THE JURISDICTION OF ARBITRATION TRIBUNALS UNDER THE NEW ARBITRATION AND CONCILIATION WORKING PROCEDURE PROCLAMATION NO. 1237/2021

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The Jurisdiction of Arbitration Tribunals under the New Arbitration and Conciliation, Working Procedure Proclamation No.1237/2021

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DECLARATION

I, the undersigned, declare that this thesis is my original work and has not been submitted in any other higher learning institution. I also declare that all materials used in this thesis have been duly acknowledged.

Zerihun Desalegn

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MAY, 2023

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Abstract

This research examines and analyzes the competence of an arbitration tribunal in deciding on jurisdictional disputes from arbitration law of Ethiopia and international commercial arbitration rules and other countries' commercial arbitration laws perspectives. Major international commercial arbitration rules and most national commercial arbitration laws empower arbitration tribunals to decide on arbitration jurisdictional disputes. Similarly, the new arbitration law of Ethiopia enacted in 2021 gives authority to rule on disputes arising out of the validity or existence of the arbitration agreement unlike the civil code which empowered the regular court in determining arbitration's jurisdictional disputes. This will help prevent an ill intended party from unnecessarily delaying the proceedings by taking the case to the regular court. Furthermore, such legislative measure taken on the competence of the tribunal to have power to rule on its jurisdictional controversy will attract foreign investment and develop the sector. However, the research finds out that the new Ethiopian arbitration law lacks clarity concerning the decision of the tribunal on a dispute arising out of its jurisdiction is deemed to be an award or not. Besides, the law lacks clarity as to whether or not the objection of the party against jurisdictional decision of the tribunal is considered to be an appeal and the legal status of the decision made by the first instance court. In addition to that, our law lacks explicit provision with respect to the material jurisdiction of courts to grant interim measures. As result of this there is no consistency and predictability between and among various levels of courts in their decisions. Thus, the law should be amended with the intention of avoiding such ambiguity thereby dispelling confusion on the matter.

Key words: Arbitration, jurisdiction, competence-competence, Separability, arbitrability, Provisional Interim measure.

LIST OF ABBREVIATIONS/ACRONYMS

CC……..Civil Code of Ethiopia

CPC……Civil Procedure Code of Ethiopia

FAA……Federal Arbitration Act

ICC…….International Chamber of Commerce

ICSID…….International Center for Settlement of Investment disputes

UNCITRAL……United Nations Commission on International Trade Law

UNCTAD……United Nations Conference on Trade and Development

NYC……New York Convention

JIL……...Journal of International Law

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CHAPTER ONE
GENERAL INTRODUCTION

1.1. Background of the Study

Disputes are inevitable part of the human relationship. There are various methods of resolving disputes. Litigation in courts is the most common form of disputes resolution to day. All other mechanisms, other than court litigation, are generally categorized under an umbrella term called "Alternative Dispute Resolution" or "ADR".[1] Alternative dispute resolution mechanisms are mechanisms of resolving disputes in general and commercial disputes in particular extra-judicially.[2]

ADR was developed in the Western legal system as a result of the short comings in court litigation.[3] The shortcomings of litigation include, among others, the cumbersome rules of procedure; the high cost of litigation and publicity which goes with the bearings and the judgments. Moreover, the processes of litigation have been acknowledged to prove grossly inadequate and prone to more damage than resolution of conflict by hampering positive future relation and association between the parties to it.[4]

The most commonly used ADR mechanisms are, negotiation, conciliation, mediation and arbitration.[5] Among these ADR mechanisms, arbitration is one of the most significant one. Since time immemorial arbitration played a significant role in the friendly disposal of disagreements arising in the communities. More particularly, nowadays the importance of arbitration in handling domestic and transnational commercial dispute is steadily growing in the era of globalization. Arbitration is seen here as a non-judicial dispute settlement mechanism whereby parties to a dispute resort to a third party (or parties) whose determination over the dispute is as binding as court decisions.[6] In Oxford dictionary, arbitration is defined as ‘’uncontrolled decision’’ the settlement of a question at issue by one to whom the parties agree to refer their claim to obtain an

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[1] Shipi M., Alternative Dispute Resolution in Ethiopia-A Legal Framework .p.266. Available at: https://www.ajol.info/index.php/afrrev/article/view/41054/8478. Last accessed on 23/10/2021.
[2] Ibid.
[3] Emond D. (ed.), Alternative Dispute Resolution: A Conceptual Overview, Commercial Dispute Resolution: Alternative To Litigation, (Ontario Canada Law Book Inc.,1989), p.5. Available at: https://digitalcommons.osgoode.yorku.ca/faculty_books/42, last accesed on 23/10/2021.
[4] Shipi M., Cited above at note 1, p.267.
[5] Ibid.
[6] Hailegabriel Gaddissa Feyssa, “The role of Ethiopian courts in commercial arbitration” Mizan Law Review,, vol. 4, no. 2(2010), p 306.

equitable decision.[7] It is also an alternative non-judicial dispute settlement mechanism used for resolution of disputes outside regular courts by which neutral third party renders a binding judgment as between the parties.[8]

From the above definitions it is possible to outline certain essential characteristics of arbitration. One of the cornerstones of arbitration is its consensual nature. The power and jurisdiction of arbitrators are determined by the intention of the parties to a dispute as reflected in their contractual agreement. Thus, the scope of an arbitrator's power is circumscribed by the wording of the arbitration agreement.

