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Mandatory Arbitration in Light of the New
Ethiopian Arbitration and Conciliation
Working Procedure Proclamation No.
1237/2021: A Doctrinal Study

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**MANDATORY ARBITRATION IN LIGHT OF THE NEW ETHIOPIAN
ARBITRATION AND CONCILIATION WORKING PROCEDURE
PROCLAMATION NO. 1237/2021: A DOCTRINAL STUDY**

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PLAGIARISM DECLARATION

I TEMESGEN WONDMAGEGN, do hereby declare that the thesis “**MANDATORY ARBITRATION IN LIGHT OF THE NEW ETHIOPIAN ARBITRATION AND CONCILIATION WORKING PROCEDURE PROCLAMATION NO. 1237/2021: A DOCTRINAL STUDY**” is my original work and that it has not been submitted for any degree or examination in any other university. Whenever other sources are used or quoted, they have been duly acknowledged.

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Abstract

Ethiopian law is replete with statutes that broadly provide that certain disputes “shall be settled by arbitration”. These statutory provisions impose arbitration on defined persons as the means for settling their disputes with various public bodies and institutions (statutory arbitration) and with other individuals. Thus, statutory arbitration can be defined as arbitration pursuant to an enactment that provides for a dispute to be submitted to arbitration. This compulsory approach to arbitration departs significantly from the consent-based model of arbitration.

This Thesis considers the legal framework for statutory arbitration in Ethiopia. It examines the rationale for statutory arbitration, the applicable laws governing the arbitration process, documents some of the statutes that provide for statutory arbitration and assesses the scope of applicability of the newly enacted Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021 to mandatory statutory arbitration.

Keywords: Ethiopia, arbitration, statutory arbitration, mandatory arbitration, consent

1 CHAPTER ONE: INTRODUCTION

1.1 Background of the Study

Modern Arbitration and Conciliation Procedural Law was introduced to Ethiopian legal system during the enactment of the Civil Code¹ and the Civil Procedure Code.² The rules and principles governing arbitration and conciliation were dispersedly located both in the Civil Code and Civil Procedure Code. There had been strong stance among Ethiopian legal scholars that there should have been separate and comprehensive procedural law governing arbitration in general and commercial arbitration in particular. As a result, in 2021, an applicable procedural law which is comprehensively to regulate arbitration and conciliation for amicable settlement of commercial disputes was promulgated for the first time.³

Alternative Dispute Resolution (ADR) as one of dispute settlement mechanisms, is widely used to resolve disputes arising from commercial or trade activities. ADR mechanisms range from negotiation to arbitration. Arbitration as one of ADR mechanisms is a private system of adjudication.⁴ It gets operational through the agreement of the parties to the dispute. And this agreement is commonly termed as arbitration agreement.

It is often said that the foundation of arbitration is the agreement to arbitrate. Such an agreement could be stated either in the principal commercial contract or in a separate document.

An arbitration agreement refers to either present or future disputes to the arbitration tribunal. Normally, the parties express their consent to submit any future dispute to arbitration in a written agreement that is a clause in the commercial contract between them.⁵ The parties' arbitration agreement is frequently contained in a clause or clauses that are embedded in the parties'

¹ Civil Code of the Empire of Ethiopia, 1960, Negarit Gazeta, Extraordinary Issue, No. 165, 19th Year, No. 2, [herein after referred to as "Civ. C. "] Arts. 3318-3346 deal with Arbitration and conciliation.

² Civil Procedure Code of the Empire of Ethiopia, 1965, Negarit Gazeta, Extraordinary Issue, No.3, [herein after referred to as "Civ. Pro. C."]

³ Arbitration and Conciliation Working Procedure Proclamation, 2021, Proc. No. 1237, Fed. Neg. Gaz., Year 27, no. 21

⁴Moses, M. L., The Principles and Practice of International Commercial Arbitration (Cambridge University Press, 2008) p. 21

⁵Id, P. 22

commercial contract.⁶ This kind of arbitration agreement is commonly described as arbitration clause and it refers disputes to arbitration tribunal that may arise in the future.

If parties do not have an arbitration clause in their contract, however, they can still enter into an agreement after a dispute has arisen.⁷ This is known as submission agreement⁸ and it is prepared in a document separate from the principal commercial contract.

In some cases, parties may relatively or absolutely lack the freedom to choose arbitration as their mode of dispute settlement. In other words, they may be practically or legally forced to employ arbitration as the only way of settling their dispute. This happens first, in adhesive contracts where arbitration clause is inserted by one of the parties leaving no option to the other party but to accept the arbitration clause. Second, arbitration as a dispute settlement mechanism may be stipulated by law. Such type of arbitration is known as statutory arbitration. Despite the source of imposition (i.e. be it contractual or statutory) as far as one or both of the parties could not exercise their freedom to choose or freely consent to arbitration clause, the arbitration could be characterized as “mandatory”.

If an agreement intended to refer future disputes to arbitration is adhesive arbitration agreement and practically leaves no option for the parties, it is termed as mandatory arbitration. It is frequently used to employment, customer, and consumer contracts.

Statutory arbitration is an arbitration conducted in accordance with the provisions of certain special Acts which provide for arbitration in respect of disputes arising on matters covered by those Acts. It can also be defined as a type of arbitration imposed by law from which the parties cannot opt-out. In other words, it is an arbitration under an enactment.⁹

Mandatory arbitration begins when a consumer or employee enters a contract containing a mandatory arbitration clause.¹⁰ Mandatory arbitration “refers to arbitration pursuant to an

⁶Id, p. 17

⁷ Id, p. 22

⁸ Ibid (This agreement is sometimes referred to by the French term, “compromise,” which is an agreement to submit an existing dispute to arbitration.)

⁹ World Intellectual Property Organization (WIPO), What is Arbitration?, -. <https://www.wipo.int/amc/en/arbitration/what-is-arb.html> (Accessed on 5/4/2023)

¹⁰ Fisher, Karl "Changing Mandatory Arbitration To Optional Arbitration: A Better Business Decision" Creighton Law Review, Vol. 54 (2021), pp 497-518

adhesive, pre-dispute arbitration agreement”.¹¹ The principal commercial contract containing arbitration clause in mandatory arbitration is adhesion contract. Black’s law dictionary defines adhesion contract as a standard form contract prepared by one party to be signed by another party in a weaker position, usually a consumer, who adheres to the contract with little choice about the terms.¹²

Mandatory arbitration which emanates from an adhesive arbitration contract could be termed as consensual or contractual mandatory arbitration and mandatory arbitration which comes from the law could be said that legal mandatory arbitration.

There is still a debate among legal scholars as to whether or not mandatory arbitration is fair to parties to the dispute. Proponents of mandatory arbitration argue that the process and the result obtained from such arbitration are fair to both parties to the dispute as it is efficient, less costly and expedient.

First, they argue that private arbitration is fair because arbitration firms incorporate due process procedures established by adoptive measures known as the Due Process Protocol.¹³ Proponents of mandatory arbitration also argue that arbitration is efficient because it requires less time to resolve disputes when compared to litigation in court.¹⁴ Lastly, they assert that arbitration promotes accessibility to justice for claimants who could not otherwise access the court because their claim is less than the cost of litigating the action to begin with.¹⁵

Opponents of mandatory arbitration in consumer and employee contracts, on the other hand, argue that it is fundamentally unfair because the contract that contains such a provision is, many times, unilaterally drafted.¹⁶ As a result, the average consumer and employee have little to no bargaining power.¹⁷ This leaves the consumer and employee in a position to either accept or decline the terms with no room for negotiation.¹⁸

¹¹ David S. Shwartz, "Mandatory Arbitration and Fairness" Notre Dame L. Rev. V. 84 N. 1 (2009)

¹² Bryan A. Garner, Black’s Law Dictionary, Abridged-9th edition (2010)

¹³ Fisher, Karl, cited above at note 10

¹⁴ Ibid

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Ibid

Consequently, many consumers and employees will likely accept the terms as they appear.¹⁹ Furthermore, opponents assert that substantive legal rights and jurisprudence in the subject matter will not be advanced by the judicial process because an action under mandatory arbitration is usually resolved in a private forum.

1.2 Statement of the Problem

The Ethiopian Arbitration and Conciliation Working Procedure defines arbitration agreement as an agreement to be implemented in order to partly or wholly settle future or existing dispute that may arise from contractual or non-contractual legal relationship.²⁰ This new arbitration procedural law envisages two forms of arbitration agreements. The first is an agreement concluded in order to settle future disputes (arbitration clause) and the second is an agreement made to settle existing dispute (submission agreement).

Statutory mandatory arbitration emanates from specific provisions of law which impose on the parties to settle their dispute by arbitration. There are many laws in Ethiopia that introduced mandatory arbitration for disputes: E.g. National Payment System Proclamation, Cooperatives Proclamation, Capital Markets Proclamation, Ethiopian Commodity Exchange Proclamation, Ethiopian Water Resources Management Regulations No. 115/2005 etc...

There is no, however, clarity as to whether the Ethiopian Arbitration and Conciliation Working Procedure Proclamation recognizes statutory mandatory arbitration as one form of arbitration. Hence, the researcher will try to investigate the status of statutory mandatory arbitration under the new Ethiopian Arbitration and Conciliation Working Procedure Proclamation.

This research paper will investigate whether the new arbitration law applies to statutory mandatory arbitration and if the answer is in the positive the manner and scope of application.

1.3 Research Questions

The thesis will be conducted having the following basic research questions.

¹⁹ Id

²⁰ Arbitration and Conciliation Working Procedure, 2021. Cited above at note 3, Art. 2 sub art 1,

-
1. Does the Ethiopian Arbitration and Conciliation Working Procedure Proclamation govern statutory mandatory arbitration?
 2. How will the jurisdiction of arbitration tribunals be determined in mandatory arbitration?
 3. How can awards emanating from mandatory arbitration be recognized and enforced?
 4. How are adhesive employment and consumer contracts characterized in light of the consensual mandatory dichotomy?

1.4 Objectives of the Study

1.4.1 General objective

Generally, this thesis will examine as to whether the Ethiopian Arbitration and Conciliation Working Procedure recognize mandatory arbitration; had it failed recommend the enactment of a separate and comprehensive law governing mandatory arbitration and thereby ensuring its fairness and efficiency to parties to the dispute.

1.5 Scope (Delimitation) of the Study

The scope of the whole study is limited to major legal and practical problems associated with the mandatory arbitration under the Ethiopian ADR system in general and the new Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021 in particular. Especially this research is delimited to investigating legal texts and literature and doesn't cover empirical investigation. Limitations of the Study

The first limitation associated with this research study is the that there are no detailed books and literatures on the issue and even those limited sources at international level dealing with this topic are e-books which are less likely to access them as needed by the researcher. In Ethiopia too, since the area is relatively new, it is very hard to get detailed materials written on the mandatory arbitration in light with the existing Ethiopian arbitration system. Furthermore, though, cases and judicial opinions play an appreciable role in legal research, case scarcity is another constraint the researcher faces.

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1.7 Research Methodology

The researcher will use conceptual and legal analyses and interpretation in a comparative manner. Hence, in most situations, the study will employ doctrinal legal research method.

Thus, regarding data sources and sample selection:

- Ethiopian legislations (mainly, the New Arbitration and Conciliation Working Procedure Proclamation no 1237/2021, the Ethiopian Civil Code and Civil Procedure Code); arbitration sections of the National Payment System Proclamation, Cooperatives Proclamation, Capital Markets Proclamation, Ethiopian Commodity Exchange Proclamation, Council of Ministers Ethiopian Water Resources Management Regulations No. 115/2005 will be employed as primary sources and thereby being analyzed and interpreted.
- Books, Articles, Journals, Internet sources, Cases, , unpublished materials and reports that are related with mandatory arbitration will be used as secondary data sources and analyzed and interpreted.

To assess the conceptual and practical issues in Ethiopia, interviews and discussions will be held with selected employees and consumers who entered into adhesion contract containing mandatory arbitration clauses.

1.8 Significance of the Study

The study will try to make clarity as to whether the new Ethiopian Arbitration and Conciliation Working Procedure recognizes mandatory arbitration and will make sure that this arbitration procedural law could be used during mandatory arbitration proceedings.

Hence, the study will be feasible and attractive not only for the academic purpose but it has also contribution for law makers, other future researchers and scholars as the study will add on to the existing literature.

1.9 Organization of the Study

The research paper will consist four chapters. The first chapter is the introduction part that consists of the background of the study, statements of the problem, objectives of the study, research questions, and significance of the study, scope of the study, definitions of operational terms and organization of the study. The second chapter will cover a review of the related literature and a general assessment of the Ethiopian laws dealing with mandatory arbitration. In the third chapter, will deal with the applicability of the new Ethiopian Arbitration Law to mandatory arbitrations. Finally, the fourth chapter will deal with the summary of findings, conclusions and recommendations.

