavros Brekoulakis, ‘The Relevance of the Interests of Third Parties in Arbitration: Taking a Closer Look at the Elephant in the Room’, (2009), Penn State LR, Vol. 113(4) 1166.

²⁰² *ibid* 1167.

²⁰³ Nigel Blackaby & *et al* (n 156) 105.

²⁰⁴ One can also see Netherlands Code of Civil Procedure, Article 1046, Hong Kong Arbitration Ordinance, No. 341 (1997) 3 O.H.K §§ 6B, 7 and Italian Arbitration Law, Article 816. These laws provide for the schemes on how to entertain third parties interest affected in arbitration.

²⁰⁵ Brekoulakis (n 201) 1183.

parties to bring another third party into the proceeding while intervention refers to a scenario in which a third party requires to be part of the proceeding.²⁰⁶ Opposition is also another mechanism employed to protect third parties' right after judgment or award. This is how procedural laws ensure functional equilibrium between the substantive and procedural aspect of a dispute and this mechanism should be employed to protect the rights of third parties in arbitration.²⁰⁷ Therefore, there should be certain policy driven limitations on the procedural autonomy of parties in arbitration in the interest of protection of third parties.

3.5.2. The Scenario in Ethiopia

The CPC is silent about the participation of third parties in arbitration through joinder or intervention.²⁰⁸ Article 356(3) of the CPC, however, provides that “the provisions regarding the making and hearing of an opposition shall apply by analogy to the making and hearing” under the article that provides for setting aside of an award. Opposition under Article 358 of the CPC is applicable *mutatis mutandis* to arbitration. Third parties are entitled to oppose the award by virtue of Articles 356(3) and 358 of the CPC. However, it is not expressly regulated as to whom the opposition is presented: to the court or to the tribunal.²⁰⁹

As discernible from an arbitration award rendered in the case between the Ethiopian Shipping Lines Corporation and Coffee Marketing Corporation, a third party joinder of Maritime and Transit Services Corporation has been allowed.²¹⁰ The third party joinder was requested by a written petition submitted by the Defendant on the basis of Article 43(1) of the CPC. In the case, there is no indication that the plaintiff was given the chance to comment on the petition of the Defendant. The third party opposed the petition for joinder stating that it has no relation with the dispute. Finally, the third party joined the proceeding by the order of the arbitrators.

²⁰⁶ S.I. Strong, ‘Third Party Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure’, (1998), *Vanderbilt J Transnational L*, Vol. 31, 920-921.

²⁰⁷ Brekoulakis (n 201) 1183, and see also Strong (n 206) 923.

²⁰⁸ Girmachew Nigussie (n 155) 62.

²⁰⁹ *ibid.*

²¹⁰ The Ethiopian Shipping Lines Corporation Vs Coffee Marketing Corporation, third party Joinder-Maritime and Transit Services Corporation, File Number 21/B/73, Report of Arbitral Awards, Volume 4, available at EACC Library.

The AACCSA-AI entertains application for the intervention of third parties and joinder, and finally the arbitrator/s decide whether the joinder or the intervention of third parties would be granted or denied²¹¹ just like the case indicated above. However, third parties with an intention to intervene and third parties who are joined at the request of one of the existing parties must, first of all, sign agreement to arbitrate in the form prepared by the Institute.²¹² Furthermore, there is mandatory arbitration fee to be paid by the third party. Ato Yohannes stated that the will of the original parties is irrelevant and it is up to the arbitrators to decide in allowing or denying the joinder or the intervention of the third party. From the above, it may be concluded that third parties, with established interest at stake, will not be prohibited from getting involved merely because of the refusal of either of the existing parties.

However, a closer look at the Rules of Arbitration of both AACCSA-AI and EACC shows that they do not have clear provisions on how to deal with intervention and joinder of third parties. Ethiopian arbitration law provides for arbitration as between the parties who made arbitration agreement for the resolution of a dispute that has already arisen or a dispute that may arise in the future as between themselves. The right of third parties who are not parties to such an agreement with the disputants are not well addressed in the law. The issue of third parties interest in arbitration is one problem that needs to be resolved in Ethiopia.²¹³ The arbitral award between the two parties is enforceable like court judgement in Ethiopia. That might adversely affect third parties' interest.