Upon the appointment of arbitrators, the power to administer proceedings is deemed to have been conferred on the arbitrators having derived their powers from the consent of the parties as expressed in the arbitration agreement. Other than the agreement as the source of their powers, the arbitrators also derive powers as may be conferred by the applicable laws.

Jurisdiction is the life blood of all legal proceedings in general and arbitral proceedings in particular. A suit can only be brought in a court or tribunal to hear and determine a case or a dispute. Where a court or an arbitral tribunal lacks jurisdiction, the entire proceedings would be a nullity no matter how well conducted. The legal principle that "you cannot put something on nothing and expect it to stand" remains trite and applicable to legal and arbitral proceedings.[9]

The term "jurisdiction'' has several different meanings. It can mean, for example, the administration of justice or the extent of legal authority; it can also mean a geographical area with politically defined borders.[10] In the field of court proceedings, it is defined as the power of a court to hear and determine a case.[11] It is the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties. There are three elements of jurisdiction of courts:1) Judicial jurisdiction; 2) Material jurisdiction; and 3) Local jurisdiction.[12]

Since Arbitration involves a binding decision, like regular courts, questions arise as to what matters of the decision are binding; who is to be bound and who is to decide those matters. These are jurisdictional problems that need proper solutions before a decision on the merits can be taken. An arbitral tribunal must, therefore, operate within the powers and jurisdiction conferred

[7] Oxford Dictionary of English, 3rd edition, Oxford University Press, 1969.
[8] Shipi, Cited above at note 1, p 268.
[9] Ibid.
[10] Bryan A. Garner, Black's Law Dictionary, (9th ed., 2010), p.853.
[11] Robert Alen Sedler, Ethiopian Civil Procedure, (1st ed., 1968) p.19.
[12] Ibid.

upon it by the parties and the applicable laws. In other words, the tribunal must remain within its terms of reference and not exceed it. Failure to abide by it would render the final award liable to be set aside or not recognized and enforced.

One of the common criticisms against arbitration is that if one of the parties, usually the respondent, is not committed to resolving the dispute through the arbitration process, there is tremendous opportunity to delay the arbitration process. This criticism is a result of the fact that the development of arbitration as a speedy and efficient dispute resolution mechanism *"brings with it increasing substantive and procedural challenges to the arbitration process"*[13] by a party who has an interest in delaying the overall process.

One of the procedural challenges made to the arbitration process is the tribunal's lack of jurisdiction to determine the validity of a contract containing the arbitration clause. According to this objection a tribunal cannot invalidate the main contract without the risk that its decision will call into question the validity of the arbitration clause from which the tribunal derives its power which in turn calls into question the validity of the award given by the tribunal.

The same is true for a challenge made against the arbitration clause. Since arbitrators derive their power from the parties' agreement, a challenge to this agreement would logically leave them powerless to hear a case until it was determined that the agreement was indeed effective, conferring on them the authority to resolve the relevant disputes. This objection necessitates the intervention of the judiciary for the sole purpose of deciding the jurisdiction of the arbitrators which in practice will cause inconvenience, delay and unnecessary costs which destroys the overall purpose of arbitration as a speedy and efficient means of solving dispute.

To resolve these practical problems and to strengthen the jurisdiction of the arbitral proceeding, and thereby minimize the challenges being used as a tactic to delay or derail the arbitration proceedings, most modern arbitration laws make use of different techniques. The central element in those efforts is, modern laws of commercial arbitration have developed the doctrines of separability/severibility and competence-competence (Kompetenz-Kompetenz principle).[14] Although they serve different functions, these principles are together intended to give primary

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[13] J. Zadkovich, "Divergence and Comity among the Doctrines of Separability and Competence Competence," Vindobona Journal of International Commercial Law and Arbitration., vol. 12, no.1 (2008), in Solomon Emiru Gerese, Comparative Analysis of Scope of Jurisdiction of Arbitrators under the 1960 Civil Code of Ethiopia (2009, Unpublished, Central European University), p.1. available at http://docplayer.net/120192267-Comparative-analysis-of-scope-of-jurisdiction-of-arbitrators-under-the-ethiopian-civil-code-of-1960.html, last accessed on 11/09/2021.

[14] Babatunde Osadare, Jurisdiction and Powers of Arbitral Tribunals: Who Decides? P.5. Available at: https://www.academia.edu/, last accessed On 21/01/2021.

responsibility to the tribunal concerning for to determining whether it has jurisdiction. Moreover, both doctrines are designed to protect the Autonomy of the arbitration process from early and obstructing judicial intervention.[15]

According to the doctrine of separability/severibility, the arbitration clause has independent existence or is "separable" from the main contract.[16] In international arbitration separability/severability of an arbitration clause is a technique under which the arbitration clause in a main contract is regarded as separate from the main contract to strengthen the jurisdiction of an arbitrator or a panel of arbitrators.[17] The principle traditionally gives the arbitral tribunal power to separate the arbitration agreement from the main contract where it is contained.