2 CHAPTER TWO: THE NATURE OF MANDATORY ARBITRATION AND ITS PLACE IN ETHIOPIAN LAWS

2.1 Consent as the Foundation of Arbitration

The foundation of every arbitration proceeding is the arbitration agreement. The parties' agreement constitutes a contract to refer disputes, which have arisen or may arise in the future between them to arbitration. The freedom of parties to consensually execute an arbitration agreement is known as the principle of party autonomy.²¹

The arbitration agreement is the basis of any consensual arbitration so there cannot be an arbitral reference in the absence of a valid and enforceable arbitration agreement. The whole realm of arbitration commences with the existence of such an arbitration agreement. In effect, if there is no consent to arbitrate, there is nothing for the arbitral reference to stand.²²

Commercial arbitrations arise from arbitration agreements voluntarily reached by both parties. The parties' consent provides the underpinning for the power of the arbitrators to decide the dispute. The parties' consent also limits an arbitrator's power because an arbitrator can only decide issues within the scope of the parties' agreement. Arbitrators are also expected to apply rules, procedures, and laws chosen by the parties. Normally, the parties express their consent to submit any future dispute to arbitration in a written agreement that is a clause in the commercial contract between them. If they do not have an arbitration clause in their contract, however, they can still agree after a dispute has arisen. This is known as a submission agreement.²³

The Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021 (hereinafter to be referred to as "arbitration Proclamation") under article 2/1/ defines "arbitration agreement"

²¹ Fagbemi, S. A, "The doctrine of party autonomy in international commercial arbitration: myth or reality?", Journal of Sustainable Development Law and Policy, Vol. 6 No. 1 (2015). pp. 223-246

²² Onyema, E., International Commercial Arbitration and the Arbitrator's Contract (Routledge, 2010) p.8

²³ Moses, M. L., cited above at note 4, p.2

as an agreement to be implemented in order to partly or wholly settle future or existing dispute that may arise from contractual or noncontractual legal relationship. Since the arbitration agreement is a contract, the disputing parties must have capacity to conclude a contract, to sue and be sued. Since arbitration agreement is a special type of contract, the general rules of contract apply in so far as the matter is not specifically regulated by the arbitration Proclamation.

The principle of autonomy is a cornerstone not only to arbitration agreements but also to every contractual relation. The autonomy of parties is relevant in all the processes from the making to the extinction of the contract.²⁴

However, some scholars have challenged the proposition that consent is the cornerstone of arbitration.²⁵ The essence of arbitration is the maximization of freedom (i.e., the maximization of party autonomy). This includes the freedom to appoint arbitrators, tailor the arbitral procedure, and choose the applicable law. If parties are deprived of these freedoms, the essence of arbitration will be snatched. This system of dispute resolution could no longer be called arbitration. Therefore, the fundamental defining element of arbitration should not be whether the arbitration is the result of voluntary or mandatory, rather it should be the parties' autonomy to choose and determine the process. If they are afforded the freedom to choose the arbitrators, the applicable law and the arbitration procedure, the fact that arbitration is required by law should not be a serious problem.

2.2 What is Mandatory Arbitration?

In any discussion about mandatory arbitration, it is first and foremost necessary to clarify in what context the term is used. Conceptually, mandatory arbitration may convey two completely different messages to the reader. When arbitration is legally required or imposed by law on the parties it constitutes statutory, mandatory arbitration. On the other hand, it may be contractual mandatory if the decision or the choice to resort to arbitration is solely made by one of the parties against the other who practically has no bargaining power.²⁶ This usually occurs in employment

²⁴ Melese Wondmagegnehu Belete, "The "Principle of Autonomy" in Contract under the Civil Code of Ethiopian: Is it an Absolute Principle?" *Beijing Law Review*, vol. 10 no. 4 (2019)

²⁵ Fabio Núñez del Prado, "The Fallacy of Consent: Should Arbitration Be a Creature of Contract?," *Emory Int'l L. Rev.*, vol. 35 no. 219 (2021)

²⁶ Mara Kent, "Forced vs. Compulsory Arbitration of Civil Rights Claims", *LAW & INEQ.*, v. 23 no. 1 (2005).

contracts which may be manifested either as compulsory or forced arbitration. In compulsory arbitration, the employee actually signs the agreement to arbitrate, and thus is "compelled" to live up to the bargain, whereas, in forced arbitration, the employee who objects to the agreement is forced to choose between signing it or losing his or her job.²⁷

Ethiopian law is replete with statutes that broadly provide that certain disputes "shall be settled by arbitration". These statutory provisions impose settlement of disputes through arbitration on defined persons as the means for settling their disputes with various public bodies and institutions (statutory arbitration) and with other individuals. Thus, statutory arbitration can be defined as arbitration pursuant to an enactment that provides for a dispute to be submitted to arbitration.

Statutory arbitration is an arbitration conducted in accordance with the provisions of certain special Acts which provide for arbitration in respect of disputes arising on matters covered by those Acts. It can also be defined as a type of arbitration imposed by law from which the parties cannot opt-out. In other words, it is an arbitration under an enactment.²⁸ Statutory arbitration is a type of arbitration that is required by law or statute. Non-statutory arbitration is a type of arbitration that is not required by law or statute. The main difference between statutory and non-statutory arbitration is that statutory arbitration is mandatory and non-statutory arbitration is voluntary.

In the American context, mandatory arbitration refers to the arbitration of a dispute pursuant to a provision in an adhesion contract requiring the arbitration of future disputes.²⁹ It is usually described as mandatory dispute arbitration because the arbitration clause devises future potential disputes, not existing disputes. Such arbitration is "mandatory" in that courts will rigorously enforce the arbitration clause and compel the parties to arbitrate, even if one of the parties would prefer to litigate once the dispute arises.³⁰

Available at: <https://scholarship.law.umn.edu/lawineq/vol23/iss1/2>

²⁷ Ibid

²⁸ World Intellectual Property Organization (WIPO), What is Arbitration?, cited above at note 9

²⁹ Shwartz, D. S., cited above at note 11

³⁰ Coleman, C. D., "Is Mandatory Employment Arbitration Living Up to Its Expectations? A View from the Employer's Perspective," ABA Journal of Labor & Employment Law, vol. 25, no. 2 (2010), pp. 227-239

On the other hand, statutory comprises different types of arbitrations. The statutes may simply encourage or permit parties to resolve their dispute through arbitration. This happens when the matter is considered non-arbitrable. Another form of statutory arbitration is strictly mandatory compelling the parties to resort to only arbitration as a dispute settlement mechanism.

2.3 Characteristics of Mandatory Arbitration Compared to Voluntary Arbitration

The principle of party autonomy is the basis for any arbitration. In other words, parties have the freedom to choose arbitration as a mechanism for resolving their present or future disputes from among the available dispute resolution mechanisms as far as the subject matter of the dispute is arbitrable. The choice of arbitration as a means of dispute resolution is made by the agreement of the parties. And such agreement is commonly termed as arbitration agreement.

An arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.³¹Hence there must primarily be an agreement of the parties in order to refer or submit disputes to arbitration. The above-mentioned definition of arbitration implies that there must be free consent of the parties to submit disputes to arbitration.

The parties' consent provides the underpinning for the power of the arbitrators to decide the dispute.³²This kind of arbitration agreement is commonly termed as submission agreement³³ and is made at the time the dispute arises. In addition such arbitration agreement is prepared in a separate document different from the dispute contract. If they do not have an arbitration clause in their contract, however, they can still enter into an agreement after a dispute has arisen.³⁴

When parties choose to arbitrate, they opt out all other dispute resolution mechanisms including litigation. Parties who arbitrate have decided to resolve their disputes outside of any judicial

³¹ Model Law on International Commercial Arbitration (United Nations Commission on International Trade Law [UNCITRAL]) UN Doc A/40/17 (1985), Article 7, Paragraph 1

³² Moses, M. L., Moses, M. L., cited above at note 4, p.2

³³ This agreement is sometimes referred to by the French term, "*compromis*," which is an agreement to submit an existing dispute to arbitration.

³⁴ Moses, M. L., cited above at note 4, p. 22

system.³⁵ We can call such form of arbitration as voluntary arbitration. And the reference of the parties to such arbitration is made at the time the dispute arises. In Voluntary arbitration parties to the dispute are supposed to have proportional bargaining power to negotiate on all the terms of the arbitration agreement. Arbitration is called *obligatory* when it is made compulsory on the parties, by virtue either of their own previous arrangement or of statutory prescriptions.³⁶

Another distinction to be made is that between voluntary arbitration and compulsive arbitration. The first is the direct result of the intention of the parties and nothing else. The second comes as the consequence of a former agreement (arbitration clause) or legal provisions such as are found in the Code of Commerce,³⁷

Every voluntary arbitration is based upon a submission agreement. If one of the parties should refuse to concur in the making of the submission, in appointing arbitrators or indicating the subject-matters of the dispute, the judge will intervene to set the arbitration going.³⁸

Voluntary arbitration requires a "submission" by means of which the parties select their arbitrators and determine the matters submitted for arbitration.³⁹

On the other hand, mandatory arbitration comes to existence as a result of legal imposition. Statutory arbitration derives its authority from acts of parliament. Here, parties are obliged to submit some disputes to arbitral tribunals to be formed as ordered by Parliament.⁴⁰ In effect, statutory arbitral proceedings are a creation of Parliament and not of a meeting of minds even if arbitration law is applied to them.

2.4 Arguments For and Against Mandatory Arbitration in terms of Fairness, Efficiency and Accessibility

enforced pre-dispute arbitration agreements imposed on employees, consumers and franchisees in adhesion contracts.⁴¹ One of the criticisms has been it systematically favoring corporate

³⁵ id, p. 1

³⁶ Martinus Nijhoff, International Commercial Arbitration, (Rapporteur General Pieter Sanders, 1960) p. 75

³⁷Id p. 3

³⁸ Id p. 63

³⁹ Ibid

⁴⁰ Sammartano, M. R., International Arbitration: Law and Practice (Kluwer Law International , 2nd ed. 2001) p. 26

⁴¹ Shwartz, D. S., cited above at note 11

defendants. From the employees perspective many claim that requiring an employee to arbitrate employment disputes constitutes a contract of adhesion that is fundamentally unfair to the employee due to the greater bargaining power of the employer.⁴²

Arbitration, which is promoted as a more efficient dispute-resolution process, is, in practice, also unavailable to many consumers because its cost is too great. Courts have recognized that the expense of arbitration can preclude consumers from utilizing the forum that an arbitration clause has made the exclusive forum for resolving their disputes.⁴³

There is a contentious debate among jurists, legal scholars, and consumer and employee advocates concerning the wide spread use of mandatory arbitration clauses in consumer and employee contracts. This is because one of the parties entering into the contract containing mandatory arbitration clause will waive his right to take his case to litigation.

As a result, the stances among legal scholars regarding the use of mandatory arbitration in consumers and employment contracts could be put as proponents (those who argue for mandatory arbitration), and opponents (those who argue against mandatory arbitration)

To begin with, mandatory arbitration begins when a consumer or employee enters a contract containing a mandatory arbitration clause.⁴⁴ Mandatory arbitration refers to arbitration pursuant to an adhesive, pre-dispute arbitration agreement.⁴⁵ These clauses appear in a variety of contracts that average consumers enter into on a daily basis.⁴⁶ By signing a contract containing an arbitration clause, a consumer or employee essentially waives their right to resolve a dispute through the courts.⁴⁷ We will now discuss the positions and the respective arguments held by the proponents and opponents of mandatory arbitration arising from commercial contract containing mandatory arbitration clause in the following subsections.