Therefore, though arbitrators may sometimes allow third parties joinder and intervention, the mechanism is not supported by the law as there is no clear law. The rules of Arbitration of the Centers in Ethiopia do not have provisions that ensure third parties who petition to join or intervene in an arbitration proceeding. Had the Rules of Procedures included the provisions on how to deal with intervention and joinder of third parties, the parties who submit to the Rules would be bound to accept the joinder and intervention of third parties whose interest are affected by the outcome of the arbitration.²¹⁴

²¹¹ Interview with Ato Yohannes (n 159).

²¹² *ibid.*

²¹³ Interview with Ato Bezzawerk (n 144).

²¹⁴ See for instance Article 9(1) of the Rules of Arbitration of the EACC which provides that arbitration agreement that subscribes to the resolution of disputes by the Rules amounts to adopting the provisions of the Rules. Therefore,

3.6. The Existence of Formal and Informal Arbitration in Ethiopia

Arbitration ‘is a western institution’ that is transplanted to Ethiopia along with other institutions in the formal and modern sense of the term.²¹⁵ ‘*Shimgilina*’ is one of the many traditional dispute resolution schemes that is often approximated to what is referred as arbitration.²¹⁶

In a study conducted at the widely known market center, *Merkato*, merchants have the tradition of settling commercial disputes using Commercial Dispute Resolution(CDR) mechanisms.²¹⁷ However, according to the study, the cases for alternative commercial dispute settlement are not properly documented as the CDR system is not yet formalized. The study proved that predominant system of CDR is *shimgilina*, while the formal system of arbitration, be it *ad hoc* or institutional, is not prevalent in the *Merkato*. The “*shimgilina*” mechanism does not necessarily follow formal substantive and procedural laws, while arbitration uses both formal and procedural laws. However, we can see the fusion between the formal system of arbitration and the prevalent informal dispute resolution schemes. Even though both *shimgilina* and formal arbitration do have links with formal justice system in their own way, the link should have been more elaborate and should be guided by laws to be enacted by the State. If formalized, these systems of dispute settlement will contribute a lot. Generally, appropriate link should be created between CDR systems and the formal system of arbitration by educating the public of the importance of resolving disputes through formal arbitration.

3.7. Problems Related to the Entrenched Trust the Public has in Litigation

There are still awareness creation problems attributed to arbitration as a dispute resolution scheme in Ethiopia. For instance, most of the contractors in the construction industry in Ethiopia chose

if the Rules incorporated the schemes on how to deal with the interest of third parties in arbitration, the parties who adopted the Rules would be bound by the Procedures set forth in the protection of third party rights.

²¹⁵ Fekadu Petros (n 23) 131.

²¹⁶ Tilahun Teshome (n 161) 118.

²¹⁷ Mintiwab Zelelew and Mellese Madda, ‘Alternative Commercial Dispute Resolution Mechanisms in Addis Ababa: The Case of *Merkato*’ in Alula Pankhurst and Getachew Assefa(eds) “Grass- Roots Justice in Ethiopia: Contributions of Customary Dispute Resolution”, 252 available at <https://books.openedition.org.cfee> , accessed on January 26/2020.

court than arbitration as a dispute resolution scheme.²¹⁸ Therefore, awareness creation on the advantage of arbitration over litigation for construction disputes should be aggressively promoted. Not only in the construction industry, even with respect to other disputes, Ethiopians should come out of harboring entrenched litigant behavior that has existed for so long.

To create public awareness about arbitration, involvement and promotion by members of the judiciary, publications on arbitration, and the establishment of Arbitration Societies, which composes of people from different professions, may contribute a lot.²¹⁹

²¹⁸ Daniel Alemayehu (n 22) 46.

²¹⁹ Emerson (n 11) 7-8.

CHAPTER FOUR

CONCLUSIONS AND RECOMMENDATIONS

4.1. Conclusions

The western imported formal arbitration is not fully congruent with any of the long lived Ethiopian traditional dispute resolution schemes. The Ethiopian laws use various Amharic words to refer to arbitration magnifying the conceptual confusion over the subject matter of arbitration. Now the accepted name looks to be *Gilgil/ግልግል*.