This is to enable the tribunal determine a case where one of the parties is challenging its jurisdiction on grounds of invalidity or termination of the arbitration agreement. Other grounds of objection may be that there was no agreement or that parties never concluded the terms of the main contract.[18] An arbitral tribunal faced with such a problem would notionally sever the arbitration agreement from the entire contract and determine the issue even though the fact that the arbitration agreement is the subject of challenge.[19]

Separablity/severability is now recognized in many institutional arbitration rules[20] and state laws on arbitration.[21] Like many arbitration laws, the UNCITRAL Model Law adopted in 1985 expressly provides that an arbitral tribunal shall have the power to determine its own jurisdiction and any objection relating to the existence or validity of the arbitration agreement.[22]

Thanks to the doctrine of severability, any challenge to the main agreement won't affect the arbitration agreement. The tribunal can still decide on the validity of the main contract. Without the doctrine of separability, ''a tribunal making use of its competence/competence would

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[15]John Zadkovich, cited above at note 13, p.3.

[16]Babatunde Osadare, Cited above at note 14, p.6.

[17] Lew J., Mistelis L.,and Kroll S., "Comparative International Commercial Arbitration," Kluwer Law International, (2003), p.1. available at: https://www.trans-lex.org/, last accessed on 12/12/2021.

[18]Schwebel, S., International Arbitration: Three Salient Problems, (Cambridge, Grotius Publication Ltd., 1987). p.1. available at-https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/, last accesed on 12/10/2021.

[19] Park, W. "The Arbitrator's Jurisdiction to Determine Jurisdiction," TDM, Vol. 6, Issue 1, (2009). P.93. available at www.transnational-dispute-management.com, last accessed on 20/09/2021.

[20] For example, the international chamber of commerce arbitration rules (ICC Rules of Arbitration), Article 6(4). Available at: https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/, last accesed on 05/20/2023.

[21] English Arbitration Act 1996, section 7.

[22] UNCITRAL Model Law On International Commercial Arbitration, United Nations Document, A/40/17, Annex 1, 21 June 1985, Art. 16 (1). Available at: https://uncitral.un.org/en/texts/arbitration/, last accesed on 01/11/2021.

potentially be obliged to deny itself jurisdiction on the merits since the existence of the arbitration clause might be affected by the invalidity of the underlying contract."[23]

On the other hand, based on the doctrine of competence-competence (Kompetenz/Kompetenz principle), the arbitrators have conferred the power to rule on challenges directed against the arbitration clause. This is the principle that an arbitral tribunal has the jurisdiction to determine its jurisdiction.[24] Thus, it is the recognition of the arbitration tribunal's authority to determine its jurisdiction or competence. The power is necessarily derived from the applicable national law, rather than the disputed arbitration agreement, as it provides a basis for the tribunal to rule the agreement is invalid without contradicting itself.[25]

It is a method of overcoming the latent problem that would have occurred when a tribunal decides preliminary that the arbitration agreement for example is invalid. The resultant effect would have been that the arbitral tribunal itself lacks the authority to make that finding.[26] The principle gives the tribunal the legal standing to set proceedings in motion when faced with an objection raised by an uncooperative respondent. As a consequence of the tribunal having the power to rule on its jurisdiction, neither the parties nor the tribunal is required to ask a court to resolve jurisdiction questions.

There is the knotty issue as to whether it is the court that should have the primary role of deciding the existence of an arbitration agreement or whether the question should be left to the tribunal. The common approach, however, is that the arbitral tribunal should be given the first say subject to possible court review.[27]

Competence-competence is widely codified into national arbitration laws[28] and international arbitral institutions although the extent of its application under different laws varies. Article 36(6) of the Statute of International Court of Justice (ICJ)[29] confers on the ICJ powers to rule on its own jurisdiction. The ICSID Convention,[30] UNCITRAL Model Law,[31] the English Arbitration

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[23]Babatunde Osadare, cited above at note 14, p 8.

[24]Redfern, A., and Hunter, M., Law and Practice of International Commercial Arbitration (London, Sweet and Maxwell, 2004), p.300. available at- https://uk.practicallaw.thomsonreuters.com/Document/, last accesed on 20/10/2021.

[25] Ibid.

[26] Lew J., Mistelis L., and Kroll S., cited above at note 17, p.332.

[27]Jarvin, S., Objections to Jurisdictions, in Newman L. and Hill, R., (eds.), The Leading Arbitrators' Guide to International Arbitration, (2nd ed., Juris Publishing, 2008), p.105. Available at-http://arbitration law.com/files/free, last accesed on 12/12/2021.

[28] See Section 30 of the English Arbitration Act 1996, Section 2 of Swedish Arbitration Act, 1999.

[29]Annexed to the Charter of the United Nations, 1945.

[30] ICSID Convention. Art. 41(1).

Act,[32] and the ICC Arbitration rules[33] also contain similar provisions. According to the case law of the German Federal Court, the parties may vest the arbitrators with the power to rule in a binding way on the issue of their own jurisdiction.[34] The last word on this issue may then be for the arbitrators. In contrast thereto, a strong trend has come up in France for the arbitral tribunal to monopolize the first word on its jurisdiction, subject to subsequent court control.[35] Some legal systems have had a rule forbidding arbitrators to continue the proceedings once their jurisdiction has challenged.