⁴²Coleman, C. D., cited above at note 30

⁴³ Mark E. Budnitz, "The High Cost of Mandatory Consumer Arbitration", Law and Contemporary Problems, vol. 67, no. 1/2, (2004), pp. 133-166

⁴⁴ Karl Fisher, "Changing Mandatory Arbitration to Optional Arbitration: A Better Business Decision", Creighton Law Review, vol. 54, (2021) p. 498

⁴⁵ David S. Schwartz, cited above at note 11

⁴⁶ Ibid

⁴⁷ Ibid

2.4.1 Arguments against Mandatory Arbitration

Scholars who argue against the use of mandatory arbitration oppose its use from the perspectives of fairness, efficiency and accessibility. Their assertion is based on the fact that parties in employment and consumer form contracts have little or no bargaining power. First, opponents of mandatory arbitration in consumer and employee contracts argue that it is fundamentally unfair because the contract that contains such a provision is, many times, unilaterally drafted.⁴⁸

In most of these situations, the average consumer and employee has little to no bargaining power.⁴⁹ As a result, most consumers and employees have little or no meaningful choice whether to submit their claims to arbitration.⁵⁰ Consumers and employees do not actually know they have waived their right to take their cases to litigation at the time they have concluded a contract containing mandatory arbitration clause. Often, consumers and employees are not even aware that they have given up their rights.⁵¹ Besides, as contracting parties especially consumers and employees do not voluntarily give their consent to mandatory arbitration agreement, the arbitration cannot be acceptable. Arbitration can be an acceptable alternative when consent to the arbitration is truly voluntary, and occurs after the dispute arises.⁵²

This leaves the consumer and employee in a position to either accept or decline the terms with no room for negotiation.⁵³ Given the widespread use of mandatory arbitration provisions in consumer and employee contracts, many consumers and employees will likely accept the terms as they appear.⁵⁴ Additionally, opponents argue that substantive legal rights and jurisprudence in the subject matter will not be advanced by the judicial process because an action under mandatory arbitration is usually resolved in a private forum.⁵⁵

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰Id P. 511

⁵¹ Ibid

⁵² Arbitration Fairness Act of 2018, S.2591, 115th Cong. § 2 (2018), [https:// www.congress.gov/bill/115th-congress/senate-bill/2591](https://www.congress.gov/bill/115th-congress/senate-bill/2591) (last visited Jan. 11, 2020)

⁵³ Ibid Supra note 41 P.498

⁵⁴ Ibid

⁵⁵ Ibid p. 499

2.4.2 Arguments for Mandatory arbitration

On the other hand, proponents of mandatory arbitration refute the assertion of those opponents from fairness, efficiency and accessibility perspectives in several ways.

First, some proponents argue that private arbitration is fair because arbitration firms (e.g., the American Arbitration Association (“AAA”) and JAMS Mediation, Arbitration and ADR Services) incorporate due process procedures established by adoptive measures known as the Due Process Protocol. Proponents also argue that arbitration is efficient because it requires less time to resolve disputes when compared to litigation in court, which, they say, is good for both claimants and the court.⁵⁶ Lastly, proponents argue that arbitration promotes accessibility to justice for claimants who could not otherwise access the court because their claim is less than the cost of litigating the action to begin with.⁵⁷

2.5 Some of the Laws imposing arbitration as a means of settling disputes

2.5.1 National Payment System Proclamation no. 718/2011

The National Payment System Proclamation No. 718/2011 is a law that was enacted by the Ethiopian government to regulate payment systems in the country. This Proclamation was issued to regulate payment systems in Ethiopia. The Proclamation provides for the establishment of a national payment system that is secure, efficient, and reliable. It also provides for the regulation of payment systems and the licensing of payment service providers. The Proclamation also establishes the National Payment System Council, which is responsible for overseeing the implementation of the national payment system.

The Proclamation provides for the establishment of a payment system board and a payment system council to oversee the implementation of the Proclamation. The Proclamation also provides for dispute settlement mechanisms in case of disputes arising from payment system transactions.

⁵⁶ Id p. 499

⁵⁷ Ibid

The Proclamation provides for internal and external dispute resolution mechanisms. Accordingly, operators, participants and issuers of payment instruments are expected to establish internal complaint handling procedures in relation to electronic fund transfers and stored value facilities and advise users on the procedures for lodging complaints.⁵⁸ The National Bank of Ethiopia is authorized to issue a directive that rules the procedures for investigating and handling complaints in relation to electronic fund transfers and stored value facilities according to the Proclamation. The directive issued by the National Bank to this effect defines internal complaint handling process as a complaint or dispute resolution process to resolve disputes between the financial consumer or security provider and the financial services provider in accordance with the written policies and procedures of the latter and applicable directives of the National Bank.⁵⁹

The external dispute resolution mechanism generally refers to a structure where consumers resort beyond the internal complaint handling system. The Proclamation identifies mediation and arbitration as external mechanisms of dispute settlement. Disputes among parties involved in the national payment system concerning any civil matter arising under the Proclamation should be first submitted to by mediation. Failing amicable solution through mediation, parties are forced to settle their dispute through statutory mandatory arbitration.⁶⁰ Whether the reference to “parties” includes consumers is not clear. Some writers argue that consumers are not subject to the mandatory arbitration of the Proclamation.⁶¹

The National Bank of Ethiopia delegated legislative authority to issue directive for the resolutions of disputes arising in relation to national payment system. Such delegation does not make in particular mention “arbitration”. The directives subsequently issued by the Bank do not provide rules governing the statutory arbitration. In the absence of detailed rules, it might be necessary for the arbitrators to consult the relevant provisions of the arbitration Proclamation to conduct the proceeding fairly and effectively. However, in the absence of express or implied reference to they are not legally bound to apply the arbitration Proclamation.

⁵⁸ National Payment System Proclamation, 2011, Art. 20 sub-art. 1, Proc. No. 718, Fed. Neg. Gaz., year 17. No. 84

⁵⁹ Financial Consumer Protection Directive, 2020, Art. 2.20, Dir. No. FCP/01/2020, National Bank of Ethiopia

⁶⁰ National Payment System Proclamation, 2011, cited above at note 58, Art. 31 sub-arts. 1 & 2

⁶¹ Gemechis Demissie, Financial Consumer Protection in the Ethiopian Banking Sector: Analysis of the Legal and Institutional Framework, LLM diss., Ethiopia, Addis Ababa University, 2020, p .37

2.5.2 Cooperatives Proclamation No. 985/2016

The Cooperative Societies Proclamation No. 985/2016 is a law that provides for the creation, registration, and administration of cooperatives in Ethiopia.⁶² The Proclamation provides rules with respect to the operations and winding up of cooperatives. It was enacted in December 2016 after repealing the previous Cooperative Proclamation No 147/1991.⁶³

The Proclamation establishes a dispute settlement mechanism in case of disputes arising from cooperative transactions. It also provides for the establishment of an arbitration board to settle disputes between cooperatives and their members. The procedure for settling disputes through the arbitration board is not explicitly stated in the Proclamation. However, the Proclamation provides that the arbitration board shall have the power to determine its own procedure.

2.5.3 Capital Markets Proclamation no. 1248/2021

The Capital Markets Proclamation No. 1248/2021 was issued by the House of Peoples' Representatives in Ethiopia to create a capital market and establish the legal framework for its operation and its actors.⁶⁴ The Proclamation establishes the Capital Markets Authority with the objectives of regulating and supervising the capital market, promoting the development of the capital market, protecting investors and other stakeholders, and ensuring transparency and fairness in the capital market.

With the exception of matters falling under the jurisdiction of the Capital Market Tribunal, disputes among parties involved in the capital market concerning any civil matter under the Proclamation shall be resolved by mediation. Where the disputes can not be resolved through mediation, the matter shall be resolved through arbitration.⁶⁵

The Capital Market Authority is conferred with rule-making power to issue a directive governing the qualification and manner of appointment of arbitrators, the procedure of the arbitration

⁶² <https://leap.unep.org/countries/et/national-legislation/cooperative-societies-proclamation-no-9852016> Accessed 5/4/2023

⁶³ https://www.ilo.org/dyn/natlex/natlex4.detail?p_isn=109318 Accessed 5/4/2023

⁶⁴ M. Tekie, The New Capital Markets Proclamation in Brief. <https://bing.com/search?q=Capital+Markets+Proclamation+no.+1248%2f2021> Accessed 5/4/2023

⁶⁵ Capital Market Proclamation, 2021, Art. 111 sub art 1 & 2, Proc No. 1248, *Fed. Neg. Gaz.*, year 27, no. 33

proceeding and the payment of arbitration related to costs.⁶⁶ The Arbitral award is final and binding. The finality of the award is “Without prejudice to provisions Civil Procedure Code relating to appeals”.⁶⁷ It is difficult to comprehend to which provisions of the Code is the reference made. Firstly, those provisions of the Code dealing with arbitration are repealed by Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021.⁶⁸ Secondly, the term “appeal” in the Proclamation is not concerned with the general rules of appeal in the Code, because the decision of the tribunal is final, hence non-appealable.

2.5.4 Ethiopian Commodity Exchange Proclamation no. 550/2007

Ethiopian Commodity Exchange Proclamation no. 550/2007 is a legal document that establishes the Ethiopia Commodity Exchange (ECX) as a public-private partnership to facilitate the trade of agricultural products in Ethiopia. The Proclamation defines the objectives, functions, governance, and operations of the ECX, as well as the rights and obligations of its members, clients, and service providers. The Proclamation also sets out the regulatory framework for the ECX, including the roles and responsibilities of the Ministry of Trade and Industry and the Ethiopian Commodity Exchange Authority.

There is no indication in the Proclamation that suggest disputes should be settled through arbitration. There is no provision that specify the matters and parties that are subject to arbitration. Unlike, other similar statutes, the Proclamation fails to unequivocally lay down statutory mandatory arbitration as the only option available to the parties to resolve their dispute. The reference to arbitration in the Proclamation is found in the provisions dealing with the purpose and power of the Exchange. One of the purposes for which the Exchange is established is to provide a mechanism for dispute resolution through arbitration.⁶⁹ The Exchange is conferred with rule making power to establish rules and procedures for the resolution of disputes arising from exchange.⁷⁰ These rules shall in particular specify the qualifications and manner of

⁶⁶ Id Article 111 sub. Art 4

⁶⁷ Id art. 111 sub. art. 3

⁶⁸ See article 78 sub art. 2 of Capital Market Proclamation, 2021.

⁶⁹ Ethiopia Commodity Exchange Proclamation, 2007, Art. 6 sub-art. 7, Proc. No 550, Fed. Neg. Gaz., year 13. no.

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⁷⁰ Id Art. 28 sub-art. 1

appointment of arbitrators, the procedures of the arbitration proceedings: and the payment of arbitration related costs.⁷¹

It is in these rules we find express reference to statutory mandatory arbitration., The Ethiopia Commodity Exchange Rules Amendment No. 549/2021 requires all disputes (unless the Exchange is a party to a dispute) shall be submitted to conciliation or Arbitration.⁷² Subsequent amendment to the rules establishes Exchange Arbitration Tribunal. It's role is to provide facilities for the resolution of disputes. The use of such Arbitration facilities should be voluntary for Clients⁷³

The rules issued by the Authority are detailed governing almost all aspect of the arbitration proceeding. Therefore, there is little or no practical significance of the arbitration Proclamation to the arbitration proceeding before the Exchange Authority. Due to the absence of hierarchy between the Exchange rules and the Arbitration Proclamation, even in clear cases of contradiction between the two, there is no mechanism by which priority is given to the Proclamation.

2.5.5 Council of Ministers Ethiopian Water Resources Management Regulations No. 115/2005

The Ethiopian Water Resources Management Regulations No. 115/2005 was issued by the Council of Ministers to provide for the management, development, and utilization of water resources in Ethiopia. The regulation provides for the establishment of a Water Resources Management Authority to oversee the implementation of the regulation. The regulation also provides for the establishment of a Water Resources Management Fund to finance the activities of the Authority.

The general rules of dispute settlement are stipulated in the in the establishment Proclamation.⁷⁴ Depending on the parties, there are two types of dispute settlement mechanisms. If the dispute is between permit holders, as well as between a permit holder and a third party concerning rights or

⁷¹ Id Article 28 sub-art. 2

⁷² Ethiopia Commodity Exchange Rules Amendment, 2021, Dir No. 549, Art. 16.1.2, Ethiopia Commodity Exchange

⁷³ Commodity Exchange Authority Directives, 2021, Dir No. 551, Part five article 4, Ethiopia Commodity Exchange Authority

⁷⁴ Ethiopian Water Resources Management Proclamation, 2000, Proc. No 197, Fed. Neg. Gaz., year 6, no. 25

obligations arising from permits, the Supervising body acts as administrative adjudication organ with the power of rendering a binding decision.⁷⁵ When the dispute is between the Supervising body and a permit holder, arising due to reasons related to the permit parties shall first attempt to reach at amicable solution. In the event that agreement cannot be reached through negotiation the case shall be settled by arbitration.⁷⁶

The Water Resources Management Proclamation No. 197/2000 delegates legislative authority to the Council of Ministers to determine the details of arbitration process by regulation.⁷⁷ The regulation that was issued accordingly contains few provisions governing the selection and appointment of arbitrators and rules about the seat and expenses of the tribunal. It also refers to the relevant laws of the Federal and Regional government as the governing laws of the arbitration.⁷⁸

2.5.6 Mining Operations Proclamation No. 678/2010 as amended by mining Operations /Amendment/ Proclamation No. 816/2013

The Mining Operations Proclamation No. 678/2010 governs the conduct of all mining operations and related activities within the territory of the Federal Democratic Republic of Ethiopia.⁷⁹ The Proclamation provides for the establishment of a Mining Operations Regulatory Authority to oversee the implementation of mining laws. The Proclamation was amended by the Mining Operations (Amendment) Proclamation No. 1213/2020.