A closer look at the cases compiled in volumes 1,2,3 and 4 of the Report of Awards indicates that most of the disputes resolved by arbitration in Ethiopia are insurance, banking, investment, and most importantly construction related disputes²²⁰. Such disputes are accompanied by complicated, technical and knowledge of special commercial feature and literatures indicate that these disputes are better resolved through arbitration than litigation and other ADR schemes. The prevalent litigation system is not effective in the contractual enforcement emanating from these cases. Because, *inter alia*, the cases involve technicality and demand special knowledge of the commercial feature of the dispute which judges of courts are not often familiar with. Therefore, the arbitration law should be adaptive to the demands of the growing business sectors indicated above. Furthermore, friendly arbitration laws invite international companies to look into Ethiopia. Friendly arbitration rule has direct link to attracting investment.

Modernizing the arbitration laws is one aspect of adapting to the changing business disputes in Ethiopia. The existing arbitration law has to be evaluated against the standards of UNCITRAL Model Law, the New York Convention and the practical demand of these businesses.

The new effort to finalize the ratification of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards is a good move in the introduction of modernization to the arbitration law in Ethiopia. This will have impact on the enforcement of foreign arbitral awards which was conditional up on reciprocity until to date.

²²⁰ See cases compiled at volumes 1, 2, 3 and 4 of the Report of Arbitral awards, published by the EACC, available at the EACC Library.

On the other hand, unlike the UNCITRAL Model Law, we find that the Ethiopian arbitration law does not have disclosure requirements for arbitrators on conflict of interest before appointment and as a ground of resignation subsequently after appointment. Furthermore, the law allows a partisan arbitrator to stay in work as long as the arbitrator is party appointed arbitrator. This partisan arbitrator cannot be challenged by the party that has not appointed him/her. This indicates the prior goal of the arbitration law is not guarantying neutrality of the tribunal. Ethiopian arbitration law has not sufficient provision that ensures neutrality of the tribunal.

The Ethiopian arbitration law does not embody clear framework provisions regulating the disciplinary conduct of the Arbitral Institutions and arbitrators. There were practical problems over the evaluation of the conduct of arbitration institutions and arbitrators which resulted, *inter alia*, the arbitrary closure by high government officials of the service of arbitration by the EACC.

The Ethiopian arbitration law does not have provision making absence of profession on the part of the arbitrator as agreed between the parties as one ground of challenge. There is no clear indication in the law about the *defacto* and *dejure* inability to conduct the proceeding as one ground of challenge. The *defacto* and *dejure* inability can be associated with the professional competence and efficiency of the arbitrator.

Furthermore, unlike the UNCITRAL Model law, the Ethiopian arbitration law did not adopt the separability doctrine and there is confusion over the existence of the competence-competence doctrine.

The Ethiopian arbitration law has quite a number of grounds for appeal against award. The grounds invite the courts to review the case on its merit. To add injury to the problem, the Federal Supreme Court Cassation bench ignores the possibility for waiver of appeal right by the parties in the arbitration clause. File Numbers 42239/2010 and 37678/2008 decided that though the parties waive their right to appeal and agree on the finality of the award, appeal is still possible and Cassation Bench can evaluate the decision against the existence of fundamental error of law. These are clearly anti-arbitration stances even against the UNCITRAL Model Law and the very concept of arbitration which is dependent on the agreement of the parties.

On the other hand, when one analyzes Federal Cassation File No. 16896/2005, Cassation decided that government administrative contracts can be submitted to arbitration, and in the same fashion

it interpreted the arbitral submission liberally as to the dispute to be submitted to arbitration. However, there is clear provision in Article 315(2) of the CPC that administrative construction contracts cannot be submitted to arbitration while Article 3329 of the Civil Code provides for restrictive interpretation of the arbitral submission in relation to jurisdictional matters. Though the decision looks pro-arbitration, it is against clear stipulation of the law, which went beyond the scope of interpretation. It is surrounded by uncertainties. The Cassation Bench is, therefore, playing a confusing role in promoting arbitration.

Jurisdictions like USA, Great Britain, and France are deemed to be arbitration-friendly jurisdictions in the world²²¹. The general assessment that is made in above conclusions indicates that Ethiopia is not arbitration-friendly country both in terms of the content of the arbitration laws, which are not in line with the UNCITRAL Model Law, and the practical undue intrusion of courts in the conduct of arbitration.