Until the evolvement of the doctrine of competence/competence, and its inclusion in the Statute of the International Court of Justice (ICJ) and major institutional arbitration rules, national laws on arbitration gave the power of determining of jurisdiction of an arbitrator to national courts which was a major drawback to arbitration being an effective means of private dispute resolution and it deprived it of its attraction.[36]

The judiciary in any jurisdiction plays an essential role in creating an environment that encourages and facilitates the use of arbitration. Establishing a complementary and supportive relationship between arbitral tribunals and national courts is indeed one of the most relevant challenges to modern international and domestic arbitration practice.[37]

On the one hand, arbitration users often need to rely on national courts to support the arbitration proceedings and guarantee that party autonomy will be respected.[38] On the other hand, an excessively interventionist court, risks damaging the users' trust in arbitration.[39] The balance between these two opposed characteristics has been described as a relationship which 'swings between forced cohabitation and true partnership'.[40] Modern international and domestic arbitration legislations attempts to strike the right balance between these characteristics.[41]

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[31] UNCITRAL Arbitration Rules, Cited above at note 22, Art., 21.
[32]The English Arbitration act, 1996. S. 30.
[33] The international chamber of commerce arbitration rules, Art. 6 (2).
[34] Peter S., "The Competence Of Arbitrators And Of Courts," Arbitration International, Vol. 8, No. 2(1992), p.199. Available at- https://academic.oup.com/, last accessed on 21/11/2021.
[35] Id., p.,200.
[36]Schwebel, cited above at note 18, p.2.
[37]A Study of International Commercial Arbitration in the Commonwealth, Commonwealth Secretariat (2020).p.8. Available at: https://thecommonwealth.org/, last accessed on 12/10/2021.
[38]Blackaby N., "Redfern and Hunter on International Arbitration," (6th ed.,2015(Oxford, Oxford University Press,2015) P. 415. Available at: https://oxia.ouplaw.com/, last accessed on 03/10/2021.
[39] Lew J., Mistelis L., and Kroll S., cited above at note 17, p. 358.
[40]Blackaby, N etal. Supra note 38, p., 415.
[41] Ibid.

When parties choose arbitration as a means of resolving their disputes, they are in a way excluding the courts from acting as their arbiter. They effectively relegate the courts to the back stage when an arbitral tribunal is seized of a matter. Though regular courts are excluded from having jurisdiction over matters agreed to be resolved by arbitration, regular courts may under certain circumstance control, assist or intervene in the process of arbitration.

Court assistance and intervention may be made at the beginning, during and after the proceeding. At the beginning of the proceedings, the assistance of the court may be sought in setting up the arbitral tribunal where parties have failed to do so. For the proper application of intervention of regular courts in the process of arbitration, the law governing arbitration in different jurisdictions and international conventions have put different controlling mechanisms for regular courts to intervene in arbitration processes.

It may also be the case that the court is called upon before the commencement of arbitral proceedings to test the arbitral tribunal's jurisdiction where it is being challenged by one of the parties.[42] Courts approach on the issue of jurisdictional challenge varies from jurisdiction to jurisdiction.[43] Whilst French law requires courts to decline jurisdiction in matters adjudged to be subject to arbitration unless the arbitration agreement is manifestly void, the position in Switzerland is not totally dissimilar as the Federal tribunal has held that courts should decline jurisdiction, at least to cases which *lexarbitri*is Switzerland, unless the ineffectiveness of the arbitral agreement is patently manifest.[44] The USA courts adopt a more liberal approach with a willingness to entertain applications at the beginning or during arbitral proceedings.[45] In England, the attitude of the court is to support the conduct of arbitration proceedings whilst retaining the general supervisory powers to intervene in deserving cases. The UNCITRAL Model Law particularly enjoins the courts in dealing with matters, the subject of an arbitration agreement, to refer the parties back to arbitration unless the agreement is found "null and void, inoperative or incapable of being performed."[46] This was not always so. Some legal systems have had a rule forbidding arbitrators to continue the proceedings once their jurisdiction has challenged.[47]

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[42] Lew J., Mistelis L., and Kroll S., cited above at note 17, p.371.
[43] Ibid.
[44]Paulsson, J., Interference by National Courts, in Newman L. and Hill, R., (eds.), The Leading Arbitrators' Guide to International Arbitration, (2nd ed., Juris Publishing 2008), p.128; available at:http: //arbitration law.com.last accesed on 12/12/2021. see also Jarvin, S., cited above at note 27, p.107.
[45]Jarvin, S., cited above at note 27, p.99.
[46]UNCITRAL Model law, Art.8 (1).
[47]Jarvin, S., cited above at note 27, p.99.

In Ethiopia, the enactment of the 1960 Civil Code[48] and the 1965 Civil Procedure Code[49] of Ethiopia has a significant impact in the introduction and development of modern arbitration. The civil code (Arts.3325- 3346) governs the substantive aspect of Arbitration, whereas the civil procedure code contains provisions (Arts. 315-319; 350-357) regarding the procedural part of the process. In addition, there are scattered legal provisions governing conciliation and arbitration of specific disputes.

Recently, Ethiopia has ratified the 1958 convention on the recognition and enforcement of foreign arbitral awards (commonly called the New York Convention) through ratification proclamation number 1184/2020.[50] More importantly, on 2 April 2021, a new Arbitration and Conciliation working procedure proclamation (here in after referred to as the proclamation) was enacted.[51] The Proclamation applies to commerce-related domestic arbitrations, and international arbitrations whose seat is in Ethiopia.[52] But, it also contains a few provisions that govern international arbitrations whose seat is outside Ethiopia.[53]

The proclamation answers the question as to whether a regular court or an arbitration tribunal should decide if arbitral jurisdiction is established or not. In this regard, the proclamation, under article 19(1), clearly empowers the arbitration tribunal to determine its own jurisdiction and the validity of the main contract containing the arbitration clause.[54]