The Proclamation prescribes negotiation as a primary mechanism of resolving any dispute, controversy or claim between the Licensing Authority and a licensee arising out of, or relating to an agreement for reconnaissance, exploration, retention or mining, or the interpretation, breach or its termination.⁸⁰ In the event that agreement can not be reached through negotiations, parties are required to solve their case through statutory mandatory arbitration.⁸¹

⁷⁵ Id Art. 9 sub art. 1

⁷⁶ Id Article 9 sub art. 4

⁷⁷ Id Article 9 sub art. 3

⁷⁸ Water Resources Management Regulations, 2005, Art. 36 sub art. 1(c), Reg. No. 115, Fed. Neg. Gaz., year 11, no. 27

⁷⁹ <https://leap.unep.org/countries/et/national-legislation/mining-operations-proclamation-no-6782010> Accessed 5/4/2023

⁸⁰ Mining Operations Proclamation, 2010, Art. 78 sub art. 1, Proc. No. 678, Fed. Neg. Gaz., year 16, no. 45

⁸¹ Id Art. 78 sub art. 2

An arbitral award by the tribunal shall be final and binding upon the parties. However, parties aggrieved by the decision of the arbitration may lodge an appeal to the concerned court.⁸² As regards the applicable law governing the arbitration proceeding, the Proclamation deviates from other statutory arbitrations. It states the arbitration shall be conducted in accordance with the procedures specified in the agreement.⁸³ Practically, mining operations are conducted based on detailed standard agreements with the government. Rules of arbitration are a common element of such agreements.

2.6 Arbitration in Employment and Consumers Contracts under the Ethiopian Law from Fairness, Efficiency and Accessibility Perspectives

It has already been pointed out under section 2.2 of this chapter while discussing the meaning of mandatory arbitration that the term may refer to two different kinds of arbitration. The first one designated as “mandatory pre-dispute arbitration” is contractual by its very nature and is similar with the ordinary agreements of arbitral submission except it is an “adhesive contract. On the other hand, the term “mandatory arbitration” may refer to “statutory arbitration” where the legislature compels the parties to use arbitration as an exclusive mechanism of settling their dispute. A discussion about mandatory arbitration within the Ethiopian context must take into account these two aspects of mandatory arbitration.

Accordingly, the two forms of mandatory arbitration will be assessed in light of Ethiopian arbitration law and other special statutes. The first part will survey how arbitration is administered under specific statutes. The second part examines contractual mandatory arbitration focusing specifically on employment contracts

⁸² Id Art. 78 sub art. 2 & 3

⁸³ Id Art. 78 sub art. 2

2.6.1 Arbitration in Employment Contracts

Before examining the status of mandatory arbitration in the settlement of labour disputes, be it contractual or statutory, it is important to first comprehend the nature and category of labour disputes that may arise in the workplace. The labour Proclamation defines labour disputes as:

*[A]ny dispute between a worker and an employer or trade union and employers' association in respect of the application of law, collective agreement, work rules, employment contract and also any disagreement arising during collective bargaining or in connection with collective agreement.*⁸⁴

The Proclamation classifies labour disputes into individual and collective without offering any definition. The category is used to characterize the list of matters falling under the Labour Relations Board and ordinary courts. Despite an effort by the Cassation Bench of the Federal Supreme Court⁸⁵ to distinguish between the two, what constitutes individual and collective still remains far from a settled issue. One useful approach to drawing a line between individual and collective labour disputes is to relate it to the general classification of the employment relationship. Accordingly, an employment relation is individual if it exists between an employee and an employer. This relationship exists at an individual level and is mainly governed by the employment contract and labour legislation. On the other hand, collective labour relation is established between a labour union or employee's representatives and an employer or employer's representatives. Key defining characteristics of the relationship at the collective level is that it is between two parties with more or less equal bargaining power. It can also be described as a relationship between organized labour and management.

The individual and collective relations correspond with individual and collective disputes. Therefore, it is important to look into the parties in determining the types of labour disputes although there are exceptional cases where a group of employees may be in dispute with the employers on matters having implications on the collective interest of all or portion of the workforce.

⁸⁴ Labour Proclamation, 2019, Art. 137 sub. Art. 3, Proc. No. 1156, *Fed. Neg. Gaz.*, year 25 no. 89

⁸⁵ KK Blanket Factory Basic Trade Union Vs. KK Industries (Fed. Sup. Ct, 1997 E.C.) C/F/ No. 18180 V. 3

Arbitration is used as a preferred mechanism of labour dispute settlement mechanism in many jurisdictions. This doesn't mean it is beneficial to employees or it is their first choice compared to ordinary litigation. Labour disputes, especially at the collective level may have destructive effect to both parties if they are left unsettled on time. The usual 'remedies' of strike and lock-out, though effective as back up plan are nor always effective and their negative impact may be felt by society and the economy.

Labor disputes are also classifiable as “disputes of right” and “disputes of interest”. A dispute of right concerns with “the violation of or interpretation of an existing right (or obligation) embodied in a law, collective agreement, or individual contract of employment or custom and practice. On the other hand, dispute of interest “arises from differences over the determination of future rights and obligations, and is usually the result of a failure of collective bargaining.”⁸⁶

Now, let's address the question whether arbitration is recognized as a dispute settlement mechanism by the labour Proclamation in light of the category of disputes. The labour Proclamation states that parties to a dispute may agree to submit their case to arbitrators or conciliators, of their own choice for settlement in accordance with the appropriate law.⁸⁷ The types of disputes parties “agree to submit” is restricted to collective labour disputes enumerated under article 143 of the Labour Proclamation. This conclusion is based on the reference to article 142 by article 144/1/ and cumulative reading of article 142 and 143 of the Labour Proclamation. The provision of article 144/1/ starts with a statement “Notwithstanding the provisions of Article 142 of the Proclamation...”. Again 142 limits the scope of the provision to disputes in respect of matters specified under Article 143. Those “specified matters” are collective labour disputes including both disputes of right and interest mentioned above.

When the labour Proclamation singles out collective labour disputes and expressly recognizes their settlement through voluntary arbitration agreement, this raises a question as to the status of voluntary arbitration regarding individual labour disputes. Does the law impliedly intend to suggest that voluntary arbitration of individual labour disputes is not permitted? If it could be argued that arbitration agreement between the employee and employer is valid irrespective of the

⁸⁶Birhanu Beyene Birhanu, “Voluntary interest arbitration in the Ethiopian labor proclamation: the problems in its design and a way to fix them” *Oromia Law Journal*, vol. 6 no. 1, pp.67-85.

⁸⁷ Labour Proclamation, 2019, cited above at note 84, Art. 144 sub. Art. 1

type of dispute, which law governs the arbitration process and also the substantive labour law to solve the dispute? These questions will be addressed under Chapter three of this thesis.

Some statutes, unlike the labour Proclamation do not specifically recognize the agreement of the parties to settle their labour dispute, but simply make a general statement about the preferability of arbitration. The Industrial Parks Council of Ministers Regulations No. 417/2017 indicates Labour disputes within the Parks are to be solved through the dispute settlement mechanisms laid down under the labour Proclamation by “giving priority to alternative dispute mechanism”.⁸⁸ This adds nothing to labour dispute settlement mechanism through arbitration discussed above.

2.6.2 Arbitration in Consumer Contracts

The Trade Competition and Consumers Protection Proclamation No. 813/2013 defines consumer as a natural person who buys goods and services for his personal or family consumption, whether the price is being paid by him or another person and not for manufacturing activity or resale. Therefore, consumer contracts may be understood as agreements involving the purchase of goods and services for consumption. These contracts share a common characteristic with employment contracts in being “adhesive”. The consumer has no option, but to either agree to the terms and conditions of the seller or risk denial of the goods and services.

When arbitration clause is inserted in consumer contracts, consumers will be forced to submit their dispute to arbitration. Due to the big difference in bargaining parties, the arbitration clause, in the practical sense, does not reflect a genuine consent of the consumer. However, legally speaking, this does not signify, the validity of the arbitration contract will be usefully challenged. Unless a court finds a defective consent based on the tests of contract law, there is hardly any ground to invalidate the arbitration agreement.

The law also seems to take cognizance of the problem inherent in consumer contracts. The Trade Competition and Consumers Protection Proclamation No. 813/2013 has devised a dispute settlement mechanism through administrative tribunal that is empowered to determine compensation for consumers. The Proclamation establishes two tier system of administrative tribunal which has first instance and appellate jurisdiction. Accordingly, the adjudicative

⁸⁸ Industrial Parks Council of Ministers Regulations, 2017, Art. 21 sub. Art. 2, Reg. No. 417, Fed. Neg. Gaz., year 23. No. 93

Benches of the Trade Competition and Consumers Protection Authority is authorized to hear claim by consumers victimized by transactions conducted in the Addis Ababa or the Dire Dawa city administrations and order compensation in accordance with the relevant laws.⁸⁹ Appeal from the decision of the benches will be submitted to the Federal Trade Competition and Consumer Protection Appellate Tribunal.⁹⁰

The scope of the bench is very limited as it can only order compensation for violation of consumers protection provisions stipulated under Part Three of the Proclamation. Part three generally regulates distribution of goods and services which includes hoarding and price regulation of goods and services. There are indeed claims falling outside of the jurisdiction of the Authority's tribunal. What disputes do fall outside its jurisdiction?

In light of the above brief overview of the legal framework for settlement of consumer disputes, it is likely that arbitration contract for disputes falling within the jurisdiction of the tribunal will be valid. Arbitration is dispute settlement mechanism alternative to litigation. Administrative litigation is by itself an alternative dispute settlement mechanism governed by different rules and principles of administrative law. This view is shared by the Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021. According to article 7 sub article 9 of the Proclamation, administrative disputes falling under the powers given to relevant administrative organs by law are non-arbitrable

Even for those consumer claims not covered by the Proclamation there is no chance they could be submitted to arbitration by agreement. The newly enacted Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021 has expressly categorized matters related Trade competition and consumers protection as non-arbitrable cases.⁹¹

In summary, the above brief discussion makes it clear that, unlike labour disputes, the issue of the validity of adhesive arbitration consumer contracts will not arise. The legal basis, if any, for arbitration contract of consumer disputes has to necessarily rely on statutory arbitration. The statutory nature of such arbitration may be manifested in one of the sub categories discussed

⁸⁹ Trade Competition and Consumers Protection Proclamation, 2013, Art. 32 sub. Art. 1/ c, Proc. No. 813, Fed. Neg. Gaz., year 20. no. 28

⁹⁰ Id Art. 33 sub. Art. 2/ b

⁹¹ Arbitration and Conciliation Working Procedure Proclamation, 2021, cited above at note 20, Art. 7 sub. Art. 8

below under section 2.8 of this thesis. The applicable arbitration law governing each category of statutory arbitration is reserved for discussion under Chapter 3 of this thesis.

2.7 Non-Mandatory Statutory Arbitration

Some of the specific statutes dealing with arbitration simply affirm the possibility of resorting to arbitration as a dispute settlement mechanism. One may question the relevance of a statute if it does not subject the parties to statutory arbitration or provide them an alternative or modified form of voluntary arbitration.

2.7.1 Arbitrability clauses

Some of the statutes providing ‘arbitration’ are simply ‘arbitrability clauses’ laying down an exception to non-arbitrability of administrative contracts or avoiding any dispute about the arbitrability of the subject matter. For instance, Public Private Partnership is a new concept and it is difficult to whether it could precisely be categorized as an administrative contract. For this reason, the statute governing the partnership has made sure that any restriction on arbitrability on other laws will not affect the arbitration provision in the partnership agreement. It specifically states:

Notwithstanding any contrary provision in any existing law, the Project Agreements may provide for settlement of disputes through arbitration or any other forms of alternative dispute resolution mechanism.⁹²

The same is true of investment disputes with the government. The investment Proclamation recognizes the power or right of the Federal Government to agree to resolve investment disputes involving Foreign investments through arbitration. In other words, it recognizes such arbitration agreements as arbitrable.⁹³

2.7.2 Contractual

Not all statutory arbitrations are mandatory. Some of the statutes require express consent of the parties for the arbitration to take effect. For instance, industrial park end-users may agree to

⁹² Public Private Partnership Proclamation, 2018, Art. 61 sub. art. 2, Proc. No. 1076, Fed. Neg. Gaz., year 24. No. 28

⁹³ Investment Proclamation, 2020, Art. 28 sub. art. 2, Proc. No. 1180, Fed. Neg. Gaz., year 26. no. 28

resolve disputes between themselves by arbitration.⁹⁴ In the absence of such agreement, there will be no arbitration. Agreement of the parties is also need for arbitration to take place before the Energy Authority. Dispute between licensees or between a licensee and a customer pertaining to the conditions of supply of electricity, tariff or quality of supply or provision of services, if they agree to submit it to the Authority.⁹⁵

In some statutes the provisions providing for contractual arbitration limit the scope of disputes only to a certain category. Typical example is the Labour Proclamation. The Proclamation indicates that parties to a dispute may agree to submit their case to arbitrators or conciliators, of their own choice for settlement.⁹⁶ Such agreement is possible “Notwithstanding the provisions of Article 142 of this Proclamation”. According to Article 142 of the Labour Proclamation, labour disputes listed under article 143 may be submitted by either of the parties to the Ministry or the appropriate Authority who shall assign a conciliator with a view to amicable settlement of the case. Labour disputes specifies under article 43 are all collective labour disputes.