There is no clear provision under Ethiopian arbitration laws regulating the joinder and intervention of third parties in arbitration. The existing provision on opposition of award needs further clarification of whether the opposition is presented to the court or to the tribunal. The Rules of procedures of the EACC and AACCSA-AI do not have any provision regulating the issue. There are practical scenarios in which third parties were allowed to get involved in an arbitration in Ethiopia. However, the arbitration laws in Ethiopia do not embody clear assurance about the scheme on how to deal with interest of third parties in arbitration.

In Ethiopia, there are four Arbitration Centers/Institutions: the AACCSA-AI, EACC, ECCSA-AI and Bahir Dar University Arbitration Centers. However, there are more than 100 million people in Ethiopia across various regions. This shows establishment of Arbitration Centers in Ethiopia is at an infant stage of development. The EACC is yet to reopen its function of arbitration service. The AACCSA-AI is functioning under modern arbitration procedure Rules. The EACC has also modern arbitration Rules. The ECCSA-AI has also recently begun arbitration service. However, we don't have sufficient number of Arbitration Centers/Institutions. Even the existed ones, like EACC, suffered the arbitrary closure of service by government officials as a result of which they

²²¹ Hailegebriel G. Feyssa (n 10) 298.

stopped functioning at a time. We don't have even the large number of Arbitration Centers as envisaged in the existed laws, *inter alia*, by the Chambers of Commerce Establishment Proclamation. Ethiopian arbitration is not as institutionalized as it is supposed to be.

4.2. Recommendations

As there are major problems in Ethiopia associated with arbitration in relation to lack of modernization of the arbitration law, non-compatibility of the law to modern day businesses, accommodation of sufficient safeguards to ensuring competence and neutrality of arbitrators, lack of sufficient and well-functioning arbitration centers/institutions, and prevalent problem of accommodation of third parties' right in arbitration, the following are recommended:

- ✓ Ethiopian parliament should modernize the outdated arbitration laws in a manner that corresponds with the UNCITRAL Model Law so as to the arbitration law be adaptable to the ever changing business scenarios, more particularly in relation to construction and investment related disputes. The amendment should also include, *inter alia*:
 - Clear law that allows public construction contracts to be submitted to arbitration as construction issues are better resolved through arbitration than litigation.
 - Furthermore, the amendment should also include ethical standards of arbitrators and arbitral centers/institutions. The law should devise the requirements to do so and set out basic elements the ethical standard should contain. Whom does accept ethical complaints against arbitrators and arbitral centers has to be known clearly. In relation to misconducts of Arbitral Institutions and arbitrators, there has to be an independent Association of Arbitrators empowered by law to entertain and decide on complaints of misconducts of arbitrators and Arbitral Centers based on the framework law.
 - There has to be a clear law that embodies the scheme on how to deal with third parties' rights in arbitration.
- ✓ Arbitration Institutions/Centers should also come up with rules on how to entertain third parties' interest in arbitration.
- ✓ The Ethiopian parliament should ratify the New York Convention on the Enforcement of Foreign Arbitral Awards, which is at its final stage of adoption at the parliament, as immediately as possible.

- ✓ Ethiopia, all stake holders involved, should aspire and work towards creating hospitable and reputable arbitration centers that even entertain international trade disputes and which are technically well-equipped to resolve the cases efficiently and expeditiously. For this end, Ethiopian parliament should devise laws which determines conditions on how to establish arbitration centers, and should define basic framework rules which regulate the conduct of the institution and the arbitrators in the operation of their functions.
- ✓ New Arbitration Institutions/Centers should come into operation to catch up with the increasing demand of the business community for well-functioning Arbitration Centers. The existing and the new comer Centers should work towards creating awareness through seminars and conferences. All stake holders, Governmental and others, should help them to be fully operative.
- ✓ Legal and other professionals should work towards specialization in arbitration. The legal professionals should also promote arbitration by including arbitration as a means of dispute resolution scheme in contracts.
- ✓ Governmental and Non-Governmental actors should help the existing and the coming new Arbitration Institutions/Centers materially, financially and should also create a workable atmosphere to the Institutions/Centers. The Centers should be working towards meeting the demands of the domestic business community and should also aspire and work towards joining the international competition as a preferred venue of international arbitration
- ✓ The Federal Supreme Court Cassation Bench should play positive role in promoting arbitration without deviating from the intent of the law.

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