On the other hand, the proclamation, allows an early intervention of regular courts (First Instance Court) to accept an objection by the aggrieved party against the decision of the tribunal in its own jurisdiction within one month from the date of rendering of such decision.[55] Hence, a party who is dissatisfied by the decision of the tribunal on its jurisdiction, usually the respondent, can submit to the first instance court an objection against the decision of the tribunal. Even if the aggrieved party is allowed to file an objection against the decision of the tribunal in its own jurisdiction, the submission of such objection, however, shall not prevent the tribunal from continuing with the arbitration proceedings and rendering an award.[56] Moreover, art. 9 of the

[48]Civil code of the Empire of Ethiopia, 1960, Negarit Gazeta, Extra ordinary issue, No.165, 19th year, No. 2.
[49] Civil procedure code of the Empire of Ethiopia, 1965, Negarit Gazeta, Extra ordinary issue, No.3.
[50] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards Ratification Proclamation, 2021, Proc. No.1184, Fed. Neg. Gaz., year 27, no.25.
[51]Arbitration and Conciliation Working Procedure proclamation, 2021, Proc. No. 1237, Fed. Neg. Gaz., year 27, no.21.
[52] Id., Art. 3 (1).
[53] Id., Art. 3 (2).
[54]Id., Art.19 (1).
[55]Id., Art.19 (5).
[56] Id., Art.19 (6).

proclamation clearly specifies that the contracting parties may request *the court* interim measures to be taken before the arbitration proceeding or during the proceeding. The proclamation, however, has nowhere specified *the court* which has exclusive material jurisdiction to grant an interim measure.

Thus, under the proclamation, though an arbitration tribunal is empowered to determine the existence or nonexistence of a valid arbitration agreement between the contracting parties including as to whether it has jurisdiction to hear the case or not, and the contracting parties are at liberty to request the court an interim measures to be taken before the arbitration proceeding or during the proceeding; and yet, there are still some unresolved issues in the proclamation towards jurisdictional questions in relation with arbitral tribunals.

Some of these questions are: what is the role of regular courts in relation with jurisdiction of Arbitral tribunals? Does the decision of the tribunal on its jurisdiction under Article19 (1) of the proclamation amounts to an award as defined under Article 2(2) of the proclamation? If it is an award, should there be an agreement of the parties to lodge an appeal against the decision of the tribunal on its jurisdiction under Article 49 (1) of the proclamation? When shall an objection be made under Article 19(5) of the proclamation? What is the legal status of an objection made under Article 19(5) of the proclamation? Is it an 'appeal' under article 49 of the proclamation? What would be the legal status of the decision given by the first instance court under Article 19(5) of the proclamation? Is it an 'award' under article 2(2) of the proclamation? What would be the fate of the arbitration tribunal's award on the merit of the case if an objection against the decision of the tribunal on its jurisdiction is reversed by the first instance court? If a case is not arbitrable under Article 7 of the proclamation, then does it necessarily mean that the arbitration tribunal has no jurisdiction? What is the relationship between arbitrability and Jurisdiction? which court has the material jurisdiction to grant provisional interim measures?

Therefore, in this paper the writer will strive to analyze the above issues concerning the jurisdiction of arbitration tribunals in general and the power of arbitral tribunals to decide on the validity of the arbitration agreement and the main contract containing the arbitration clause in particular. Moreover, the role of regular courts in determining arbitral jurisdiction and granting interim orders under Ethiopian law and other international arbitral instruments and the lesson that we learn from the latter and other advanced arbitration laws as the case may be will be discussed.

1.2. Statement of the Problem

Unlike regular courts, the basis for the jurisdiction of the arbitrator/arbitral tribunal does not emanate from his/her/its appointment by the sovereign as a judge but from the agreement of the parties in the dispute. Determining the jurisdictional powers of the arbitral tribunal is anchored on the arbitration agreement. Thus, when parties enter into an agreement containing an arbitration clause, "they conclude not one but two agreements, the arbitral twin of which survives any birth defect or acquired disability of the principal agreement."[57]

It is often the case that one of the parties who had submitted to arbitration, often the respondent, would object to the jurisdiction of the arbitral tribunal. These challenges as to the jurisdiction of the arbitral tribunal frequently occur particularly in cases where the defendant anticipates an unfavorable award. These challenges and objections may be based on several heads. The respondent may allege that there was never an agreement to arbitrate disputes or that the tribunal has no jurisdiction or the principal agreement containing the arbitration clause or the arbitration agreement has become null and void. It may also be alleged that the person who signed the agreement had no authority or that the dispute is not arbitrable.[58] Decisions on such objections and challenges must be taken at an appropriate time during the procedure.

Here the question arises as to who is to decide these jurisdictional challenges and when. When a tribunal is faced with such objections albeit spurious, should it cower and hands off the matter completely to the helplessness of the claimant? Or should the tribunal wait for regular courts to decide on its jurisdiction? Or does the tribunal have authority to decide on objections raised against the validity of the arbitration agreement? Is it the tribunal or ordinary courts which should have the primary role of deciding the existence of an arbitration agreement? Who is going to make that decision, the arbitral tribunal or the court? Who has the final say on arbitral jurisdiction? What would be the role of regular courts in relation with the arbitral jurisdiction? which court has the material jurisdiction to grant provisional interim measures?