It is suggested that based on cumulative reading of articles 142, 143 and 144 of the Labour Proclamation the recognition of arbitration agreement under article 44 excludes individual labour disputes. Does that mean individual labour disputes could not be solved through arbitration if the parties agree? This question will be addressed under Chapter Three of this thesis.

2.7.3 Adhesive contracts

Voluntary arbitration under adhesive contracts disguise the true nature of the agreement. In terms of formality there will be signed agreement between the parties. The agreement is part of the commercial contract. The party agreeing to the arbitration clause has no option but to either leave or take the commercial contract in its totality.

In some of the statutes, existence of arbitration agreement is assumed to exist. They do not expressly provide the freedom to agree or not to agree to the arbitration. Under the Public Private Partnership Proclamation No. 1076/2018 indicates that notwithstanding any contrary provision in any existing law, the Project Agreements may provide for settlement of disputes through

⁹⁴ Industrial Parks Council of Ministers Regulations, 2017, cited above at note 88, Art. 27

⁹⁵ Energy Proclamation, 2013, Art. 38 sub art. 1/b/, Proc. No. 810, Fed. Neg. Gaz., year 20. No. 12

⁹⁶ Labour Proclamation, 2019, cited above at note 84, Art. 144 sub. art. 1

arbitration or any other forms of alternative dispute resolution mechanism.⁹⁷ Similarly, the Mining Operations Proclamation No. 678/2010 as amended by mining Operations /Amendment/ Proclamation No. 816/2013 states in the event that agreement can not be reached through negotiations, the case shall be settled by arbitration in accordance with the procedures specified in the agreement⁹⁸

Both Proclamations, assume the inclusion of arbitration clause in the commercial contract entered between the government and the private party. Project agreements and also mining agreements are standard agreement prepared by the government. Therefore, the private party has no freedom to bargain the exclusion of the clause.

2.7.4 Mandatory

When arbitration is mandatory, that will be the only option available for the parties to submit their claim. It in effects ousts courts' jurisdiction to try the case.

Arbitration is mandatory under the following statutes:

- National Payment System Proclamation No. 718/2011⁹⁹
- Ethiopian Water Resources Management Proclamation No. 197/2000¹⁰⁰
- Ethiopian Commodity Exchange Proclamation No. 550/2007¹⁰¹
- Cooperative Societies Proclamation No. 985/2016

When the disputes provided under Article 64 of this Proclamation regarding cooperative societies are not settled by conciliation they shall be referred to arbitration¹⁰²

If mandatory arbitration is the intention of the legislature, it has to be expressed in a clear language on the statute. With the exception to arbitration under Commodity Exchange, all the statutes indicate that the dispute “shall be settled by arbitration”. The same expression is not to be found in the Commodity Exchange Proclamation. The Proclamation states the Exchange shall, subject to the approval of the Exchange Authority, establish rules and procedures for the

⁹⁷ Public Private Partnership Proclamation, 2018, cited above at note 92, Art. 60 sub art 2

⁹⁸ Mining Operations Proclamation No. 678/2010 as amended by article 2 sub article 28 of mining Operations /Amendment/ Proclamation No. 816/2013

⁹⁹ National Payment System Proclamation, 2011, cited above at note 58, Art. 31 sub art. 2

¹⁰⁰ Ethiopian Water Resources Management Proclamation, 2000, cited above at note 74, Art. 9 sub art. 4

¹⁰¹ Ethiopian Commodity Exchange Proclamation, 2007, cited above at note 69, Art. 28 sub art. 1

¹⁰² Cooperative Societies Proclamation, 2016, Art. 62 sub art. 1, Proc. No. 985, Fed. Neg. Gaz., year 23. no. 7

resolution of disputes arising from exchange transactions through arbitration. This is clearly a provision delegating legislative power. It does not in any indicate the type of arbitration will be mandatory.

Mandatory Statutory Arbitrations are arbitrations conducted in accordance with the provisions of certain special Acts which provide for arbitration in respect of disputes arising on matters covered by those Acts. In most countries, the rules governing arbitration by consent are applicable also to statutory arbitral tribunals, unless excluded by the statute. Under Ghanaian arbitration law, the Arbitration Act 2005 applies to statutory arbitrations only insofar as the 2005 Act is not inconsistent with the statute or any recognized or authorized rules or procedures pursuant to which the reference takes place. The UK Arbitration Act 1996 also expands provisions for statutory arbitration.¹⁰³

Similarly, Indian of Arbitration and Conciliation law lays down that Part I of the Act except sub-section (1) of section 40, sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder.¹⁰⁴

The effect of extending provisions is to put statutory arbitrations on an equal footing with private consensual arbitrations, so far as possible. In Ethiopia, Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021 does not contain any provisions extending the applicability of the Proclamation to mandatory statutory arbitrations on matters not covered by the respective specific statutes. Before we examine the applicability of the Proclamation to mandatory statutory arbitration, the following is a brief discussion of the legal regime governing statutory arbitration as specified in each specific statute.

¹⁰³ Oppong, R. F., “The Nature and Constitutionality of Statutorily-Imposed (Non-Contractual) Arbitration in Ghana” *Journal of African Law*, vol. 65. no. 2 (2021) pp. 205–222

¹⁰⁴ Section 2(4) Indian of Arbitration and Conciliation Act, 1996

2.8 The Law Applicable to Mandatory Statutory Arbitration

2.8.1 Specific Statutes

The source of mandatory statutory arbitration is a primary legislation enacted by parliament. These statutes may vary in terms of the manner of laying down rules governing the arbitration process. Some of them are limited to determining the jurisdiction of the tribunal. Other statutes contain few provisions on selection and appointment of arbitrators and the binding effect of the award including the manner of its execution. Apart from few provisions formulated in broad terms about the type of disputes subject to arbitration and regulating general aspects of the arbitration process, the specific statutes establishing statutory arbitration do not provide detailed rules of the arbitral proceeding.

2.8.2 Administrative Rules and Regulations

With the exception of the Cooperative Societies Proclamation No. 985/2016, all the remaining statutes delegate rule making authority either to the Council of Ministers or the relevant administrative agency to lay down the detailed rules applicable to the specific mandatory statutory arbitration. The Ethiopian Water Resources Management Regulations No. 115/2005 was issued pursuant to article 9/4/ of Ethiopian Water Resources Management Proclamation No. 197/2000 which provides that the details of the mandatory statutory arbitration under the Proclamation to be determined by a regulation.

The National Payment System Proclamation delegates the National Bank to issue a directive for the resolutions of disputes arising in relation to national payment system.¹⁰⁵ The Ethiopian Commodity Exchange is conferred with rule making authority to establish rules and procedures for the resolution of disputes arising from exchange transactions through arbitration.¹⁰⁶ Similarly, Capital Markets Proclamation authorizes the Capital Markets Authority to determine by a directive the qualification and manner of appointment of arbitrators, the procedure of the arbitration proceedings, and the payment of arbitration related costs.¹⁰⁷ With the exception of Ethiopian Commodity Exchange all the other administrative organs have not yet issued detailed

¹⁰⁵ National Payment System Proclamation, 2011, cited above at note 58, Art. 31 sub. Art. 4

¹⁰⁶ Ethiopian Commodity Exchange Proclamation, 2007, cited above at note 69, Art. 28 sub art 1

¹⁰⁷ Capital Market Proclamation, 2021, cited above at note 65, Art. 111 sub art. 4

rules of arbitration. This raises the question how the gap may be filled in conducting arbitration proceeding under each statute.

2.8.3 The Civil Procedure and Civil Code

In Most of the mandatory statutory provisions, reference is made to the Civil and Civil Procedure Code. The reference may be either by laying down a “reservation clause” regarding the right to appeal or by adopting the provisions of the Code to apply on matters not covered by the statute. For instance, the Water Resources Management Regulations states that the provisions of the Ethiopian Civil and Civil Procedure Code shall apply on matters which are not covered by the regulation. The relevant provisions of the Civil Code also apply when the parties fail to agree select the presiding arbitrator.¹⁰⁸ The arbitrators under Cooperative Societies Proclamation are required to conduct their arbitration hearing and fulfill any of their duties in accordance with the Civil Procedure Code.¹⁰⁹

The problem of a reference either to the Civil Code provisions governing arbitrations or Civil Procedure Code Provisions governing appeal or setting aside of arbitration awards is that they lack binding effect as they are repealed. The provisions of Articles 3318 to 3324 of the Civil Code which deal with conciliation and the provisions Articles 3325 to 3346 of the Civil Code about arbitration including the provisions of the Civil Procedure Code from Articles 315 to 319,350,352,355-357 and 461 are repealed by the Proclamation.¹¹⁰ This raises the question of whether a reference to the repealed provisions of both Codes should be read as a reference to the current arbitration Proclamation. It is suggested that a reference to the repealed part of the law should be understood as a reference to the repealing law.

2.8.4 Agreement of the Parties

In one instance agreement of the parties is stipulated as the governing law of the arbitration proceeding despite the mandatory nature of the arbitration. Article 76 sub art 2 of the Mining Proclamation states:

¹⁰⁸ Ethiopian Water Resources Management Regulations, 2005, cited above at note 78, Art. 36 sub art 4 & 1/b/

¹⁰⁹ Cooperative Societies Proclamation, 2016, cited above at note 102, Art. 62 sub art 2

¹¹⁰ Arbitration and Conciliation Working Procedure Proclamation, 2021, cited above at note 3, Art. 78 sub art. 1 and 2

In the event that agreement can not be reached through negotiations, the case shall be settled by arbitration in accordance with the procedures specified in the agreement.

The Proclamation does not lay down general procedural rules of the arbitration. No delegation is also given for the purpose of prescribing the applicable rules. Unlike other mandatory statutory provisions there is no reference to the Civil and Civil Procedure Codes to apply on matters not covered by the Proclamation.

3 CHAPTER THREE: THE LEGAL STATUS OF MANDATORY ARBITRATION UNDER THE ETHIOPIAN ARBITRATION LAW

3.1 An Inquiry made to Clarify whether or not the New Ethiopian Arbitration and Conciliation Law Recognizes Mandatory Arbitration

3.1.1 Overview of the Ethiopian Arbitration Law

Modern arbitration and conciliation law was introduced to the Ethiopian legal system during the Imperial Era. During this time the rules and principles governing arbitration and conciliation were incorporated in the Civil Code and Civil Procedure Code of Ethiopia. These rules and principles had been applicable in resolving arbitral disputes since then. However, since such arbitration rules and principles are dispersedly mentioned in the Civil Code and Civil Procedure Code, they become difficult for consolidative application by lawyers in general and arbitrators in particular. Due to its demerits, Ethiopian legal scholars had been calling for an amendment there by enacting comprehensive and consolidated rules and principles to ADR law in general and arbitration and conciliation law in particular. After almost sixty years, Ethiopia has now enacted new arbitration and conciliation law in 2021.

3.1.2 Nature of the New Ethiopian Arbitration and Conciliation Procedural Law concerning Arbitration in General

The new Ethiopian Arbitration and Conciliation Working Procedure covers the formal validity of the arbitration agreement, and the obligation of courts to refer parties to arbitration unless the agreement is void. The new Ethiopian arbitration law requires an arbitration agreement to be

made in writing.¹¹¹ It also limits interference of the court in arbitration matters and permits parties to seek interim relief from a court without losing the right to arbitrate. Besides, the new Ethiopian arbitration and conciliation law deals with the composition of the arbitral tribunal, challenges to arbitrators, the jurisdiction of the tribunal, and the tribunal's powers to order interim measures. Furthermore, it regulates the arbitral proceedings, basically providing that the parties can agree on how the proceedings will take place. It also provides that if the parties do not agree, then the tribunal can determine how the arbitration will proceed. It has rules pertaining to the award, settlement, recourse against the award, and recognition and enforcement of the award.

3.1.3 Recognition of Contractual and Statutory Mandatory Arbitration

Before delving into “an inquiry to clarify whether the new Ethiopian arbitration and conciliation law recognizes mandatory arbitration”, one has to start with a clarification of the nature of the inquiry itself, since clarity of a question is a prerequisite for clarity of the subsequent answer. The phrase “mandatory arbitration” is used in different contexts and signifies different meanings in different jurisdictions. This is discussed in detail under 2.2 of this thesis. Therefore, there is no need to reproduce the different definitions here.

However, it might be helpful to review the usage of the word “mandatory” in the context of the nature of the new Ethiopian arbitration and conciliation law. This law exclusively governs and applies to consensual or voluntary arbitration agreements.

Statutory arbitration implies a statutory arbitration imposed on the parties. Here, the only option available for one of the parties is to proceed through arbitration or waive the right to bring action before a judicial organ. This kind of arbitration may be best described as “forced arbitration”. This type of arbitration, which is involuntary by its very nature, is not recognized by the arbitration Proclamation.

Statutory arbitration is not always mandatory. The statute may simply provide arbitration as a dispute settlement mechanism, with or without laying down some rules, on the condition that parties voluntarily agree to submit their dispute to arbitration. The basic characteristic of such

¹¹¹ Ethiopian Arbitration and Conciliation working Procedure Proclamation, 2021, cited above at note 3, Art. 6 sub. art. 1

statutory contractual arbitration is not different from the ordinary arbitration governed by the Proclamation. Therefore, in terms of recognition, the Proclamation equally recognizes statutory contractual arbitration just like any other voluntary arbitration.

It is important to take note that the issue of recognition does not address questions related to applicability including the scope of applicability of the arbitration Proclamation to different forms of arbitration, be it contractual or mandatory, which may be generally categorized as statutory. Applicability will be discussed in the next section of this thesis.

The term “Mandatory Arbitration” is sometimes used to refer to arbitration agreements in which a party’s consent is affected due to differences in bargaining power. In this sense, arbitration agreements contained in adhesive contracts like employment and consumer contracts are regarded as “mandatory”. This is how “mandatory arbitration” is mostly used in the US. In the Ethiopian context, unless it is proved that the arbitration agreement is vitiated due to defect of consent, the arbitration Proclamation does not treat such type of arbitration agreements differently. The difference in bargaining power while entering into arbitration agreement, does not in any affect the recognition of such agreement by the arbitration Proclamation.

3.2 Applicability of the Proclamation to Mandatory Arbitration

To answer the question of whether the newly enacted Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021 applies to arbitrations, which by their very nature deviate from the one contemplated by the Proclamation, including the extent of application, again one has to start with the categories of mandatory or statutory arbitrations discussed in this thesis.

Under section 2.8 of this thesis, four categories of statutory arbitrations are identified. In all of these types of arbitrations, the extent of application of the arbitration Proclamation is determined by each specific statute. Some statutes may lay down basic rules governing a certain aspect of the arbitration like, the selection and appointment of arbitrators, the procedure of oral hearing, the effect of the arbitration award, etc... Other statutes, on the other hand, do not provide any rules governing the arbitration proceeding.

3.2.1 Scope of Applicability

The primary scope of applicability of Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021 is limited to commercial-related national arbitration and international arbitration whose seat is in Ethiopia.¹¹² For international arbitrations, the scope may be modified by an International Treaty to which Ethiopia is a signatory. There are also exceptional circumstances where the Proclamation may partially apply when International arbitration is situated outside of Ethiopia or where the principal residence or the principal business place of one of the contracting parties is situated in Ethiopia and where the place of arbitration is not designated.¹¹³

There is no statutory definition of commercial-related arbitration in the Proclamation. Defining what disputes are included in the category of the commercial related disputes is important to determine the proper scope of the Proclamation because it implies non-commercial disputes are outside of its scope. Other statutes also do not provide any definition of commercial related or commercial disputes. A related definition is to be found under the Commercial Registration and Licensing Proclamation No. 980/2016, if we can define commercial disputes as disputes related to arising out of commercial activity. This Proclamation defines commercial activity as any activity carried on by a business person.¹¹⁴ A business person is again defined with reference to the commercial code, as any person who professionally and for gain carries on any of the activities specified in the Commercial Code or who dispenses services, or who carries on those commercial activities designated as such by law.¹¹⁵ The newly amended Commercial Code specifies 37 (thirty-seven) activities that constitute activities carried out by a trader. Without the need to mention all those activities here, a commercial activity could be understood as covering broad activities and business transactions.

Therefore, a commercial dispute could be defined as a disagreement relating to commerce between two or more stakeholders. These disputes generally arise in relation to contract terms

¹¹² Id Art. 3 sub art. 1

¹¹³ Id Art. 3 sub art. 2 & 3

¹¹⁴ Commercial Registration and Licensing Proclamation, 2016, Art. 2 sub art. 3, Proc. No. 980, Fed. Neg. Gaz., year 22. No. 101

¹¹⁵ Ibid

and conditions, fiduciary duties, or intellectual property rights.¹¹⁶ This definition, however, raises a question as to whether labour disputes and administrative law disputes could be fairly considered commercial disputes. Labour is an essential element of any business transaction, therefore, there is no reason to exclude it from commerce. Hence, labour dispute is also one type of commercial dispute. This being the case, disputes with administrative agencies, regarding the manner of exercising quasi-judicial or legislative authority is not commercial dispute.

Defining commercial disputes is important because those statutory non-commercial disputes will be outside of the scope of the arbitration Proclamation by definition. For such types of disputes to fall within the scope of applicability of the arbitration Proclamation, a clear reference is required. With this in mind, let's now explore the manner and extent of applicability of the arbitration Proclamation to statutory, especially, mandatory arbitrations.

Almost all the statutes providing contractual or mandatory arbitration refer to the relevant provisions of either the Civil Code, Civil Procedure Code, or both. The reference to either of the two may be related to all or some aspects of matters of the arbitration proceeding. The arbitrators under the Cooperative Societies Proclamation No. 985/2016 are required to conduct their hearing and fulfill any of their duties in accordance with the Civil Procedure Code.¹¹⁷ In some of the statutes, the reference could be limited to a particular aspect of the arbitration.

While some of the statutes favor the Civil Procedure Code, others refer to the pertinent provisions of the Civil Code provisions. The Industrial Parks Council of Ministers Regulations No. 417/2017, after requiring a written form of arbitration agreement, leaves the details to be governed by Article 3325 and the subsequent provisions of the Civil Code.¹¹⁸

Other statutes refer to both the Civil Code and Civil Procedure Code. For instance, the provisions of the Ethiopian Civil and Civil Procedure Code apply to matters; which are not covered by the Ethiopian Water Resources Management Regulations No. 115/2005.¹¹⁹ Not all statutes, however, specifically mention the Civil Procedure or Civil Code. Under the Labour Proclamation No. 1156/2019, the arbitration agreement is to be governed “in accordance with the appropriate law”.

¹¹⁶ Nathan Ganapathi. Estate & Family Law Blog. Retrieved from Ganapathi Law Group: <https://www.ganapathico.com/blog/solving-commercial-disputes-vancouver/> accessed on (2022, November)

¹¹⁷ Cooperative Societies Proclamation, 2016, cited above at note 102, Art. 62 sub art. 2

¹¹⁸ Industrial Parks Council of Ministers Regulations, 2017, cited above at note 88, Art. 27 sub. art. 2

¹¹⁹ Ethiopian Water Resources Management Regulations, 2005, cited above at note 78, Art. 36 sub. art. 4

When there is an express reference to either of the Codes or both, determining the applicability of Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021 is not as such a complicated task. For those matters not covered by the specific statutes, the arbitration Proclamation should be considered the governing law of the arbitration. Even though this is a reasonable conclusion, how repeal of the relevant provisions of both codes is to be reconciled with the existing arbitration Proclamation becomes somehow problematic. For instance, when a statute states that the Civil Procedure Code provisions on arbitration apply to matters not covered by the statute, does that mean only the provisions of the arbitration Proclamation, which are identical or have close similarity with the code, should apply? Or should all the provisions of the arbitration Proclamation apply irrespective of the manner of reference?

As indicated above, the Civil Code provisions dealing with arbitration are repealed totally, whereas the legislature kept some provisions and repealed the remaining provisions of the Civil Procedure Code. The Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021 in repealing the procedural and substantive rules has consolidated those rules under one arbitration Proclamation. Therefore, it is suggested that the scope of application should not be determined selectively, but to the whole content of the Proclamation.

In some cases, no reference is made by the specific statutes. Some of them are silent on the issue and do not provide any mechanism for determining the governing law. Both the Public Private Partnership Proclamation No. 1076/2018 and the Investment Proclamation No. 1180/2020 are silent as to the applicable law to govern the arbitration. To determine the applicable law when the specific statute is silent or first the type of statutory arbitration contemplated by the statute should be identified. If it is a contractual or simply arbitrability clause, it is not since it is not in any way different from ordinary voluntary arbitration, the arbitration Proclamation will apply by default.

When the type of arbitration is mandatory and there is no reference, usually there will be a delegation of legislative power to an agency or the Council of Ministers. One typical example is the Ethiopian Commodity Exchange Proclamation No. 550/2007. The Proclamation authorizes the Commodity exchange to establish rules and procedures for the resolution of disputes arising from exchange transactions through arbitration. Accordingly, detailed rules of arbitration are

issued by the exchange. The rules govern almost every aspect of the arbitration.¹²⁰ Given the mandatory nature of exchange arbitration and the presence of detailed rules, there is no way the Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021 could apply.

A problem arises when the rules formulated based on delegated legislation are limited in scope and do not cover some aspects of the arbitration process. The Energy Proclamation No. 810/203 delegates legislative authority to the Council of Ministers to determine rules regarding members of the arbitration panel and the procedure to be followed for the settlement of disputes.¹²¹ The same is true of arbitration under Ethiopian Water Resources Management Proclamation No. 197/2000, which delegates the Council of Ministers to determine the details of the arbitration by regulation.¹²² In both cases, the respective regulations have been issued, but they are not detailed enough to deal with all aspects of the arbitration. This gap was filled by making a clear reference to the relevant provisions of the Codes by the regulations. The arbitration Proclamation is made applicable to energy and water arbitrations due to the existence of such reference under the respective regulations.

The problem is no delegation was given by the parent acts to adopt arbitration provisions of the codes by reference. When the legislative authority dictates the issuance of rules, it is questionable whether the Council of Ministers can simply fail to exercise that power and make a reference to another law. To modify i.e. to narrow or widen the scope of a Proclamation is an essential legislative function reserved to the legislature only. In the absence of express authorization, the Council of Ministers lacks the legal authority to decide the applicability of other arbitration laws to statutory mandatory arbitration.

3.3 Establishing Jurisdiction of the arbitration tribunal in mandatory arbitration

The jurisdiction of statutory tribunals is specified in the establishment act of each tribunal. Generally speaking, most of the disputes are related to consumer contracts. They cover service-

¹²⁰ Ethiopia Commodity Exchange Rules Amendment No. 549/2021 and Ethiopia Commodity Exchange Internal Rules Amendment No. 558/2021

¹²¹ Energy Proclamation, 2013, cited above at note 95, Art. 41

¹²² Ethiopian Water Resources Management Proclamation, 2000, cited above at note 74, Art. 9 sub. art. 4

producer and end-user agreements in sectors like energy, mining, and water use. There are also non-consumer-related disputes subjected to arbitration. One typical example is, disputes arising out of the relationship between members, management, and other stakeholders between themselves and the cooperative society. Given their number and geographic coverage, disputes in this category are likely to dominate mandatory arbitration in Ethiopia.

Mandatory statutory arbitration denies the parties the freedom to agree on disputes and the extent of power of arbitrators. Under voluntary arbitration, disagreement on the disputes allocated to the arbitral tribunal will be settled based on the rules of interpretation of the law of contract. The source of jurisdiction under statutory tribunals is a law enacted by the legislature. This difference implies that jurisdictional issues will be solved by applying rules of statutory arbitration.

Arbitration tribunal of cooperative societies is empowered to settle disputes regarding the organization, management, or operations of a cooperative society including disputes arising between cooperative societies.¹²³

In arbitrations by the Energy Authority, the jurisdiction of the arbitration tribunals extends to the conditions of supply of electricity, tariff or quality of supply or provision of services.¹²⁴ In the mining sector the mandatory arbitration tribunal has jurisdiction over disputes between licensing authority and a licensee arising out of, or relating to an interpretation, breach or termination of reconnaissance agreement, exploration, retention or mining.

In some cases, jurisdiction may be stated in broad terms without demarcating matters falling under the respective tribunal. Under Energy Regulation No. 447/2019 any dispute, if not settled amicably or through mediation, it may be submitted to arbitration by the parties.¹²⁵ Jurisdiction on “any disputes” practically fails to lay down any boundary. Article 73 of the regulation also states that the jurisdiction of the arbitration panel extends to matters covered by the Proclamation, the Regulation, and the directive to be issued. Still, the expression used to determine jurisdiction is too wide and fails to clear doubtful cases. For instance, it is not clear whether extra-contractual disputes, emanating from non-compliance with the conditions and requirements of the Proclamation or regulation, could be submitted to arbitration.