1.3. Research Objectives

The study is conducted with the following objectives:

1. To examine the existing arbitration law of Ethiopia in relation to jurisdiction of arbitrators with the view to make it sufficient enough to resolve business disputes;

[57]Schwebel, S., cited above at note 18, p.5.
[58]Jarvin, S., cited above at note 27, p.98.

2. To examine whether the existing arbitration law is enough to ensure the autonomy and efficiency of arbitrators to decide on the validity and existence of the arbitration clause and the main contract containing the arbitration clause;

3. To examine whether the existing arbitration law addresses the issue as to which court has the material jurisdiction to grant provisional interim measures;

4. To analyze whether the Ethiopian arbitration system sufficiently addresses the relationship between jurisdiction of arbitral tribunals towards regular courts and whether it is responsive to these issues in arbitral proceedings;

1.4. Research Questions

The paper focuses on the following specific questions;

1. How is the jurisdiction of arbitration tribunals treated under the new arbitration and conciliation working procedure proclamation and what are the major changes brought by and challenges against the new proclamation regarding jurisdiction of arbitration tribunals?
2. Does the existing arbitration law sufficiently ensure the autonomy of arbitration tribunals to determine the existence and validity of the the arbitration clause and the main contract containing the arbitration clause?
3. How is the jurisdiction of arbitral tribunals treated in other national jurisdictions and international and regional arbitration institutions?
4. What is the role of regular courts in relation with jurisdiction of arbitration tribunals under the new proclamation? When shall an objection and/or an appeal be lodged against the decision of the arbitral tribunal on its jurisdiction? which court has the material jurisdiction to grant provisional interim measures?

1.5. Significance of the Study

The paper will look into the major legal and practical problems associated with jurisdiction of arbitral tribunals in Ethiopia and put forward recommendations to tackle the major problems associated with it. The study may also give some inputs for the legislature to amend the existing law regarding the jurisdiction of arbitral tribunals. This would enable stakeholders to emphasize the recommendations made to alleviate major problems in relation to arbitration tribunals. It will also be informative to the stakeholders working in the area of arbitration. Last but not least, it will also be useful for further research.

1.6. Scope of the Study

The scope of the whole study is limited to major legal and practical problems associated with the scope of the jurisdiction of arbitral tribunals as envisaged under the new arbitration and conciliation working procedure proclamation no.1237/2021. However, detail analysis of the entire problem concerning arbitration tribunals in Ethiopia is out of the reach of the study. The major problems, as singled out in the research questions, will be within the reach of the research and the scope is limited to answering these questions and related relevant issues.

1.7. Methodology of the Research

Generally, regarding methods, the paper follows conceptual and legal analyses and interpretations comparatively. So, depending on the cases, it employs doctrinal legal research methods with a comparative study. Plus, somehow, to examine the practice in current arbitration systems, it employs non doctrinal (empirical) method and to obtain a lesson from other countries' and arbitration institutions' experience, it employs comparative research methods.

Thus, regarding data sources and sample selection:

- Regarding Primary sources, authoritative legislations: Ethiopian legislations (mainly, the New Arbitration and Conciliation Working Procedure Proclamation no 1237/2021, Federal Courts Proclamation no. 1234/2021, the Ethiopian civil code and civil procedure code); selected Arbitration rules of other Nations and International arbitration institutions' arbitration rules relating to the issue will be analyzed and interpreted, purposively.
- Regarding secondary sources: Books, Articles, Journals, Internet sources, Cases, Expert interviews (discussions), unpublished materials and reports that are related with the issue will be analyzed and interpreted, selectively and purposively.

Moreover, on the way of examining our arbitration system regarding jurisdiction of arbitral tribunals, for further clarification and to take a lesson in eclectically manner, with comparative analyses, the paper will try to over view some selected national and international arbitration rules and arbitration institutions' that have better experience on jurisdiction of arbitral tribunals.To assess the conceptual and practical issues in Ethiopia, interviews and discussions (depending on the circumstance) will be employed with:selected experts that have experience in arbitration, and Judges in Federal Courts. I will also see relevant Ethiopian and foreign cases or decisions.

1.8. Limitations of the Study

The first limitation is that there are no detailed books and works of literatures on the issue and even those limited sources at international level dealing with this topic are e-books which are difficult to access easily. In Ethiopia too, since the area is relatively new, it is very hard to get detailed materials written on the jurisdiction of arbitral tribunals. Plus, though, cases and judicial opinions play an appreciable role in legal research, case scarcity is another constraint of this study.

CHAPTER TWO

ARBITRATION AGREEMENT AND ARBITRIBILITY

2.1 Arbitration Agreement

Different legal documents use arbitration agreements, arbitral submission and arbitration clause interchangeably. An arbitration clause is used to explain the dispute which arises in the future in performing the contractual relationship.[59]Arbitration submission however is used in relation to the existing dispute that has arisen between the parties in the arbitration agreement.[60]An arbitral submission though contract is, however, peculiar in many respects. One of its peculiarities has been put succinctly by Lord Macmilan;

> *"the other clause sets out the obligation which the parties undertake toward each other ,but the arbitration clause does not impose on the parties an obligation in favor of the other. It embodies the agreement of both parties that if any dispute arises with regard to the obligation which the one party has undertaken to the other, such dispute shall be settled by tribunal of their constitution"*[61]