¹²³ Cooperative Societies Proclamation, 2016, cited above at note 102 Art. 64

¹²⁴ Energy Proclamation, 2013, cited above at note 95, Art. 38/1/ b

¹²⁵ Energy Regulation, 2019, Art. 64 sub art. 1, Reg. No. 447, Fed. Neg. Gaz., year 25. no. 21

There is also delegation problem attached to the scope jurisdiction. The regulation was issued pursuant to 38 sub-article 4 of the parent act i.e. Energy Proclamation No. 810/2013. This provision delegates legislative power to issue regulations regarding The members of the arbitration panel and the procedure to be followed for the settlement of disputes and complaints. No authority is granted for the determination of jurisdiction of the arbitration panel. Additionally, that power could not be implied from the language of the Proclamation. Such power is expressly reserved for the legislature. Accordingly, art. 31 sub article 1 alphabet b of the Proclamation limits the jurisdiction of the panel to dispute between licensees or between a licensee and a customer pertaining to the conditions of supply of electricity, tariff or quality of supply or provision of services. Therefore, the Council of Ministers in legislating on matters not delegated to it, and most importantly on matters determined by the Proclamation, has acted beyond its scope of power. The effect of such utter disregard for delegation authority is that it will make the provisions of the regulation on jurisdiction null and void.

Under the Exchange Proclamation, all disputes arising from exchange transactions fall under the jurisdiction of the arbitration panel within the Exchange.¹²⁶ This does not include disputes in which the Exchange is a party. The Exchange Commodity Directive¹²⁷ states:

Unless the Exchange is a party to a dispute, all other disputes shall be submitted to conciliation or Arbitration.

“All other disputes” may arise between different parties engaged in the Commodity Exchange one way or another. The nature and source of the dispute is not indicated in the directive. The Proclamation is also silent on this issue. It is suggested that the scope of the dispute should be limited to those arising out of contractual relations. Extra-contractual disputes are beyond the jurisdiction of the arbitration tribunal.

In terms of clarity, “all other disputes” is not helpful if there is disagreement on jurisdictional issues. Disputes which are non-contractual by their nature might be a source of further dispute between the parties. The same is true when jurisdiction is described in terms of “civil matters”. This is how the National Payment System Proclamation specifies disputes that must be settled

¹²⁶ Ethiopia Commodity Exchange Proclamation, 2007, cited above at note 69, Art. 28 sub. art. 1

¹²⁷ Section 16.1.2 of Ethiopia Commodity Exchange Rules Amendment No. 549/2021

through arbitration.¹²⁸ “Civil matter”, if taken literally only exclude criminal matters. It involves disputes arising out of extra-contractual, property, and agency as far as they are related to national payment transactions.

- Interim decisions such as injunctions, conservatory measures

3.4 Procedural Rules

Common characteristics of statutory arbitration in Ethiopia, is the absence insufficiency of procedural rules governing the arbitration process especially, hearing proceeding, the selection and appointment of arbitrators, legal effect and execution of awards. The Arbitration under Commodity Exchange is the only exception to this general statement. The rules (including subsequent amendments) issued by the Exchange regulate the arbitration proceedings in detail. The National Payment System Proclamation also delegates the National Bank of Ethiopia to issue directive for the resolutions of disputes through arbitration.¹²⁹

To accommodate the requirement of flexibility delegation of legislative authority seems feasible option for statutory arbitration. At the time of promulgation of the enabling act, it hard to predicate the nature of the actual dispute. The legislature is limited in terms of expertise to lay down special arbitration rules applicable to a specific category disputes arising under a statute.

Under Ethiopian law, legislative authority is delegated either to the Council of Ministers or to a specific agency. There is no law that defines what matters should be assigned to an agency or Council of Ministers. However, in practice, the latter usually exercise delegation power on matters of general applicability (matters affecting more than one agency) and issue that require policy decision. On the other hand when technicality and expertise is involved and the matter does not affect other sectors of the government delegation to the agency is more effective. The Council of Ministers is no more expert than the House of People’s Representatives in devising arbitration rules applicable only to a certain agency.

¹²⁸ Art. 31/1/ of National Payment System Proclamation No. 718/2011 provides that disputes among parties involved in the national payment system concerning any civil matter arising under the Proclamation shall be resolved through arbitration if they could not be resolved through mediation

¹²⁹ National Payment System Proclamation, 2011, cited above at note 58, Art. 31/4/

The Energy Proclamation delegated the Council of Ministers to determine by regulation members of the arbitration panel and the procedure to be followed for settlement of disputes and complaints.¹³⁰ However, the regulation which was issued subsequently, failed to provide detailed rules as per the delegation. On the contrary, it sub-delegated (despite absence of power of sub-delegation¹³¹) the Energy Authority to determine the qualification, appointment, cancellation and replacement of the members of the arbitration panel.¹³² It also refers to the Civil Procedure Code to govern the proceedings of the arbitration panel. Unfortunately, the Civil Procedure Code does not have rules governing arbitration proceedings.¹³³

In the absence of delegation, the statutes refer to the existing arbitration laws. Under the Water Resources Management Regulation the Civil Code will apply when parties fail to agree to appoint the presiding arbitrators. On the other hand, arbitrators will be regulated by relevant laws of the Federal and Regional government.¹³⁴

Despite the absence of rules of arbitration proceedings in the Civil Procedure most of the statutes inadvertently make the Code applicable to all or certain aspect of statutory arbitration.

3.4.1 Language and Place of arbitration

In voluntary arbitration, unless the parties have agreed on the language or languages to be used in the proceedings, such language or languages shall be determined by the arbitral tribunal.¹³⁵ The arbitral tribunal may request that each document presented in a case must be accompanied with a translation into a language of the arbitration.

Choosing the place of the arbitration is important because generally the arbitration law of the arbitral situs will be the law that governs the arbitration (the “*lex arbitri*”). Parties want an “arbitration friendly” regime, that is, one that will not unduly interfere with the arbitral process. If any court intervention is needed or occurs during or after the arbitration, the local law

¹³⁰ Energy Proclamation, 2013, cited above at note 95, Art. 38 sub. art. 4

¹³¹ It is a basic principle of delegation that an organ which has been delegated legislative power can not sub-delegated its power in the absence of clear authorization by enabling act

¹³² Art. 72/4/ of Council of Ministers Energy Regulation No. 447/2019

¹³³ Energy Regulation, 2019, cited above at note 125, Art. 74

¹³⁴ Ethiopian Water Resources Management Regulations, 2005, cited above at note 78, Art. 36 sub art. 1 c

¹³⁵ Turunen, M. S. (2010). Due process in international commercial arbitration. Oxford: Oxford University Press. P343

governing arbitrations will have an impact on the proceedings.¹³⁶ Similarly, the place of arbitration will be the one agreed by the parties. If the parties have not agreed on such place, the place of arbitration shall be determined by the arbitral tribunal.

The arbitration Proclamation under article 30 and 32 leaves the issue of language and place of arbitration to the parties to specify in their agreement. In the absence of parties' agreement the arbitral tribunal shall make the appropriate decision.

In statutory mandatory arbitration, matters regarding detailed rules of the arbitral proceeding such as the language and place of arbitration are left to the appropriate administrative agency to be determined by a directive. For instance, The qualification and manner of appointment of arbitrators, the procedure of the arbitration proceedings, and the payment of arbitration related costs shall be determined by directive of the Ethiopian Capital Market Authority.¹³⁷

3.5 Parties to the Arbitration Dispute

In almost all statutory arbitration of any form the parties to the arbitration of private parties. The government organ participates in the arbitration either acting as arbitrator,¹³⁸ formulating the rules and procedures of the arbitration¹³⁹ or facilitating the arbitration by providing administrative support. In exceptional circumstances, the parties to statutory arbitration may involve a government organ and private parties. The parties in water arbitration are the supervising body and the permit holder.

There are also instances where the disputants are more than two contracting parties. Under the Cooperatives Proclamation, Current or former members, employees, management committee, manager including heirs or representatives and the cooperative society itself may be parties to the dispute. The parties to arbitration could also be two cooperative societies.¹⁴⁰ However, since the matters to be settled through arbitration are limited to organization, management or operations of a cooperative society, it is difficult to imagine such dispute could arise between cooperative societies.

¹³⁶ Moses, M. L., Moses, M. L., cited above at note 4, p. 43

¹³⁷ Capital Market Proclamation, 2021, cited above at note 65, Art. 111 sub-art. 4

¹³⁸ For instance Energy Authority

¹³⁹ For instance Commodity Exchange

¹⁴⁰ Cooperative Societies Proclamation, 2016, cited above at note 102, Art. 64

3.6 Selection and Appointment of Judges

In most of the statutes the appointment of arbitrators is left to the parties. Accordingly, each party to the dispute will appoint one arbitrator and the presiding arbitrator will be appointed by the agreement of both parties. Such mode of selection is provided under the cooperatives Proclamation¹⁴¹ and Water Resources Management Regulation.¹⁴²

In case the parties fail to reach an agreement the specific statutes either transfer the power of appointment to the respective government organ or simply refer to the Civil Code. In the latter case, the ordinary rules in the Civil Code will govern the manner of appointment of the presiding arbitrator.

In the case of cooperatives, the appropriate authority which may be Federal or Regional Cooperative Agency¹⁴³ shall appoint a presiding arbitrator. The appointment of arbitrators under the cooperatives Proclamation is left to the parties. Accordingly, each party to the dispute will appoint one arbitrator and the presiding arbitrator will be appointed by the agreement of both parties.¹⁴⁴ In case the parties fail to reach an agreement, the appropriate authority which may be Federal or Regional Cooperative Agency¹⁴⁵ shall appoint a presiding arbitrator. There is no qualification criteria set for the judges except they should be “persons of high reputation and impartiality”.¹⁴⁶

There is no qualification criteria set for the judges except they should be “persons of high reputation and impartiality”.¹⁴⁷

3.7 Finality of Award and Appeal

In voluntary arbitration One of the reasons parties choose to arbitrate is that arbitration results in a final and binding award that generally cannot be appealed to a higher-level court. Although

¹⁴¹ Cooperative Societies Proclamation, 2016, cited above at note 102, Art 63 sub. art. 2

¹⁴² Ethiopian Water Resources Management Regulations, 2005, cited above at note 78, Art 36/1/ a & b

¹⁴³ See definition of “appropriate authority” under article 2/20/ of Cooperative Societies Proclamation No. 985/2016

¹⁴⁴ Cooperative Societies Proclamation, 2016, cited above at note 102, Art 63 sub. art. 2

¹⁴⁵ See definition of “appropriate authority” under article 2/20/ of Cooperative Societies Proclamation No. 985/2016

¹⁴⁶ Cooperative Societies Proclamation, 2016, cited above at note 102, Art 63 sub. art. 1

¹⁴⁷ *ibid*

there are occasional opportunities to appeal in some jurisdictions for the most part, a party can challenge an award only if there is some defect in the process.¹⁴⁸

The application Proclamation does not allow appeal to ordinary courts against award of a tribunal, unless the parties provide otherwise in their arbitration agreement.¹⁴⁹ Parties could also by agreement oust the jurisdiction of the Cassation Bench of the Federal Supreme Court to review the award on ground of fundamental or basic error of law. Failing agreement, an application for cassation can be submitted where there is a fundamental or basic error of law.¹⁵⁰

In statutory mandatory arbitration, parties do not have either to include or exclude appeal and Cassation review of arbitral awards. The finality of the award including availability of appeal is determined by the specific statute.

Generally speaking, an award under a statutory arbitration is final and binding. However, most of the statutes make an exception to the general rule by making the relevant provisions of the Civil Procedure Code regarding appeal applicable. The National Payment System Proclamation No. 718/2011, without providing detailed rules of the arbitration, declares the arbitral award to be final and binding on the parties. This is, as stated in the Proclamation “without prejudice to provisions of the Civil Procedure Code relating to appeals”.¹⁵¹ Similar provisions are found in Capital Market Proclamation,¹⁵² National Payment System Proclamation,¹⁵³

In some cases, the reference may be to the Civil Procedure Code in general rather than to the relevant provisions governing appeal. Under the energy laws, The Energy Authority shall arbitrate the dispute and render a final and binding award if mediation fails.¹⁵⁴ The energy Proclamation also states that the award by the Authority shall be final and binding on all parties involved in the arbitration proceeding.¹⁵⁵ There is no specific reference as to how appeal against the award is governed. However, Article 72 of the Energy regulation¹⁵⁶ states that the Civil

¹⁴⁸ Moses, M. L., Moses, M. L., cited above at note 4, p. 3

¹⁴⁹ of Arbitration and Conciliation Working Procedure Proclamation, 2021, cited above at note 3, Art. 49 sub-art. 1

¹⁵⁰ Ibid Article 49 sub-art. 1

¹⁵¹ National Payment System Proclamation, 2011, cited above at note 58 Art. 31 sub art. 3

¹⁵² Capital Market Proclamation, 2021, cited above at note 65, Art. 111 sub-art. 3

¹⁵³ National Payment System Proclamation, 2011, cited above at note 58, Art. 31 sub art. 3

¹⁵⁴ Energy Proclamation, 2013, cited above at note 95, Art. 38 sub. art. 2

¹⁵⁵ Energy Regulation, 2019, cited above at note 125 Art. 64 sub. art. 4

¹⁵⁶ Ibid

Procedure Code shall be applicable for the proceedings of the arbitration panel established under the regulation.

Despite the general or specific reference to the Civil Procedure Code, in some statutes appeal right is recognized giving ordinary courts to review the award by appeal. Under the mining Proclamations an arbitral award is be final and binding upon the parties. However, any party aggrieved by the decision of the arbitration may lodge an appeal to the concerned court.¹⁵⁷ Similarly, any person who has grievance on the decisions given by the Arbitrators pursuant to article 65 of Cooperative Societies Proclamation may lodge appeal to the Regular Courts if the issue is at Regional level to Regional Court which have jurisdiction, if it is at Federal level to the Federal High Court.¹⁵⁸

Almost all the specific statutes providing mandatory arbitration to some degree recognize the right of the parties to appeal award rendered by the tribunals. An exception to this is found in Commodity Exchange Directives. Under these rules, the parties shall abide by the arbitral award which shall be final and non-appealable.¹⁵⁹

3.8 Recognition and enforcement of awards in mandatory arbitration

In the first part of this Chapter, recognition of arbitrations whose basis is statutory, most importantly, statutory mandatory arbitrations, in light of Arbitration and Conciliation working Procedure Proclamation No. 1237/2021 has been explored in detail. Additionally, how and to what extent the Proclamation applies to statutory arbitrations was examined. This part of the thesis will investigate the issue of recognition and enforcement of mandatory arbitration.

3.8.1 In Domestic Law

Recognition and enforcement of domestic arbitration awards rendered by mandatory arbitration tribunals is tied to the question of whether such arbitration is recognized by the Proclamation,

¹⁵⁷ Article 78 sub-article 3 of Mining Operations Proclamation No. 678/2010 /as amended by mining Operations /Amendment/ Proclamation No. 816/2013

¹⁵⁸ Cooperative Societies Proclamation, 2016, cited above at note 102, Art. 61/1/

¹⁵⁹ Art. 16.1.24.2 of Ethiopia Commodity Exchange Rules Amendment No. 549/2021

and if not, whether the Proclamation is made applicable by way of reference under the specific statutes. As regards awards rendered by foreign mandatory arbitration tribunals, there is no possibility of recognition and enforcement. The source of mandatory arbitration is national law specific to each country. A foreign domestic statute can not make reference to the arbitration law of another country, as it is beyond its sovereign power to legislate outside of its own territory. In the absence of a bilateral agreement, domestic law can not determine the scope of applicability of another country's domestic law. This is also true for the recognition and enforcement of mandatory arbitration awards rendered in Ethiopia. They could not be recognized and enforced in another country.

Regarding recognition and enforcement in Ethiopia, of mandatory arbitration awards rendered by national tribunals, the question it raises and the answer to be offered is no different from the one discussed above on recognition and scope of applicability of mandatory arbitrations by the Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021. Accordingly, mandatory arbitrations, though not recognized by the Proclamation, in most cases there will be a clear reference to the existing arbitration laws. If they are made applicable by reference, this means, in effect, the scope of applicability extends to recognition and enforcement too.

The arbitration Proclamation under article 51 sub article 1 states an arbitral award rendered in Ethiopia or a foreign country shall be deemed to be binding and shall be executed pursuant to the Civil Procedure Code by applying to a court that is empowered to execute the award had the case been heard by a court. This is without disregard to the procedures and grounds for setting aside and objection to enforcement laid down under articles 50 and 52 of the Proclamation. The word "foreign" under those articles should be understood to mean only voluntary arbitration awards rendered in a foreign country.

To sum up, the recognition and enforcement of domestic mandatory arbitral awards is dependent on the existence of a reference in each specific statute. This being the case, it is interesting to note that some of the statutes have also tried to ensure that the awards will be executed in ordinary courts.

Both the energy Proclamation and subsequent regulation indicate that arbitration under the Energy Authority entails a final and binding award by the Authority.¹⁶⁰ Similarly, the Mining Operations Proclamation No. 678/2010 states an arbitration award shall be final and binding on the parties.¹⁶¹ The cooperatives Proclamation is more explicit in its statement giving binding effect to the arbitral award. Article 66 of the Proclamation reads:

Any decision, order or award made under this Proclamation shall be considered as it is made by a regular Civil Court, and, where appropriate, the courts shall have jurisdiction to order the enforcement of any such decision, order or award.

As far as there exists a reference to the arbitration Proclamation in the specific statutes, all the above provisions emphasizing the binding and final effect of the arbitration are not substantially different from article 51 of the arbitration Proclamation. Even in the absence of those provisions, the reference by itself affords those statutory arbitral awards the same level of recognition and enforcement as arbitral awards of voluntary arbitration.

3.8.2 Under the New York convention

Ethiopia ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter to be referred to as “the Convention) on February 13, 2020.¹⁶² The ratification was formally proclaimed on 13th March 2020 by Proclamation No. 1184/2020.

Ethiopia’s ratification as indicated under article 2/2/ of the Proclamation is limited to differences arising out of legal relationships, whether contractual or not, which are considered commercial under the National Law of Ethiopia. “Commercial difference” does not appear on the respective part of the convention. There is no statutory definition of commercial difference or dispute under the national laws of Ethiopia.

The convention imposes an obligation on contracting states to recognize and enforce arbitral awards made in the territory of a State other than the State where the recognition and

¹⁶⁰ Art. 38 sub art. 2 of Energy Proclamation No. 810/203 and art. 64 sub art. 4 of Council of Ministers Energy Regulation No. 447/2019

¹⁶¹ See, Mining Operations Proclamation No. 678/2010 as amended by article 2 sub article 28 of Mining Operations /Amendment/ Proclamation No. 816/2013

¹⁶² See preamble Convention on the Recognition and Enforcement of Foreign Arbitral Awards Ratification Proclamation No. 1184/2020

enforcement of such awards are sought.¹⁶³ It applies only where there exists written agreement of parties to submit their dispute or dispute to arbitration.¹⁶⁴ The written agreement includes an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams.

The requirement of written agreement in effect excludes any arbitration that deviates from the voluntary agreement of the parties. Arbitration imposed on the parties by a statutory provision of a contracting state is outside of the scope of the Convention. The does not recognize awards emanating from mandatory arbitrations. Because, at the time of enforcement, one has to present the authentic copy of the arbitration agreement which doesn't exist in the case of mandatory arbitration.

However, it is important to take note that arbitrations under adhesive contracts and contractual statutory arbitrations are still formed through written agreement of the parties. Therefore, despite the different ways these arbitrations are designated in in different jurisdictions, they are in essence contractual, hence within the scope of the convention.

¹⁶³ Article I sub art. 1 of Convention on the Recognition and enforcement of foreign arbitral awards, United Nations, New York, 1958)

¹⁶⁴ Article II of the convention

4 CHAPTER FOUR: CONCLUSION AND RECOMMENDATIONS

4.1 Concluding Remarks

With a view to modernize its arbitration laws Ethiopia enacted a comprehensive and consolidated arbitration law. The Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021 replaced the previous laws in the Civil Procedure and Civil Code. There are two basic distinctive features of this law. First, it was designed to govern voluntary or consensual arbitrations. Second, it targeted only commercial disputes. In short, the Proclamation was enacted to enable effective and speedy settlement of voluntary commercial disputes.

Statutory mandatory arbitration is a kind of arbitration specified by special statutes which imposes the parties to submit themselves to arbitration to solve their disputes. Such arbitration, except its name does not share any of the characteristics of voluntary arbitration. Ethiopian law contains a number of statutes that broadly provide that certain disputes shall be settled by arbitration. This compulsory approach to arbitration departs significantly from the consent-based model of arbitration. Close examination of the statutes governing statutory mandatory illustrates there is little or no regulatory framework laying down detailed rules of arbitration.

The applicable laws may vary from statute to statute. Generally speaking, the statute establishing the statutory tribunal usually contains some provisions dealing with jurisdiction and appointment of arbitrators. The details are left to be determined by a regulation of Council of Ministers or a directive to be issued by the respective administrative agency. However, even the regulations are not detailed enough to lay down every aspect of the arbitration process. Practically, delegating to an agency to formulate details rules of the arbitration may be an effective remedy because the agency will have the necessary resources in terms of time, and expertise. Currently, only Ethiopian Commodity Exchanged has issued detailed rules of arbitration.

One type arbitration investigated by this researcher was arbitration in “adhesive” contracts. Despite the difference in bargaining power between the parties, legally speaking such arbitration

contracts are within voluntary arbitration and hence subject to the arbitration Proclamation. Despite the potential problems associated with fairness and efficiency, an empirical research is needed to determine their effectiveness and efficiency.

Not all statutory arbitrations are mandatory. Most of them simply provide the freedom to the parties to submit their dispute to arbitration specifying general rules if the parties agree. In other words, even if the statute does not interfere in the freedom of parties to choose arbitration or nor, once arbitration contract is concluded they will be subjected to mandatory rules of arbitration distinct from the ordinary arbitration law.

Some of the statutes that permit parties to settle their dispute through arbitration on matters otherwise non-arbitrable under the arbitration Proclamation are simply “arbitrability clauses”, For instance, laws that allow the parties to solve their disagreement through arbitration regarding collective labour disputes and consumer contracts in the energy sector are no more than rules governing arbitrability. The arbitration Proclamation has expressly categorized disputes arising out of consumer contracts as non-arbitrable. On the hand, there is no indication whether collective labour disputes are arbitrable or not. These statutes either provide exceptions to the non-arbitrability clause of the arbitration Proclamation or ensure clarity on arbitrability when the issue is expressly designated as non-arbitrable by the Proclamation.

Mandatory arbitrations despite their distinct characteristics are partially regulated by the arbitration Proclamation by way of reference to this law in the specific statutes. Normally, there is no statute that mention Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021 because they were enacted prior to the coming in to effect of the Proclamation. However, some of them refer to the relevant provisions of the Civil Code and Civil Procedure Code which are now repealed and substituted by the arbitration Proclamation. In the absence of any reference, there is no acceptable legal justification to apply relevant provision of the arbitration Proclamation to statutory mandatory statutory arbitration. One important point to be noted is that statutory arbitration is not recognized directly or indirectly by the arbitration Proclamation.

All the mandatory arbitration provisions in the specific statutes were promulgated before the coming into force of the arbitration Proclamation. The reference may be either to one of the Codes or two both the Civil Procedure and Civil Code provisions. The arbitration Proclamation

has repealed the arbitration provisions found in both Codes. Unlike the Civil Code the Civil Procedure Code provisions on arbitration were applicable not only to voluntary arbitration but also “arbitrations required by law”. It may be concluded that such expression suggests the Civil Procedure Code took cognizance of existence of statutory arbitration.

4.2 Recommendations

A straight forward solution to the problem of determining the rules of arbitration governing mandatory statutory arbitration is to amend the Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021 and extend its scope to such type of arbitrations on matters not specifically covered by the statute or directives and regulations enacted pursuant to the that statute.

Another alternative solution may be to enact a distinct law specifically governing mandatory statutory arbitrations. The rules should be devised in a such a way to make mandatory arbitrations in general effective, fair, and less costly. Until a distinct law is enacted arbitration tribunals established under statutes could still resort to the arbitration Proclamation whenever there is a specific reference to the Civil Code or Civil Procedure Code. Even in the absence of any reference, it is argued that the general principles and rules of the arbitration Proclamation necessary for an impartial and just arbitral proceeding may still be borrowed and be applicable as matter of general principles of arbitration.

The arbitration Proclamation does not make any exception to adhesive arbitration contracts. They are regarded for all legal purpose as voluntary and are fully recognized by the Proclamation. However, duet to the significant difference in bargaining power, it is suggested that additional provisions that ensure fairness should be included in the arbitration Proclamation.

In determining the jurisdiction of statutory tribunals it is submitted that appeal should be allowed to the parties to challenge the jurisdiction of the arbitration tribunal. Because the source of power is statutory rather than contractual. Statutory interpretation rather than rules of interpretation of contract will apply in such case. In matters that involving of jurisdiction, courts should have power to check and supervise to ensure the arbitral tribunals do not exceed the limits of their power.

In most of the mandatory arbitrations, parties are forced to try to settle their dispute through mediation or conciliation before the arbitration proceeding is initiated. This is additional burden on the parties in terms of cost and time. Such additional requirements significantly limit the right to get fair and speedy justice. Conciliation or mediation imposed on the parties by law will not enable the parties to solve their dispute amicably. Therefore, it is suggested that in mandatory arbitration, the requirement of mandatory mediation and conciliation should be discarded and the specific statutes should be amended accordingly.

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