When we see the Ethiopian law the civil code give meaning to arbitration agreement considering it as an arbitration submission which is designed to solve the existing disputes between parties in arbitration agreement. When we closely look in to the Ethiopian arbitration law, there is no any explicit prohibition for parties to agree on future disputes to resolve through their arbitration agreement. Rather, Article 3328 of the Civil Code states the possibility of future disputes to be submitted to arbitration. Hence, parties may submit their dispute to arbitration after a dispute has arisen or they may submit their agreement before the dispute arises between them by making the arbitration agreement part of their contract or by attaching a separate arbitration agreement to the main contract. The new Arbitration and Conciliation Working Procedure Proclamation under article 2(1) 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"*

The UNCITRAL Model Law defines arbitration agreenment:

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[59]Hailegabriel Gaddissa Feyssa, cited above at note 6, p 306.
[60] Ibid
[61]Heyman and another V.DarwinLtd.From Eric Lee, Encyclopidia of arbitration Law, Lloyd of London Press 1984,sec.3.1.3

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.[62]

The requirements for an arbitration agreement are also thoroughly specified by the model law.According to the Model Law an arbitration agreement may be made in the form of an arbitration clause within a contract or in the form of a separate agreement.

More over, the Model Law requires the arbitration agreement to be made in writing.[63] Thus, an arbitration agreement in the UNCITRAL Model Law is supposed to be made in writing, where its content is made in a way to hold records in any form whether or not the arbitration agreement or the contract has been made orally (recorded agreements) or by any other means.[64] Thus, according to the Model Law, any other form of recording the contract or an arbitration agreement satisfies the form of an arbitration agreement.

The New York Convention also specifies requirements for arbitration agreement. it is required that the agreement should be in writing (Article II(1)), The all or any existing or future differences requirement is also included (Article II(1)), There must be a defined legal relationship (contractual or not) requirement (Article II(1)), The arbitarbility requirement (Article II(1)), The legal capacity requirement (Article V(1)(a)), The validity under the law of the arbitration agreement requirement (Article V(1)(a)) and also Enforcement of arbitration agreements (Article II(3)) are included.

Such requirements are also included in the Ethiopian arbitration law as discussed under Article 3326 of the Civil Code. The new Arbitration and Conciliation Working Procedure Proclamation under article 6 also specify forms of arbitration agreement. The form requirement for general contract recognizes oral contracts to be acceptable where offer and acceptance is complied with as expressed under Article 1681 of the Civil Code**.** But it is not specifically included in the Arbitration and Conciliation Working Procedure Proclamation.

[62] United Nations 1994, UNCITRAL Model Law on International Commercial Arbitration, Art. 7(2). Avaialable at:https://ibclaw.in/article-7-of-uncitral-model-law-on-international-commercial-arbitration-definition-and-form-of-arbitration-agreement/, last accesed on 09/17/2023.
[63] Id, Art. 7(3).
[64] Ibid

2.2 Arbitrability

Arbitrability serves for defining the capability of the dispute to be resolved through arbitration. The issue of arbitrability arises when the subject matter of the dispute is not capable of settlement by arbitration under the law of arbitration agreement or the law of the place of arbitration.[65] The question of arbitrability focuses on whether a particular dispute can be the subject of arbitration.[66] For different reasons, various states exclude disputes of certain categories from the ambit of arbitration.[67] Particularly matters concerning high government or public policy such as grave crimes or felonies are not capable of settlement through arbitration.

Concerning the concept of arbitrability, Redfern and Hunter provides:

> *…….Each state may decide, in accordance with its own public policy considerations which matters may be settled by arbitration and which may not. If the arbitration agreement covers matters incapable of being settled by arbitration, under the law of the agreement or under the law of the place of arbitration, the agreement is ineffective since it is unenforceable. Moreover, recognition and enforcement of an award may be refused if the subject matter of the difference is not arbitrable under the law of the country where enforcement is sought.*[68]

In international arbitration, the subject matter of the dispute must be arbitrable either under the law of arbitration agreement or the law of the place of arbitration tribunal (the forum state) in order for the agreement to be valid. Furthermore, the subject matter of the difference ought to be arbitrable so that the arbitral award is recognizable and enforceable in a country where enforcement is sought.

This international understanding of arbitrability stems from the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[69] which in Article II(1) provides that each contracting states shall recognize an arbitration agreement "concerning a subject matter

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[65]Shore Laurence, "Defining 'Arbitrability'." New York Law Journal, vol.15 (2009) p.21. available at https://www.law.com/newyorklawjournal/almID/1202431398140/ last accesed on 05/13/2023.

[66]Jacquline M., and Nolan H., Alternative Dispute Resolution (in a nutshell, (St. Paul Minnesota: West Pub., Co.), (1992) p. 131.

[67]Zekarias Keneaa, "Arbitrability in Ethiopia, Posing the Problem, "Journal of Ethiopian law," Vol. 17, (1992), p. 116.

[68]A. Redfern, and M. Hunter, cited above at note 24, p. 117.

[69] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdflast accesed on 09/17/2023.

capable of settlement by arbitration," and in Article V(2)(a) provides that an arbitral award may be refused recognition and enforcement if the "subject matter of the difference is not capable of settlement by arbitration under the law of that country."[70] Thus, the subject matter of the claim is the key to determine whether the matter is arbitrable in international or domestic commercial arbitration.

The law governing the various issues that may arise in international arbitration is usually determined through the application of rules and principles of conflict of laws, which manage potential conflicts between competing domestic legal systems.[71] Certain issues, however, are governed by substantive rules of the forum.[72]

Similarly, the subject matter of the dispute must be arbitrable for the arbitration agreement to be effective and the arbitral award to be enforceable in courts in domestic arbitration.Non-arbitrability is one of the grounds for refusal in recognition and enforcement of arbitral award by national court on its own motion that is stipulated at international level and implemented by majority of the jurisdictions.[73] For reason of sovereignty, public policy, private rights, etc certain matters may be excluded from being the subject of arbitration and non-arbitrability is one of the grounds to set aside arbitral awards.[74]

Arbitrability can be objective, based on the quality of the matter, and subjective, the status and capacity to submit dispute to arbitration.[75] In Bulgaria, Mexico, and Poland, maintenance obligations are considered as non-arbitral social matters.[76] In Nigeria and Netherlands, those matters that lie at the core of public safety and order such as criminal offenses are non-arbitral.[77]

2.3 Arbitribility under Ethiopian Law

Usually states list out non-arbitral matters in their domestic laws. Under Ethiopian Law, previously, under the Civil Code and the Civil Procedure code, it was not clear which matters are arbitrable and which are not.

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[70] Ibid.
[71] Arfazadeh Homayoon. "Arbitrability under the New York convention: The lexfori revisited," Arbitration International, vol. 17, no. 1 (2014), p.73. Available at: https://academic.oup.com/arbitration/article-abstract/17/1/73/204623, last accesed on 5/20/2023.
[72] Ibid.
[73] Koch, Elena. "Non-Arbitrability: National, International and Transnational Approaches To Define the Matters", January 2020. Available at: https://www.researchgate.net/publication/348211204, last accesed on 05/13/2023.
[74] Ibid.
[75] Ibid.
[76] Ibid.
[77] Ibid.

However, the Ethiopian Arbitration and Conciliation working procedure proclamation lists out all matters that are not capable of settlement by arbitration similar to the laws of most arbitration-friendly jurisdictions. Thus, as another basic departure from the Previous Laws, the Proclamation under article 7 contains an illustrative list of matters which are not subject to arbitration. Matters relating to family, such as divorce, adoption, guardianship, tutorship and succession cases, criminal matters, tax matters, judgment on bankruptcy and dissolution of business organizations, land matters, administrative disputes and other parties made non arbitrable by other laws are not arbitrable matters under the proclamation and the parties cannot agree to settle those disputes by way of arbitration.[78] In fact, the Civil Procedure code used to take administrative contracts out of arbitration agreement (though it was controversial) and this is maintained under the proclamation.

The Federal Courts of Ethiopia, in practice, in most cases apply the principle of non-arbitrability. In one case, the Federal First Instance Court of Ethiopia strikes out the preliminary objection raised by the defendants of a suit alleging that the dispute should have been settled by an arbitration tribunal.[79]

In this case, the Court, strikes out a preliminary objection of the defendants (the objection challenging that the court does not have material jurisdiction to resolve the dispute rather an arbitration tribunal is competent to settle the dispute) as there is no an arbitration agreement made between the disputants based on article 67(2) of the Federal Cooperative Societies Proclamation No. 985/2010[80] and aricle 6(6) of the Federal Arbitration and Conciliation Working Procedure Proclamation, alledging that the subject-matter of the dispute is non-arbitrable.

[78] Arbitration and Concilation Working procedure Proclamation, 2021, cited above at note 51, Art. 7, Sub Arts.1 - 10.

[79] Ato Teka chiksa et al. v edget sera shemanewoch hulegeb co.so.et al (Federal First Instance Court, Civil Case no 296786), (Unpublished).

[80] Cooperative Societies proclamation, 2021, Proc. No. 7, Fed. Neg. Gaz., year 23, no.7.

CHAPTER THREE

JURISDICTIONAL MATTERS IN ARBITRATION

3.1 Definition and Source of Arbitral Jurisdiction

Today, the right of the arbitrators of a tribunal to rule on their own jurisdiction is an almost fully uncontroversial part of the well-established doctrine and practice in international arbitration. The meaning of jurisdiction in commercial arbitration is comprised of two elements: one refers to the general legal authority of arbitral tribunals to seize and hear cases in dispute; the other relates to the determination of arbitral jurisdiction regarding a specific point of dispute.

Jurisdiction means and includes any authority conferred by the law upon the court, tribunal or judge to decide or adjudicate any dispute between the parties or pass judgment or order. Arbitral jurisdiction is the arbitrator's authority to hear and resolve legal and factual issues under substantive legal rules. The power and jurisdiction of arbitral tribunal commonly source from the will of the parties and the operation of the law. The power of arbitral tribunal emanates from the agreement of the parties who intend to refer their dispute to arbitration for resolution. Usually, the immediate source of arbitral authority or jurisdiction is the will of the parties and not governmental power.

The power to administer proceedings is deemed to have been conferred on the arbitrators having derived their powers from the consent of the parties as expressed in the arbitration agreement.[81]

Arbitral jurisdiction may also emanate from the operation of the law. Other than the agreement of the parties as the source of their powers, the arbitrators also derive powers as may be conferred by the applicable laws. Other than the express conferment of powers on the tribunal as explained above, powers may also devolve on the tribunal by operation of law.[82]

Hence, the arbitral tribunal need to have jurisdiction as jurisdiction is the lifeblood of all legal proceedings. Where a tribunal lacks jurisdiction the entire proceedings would be a nullity no matter how well conducted.[83]

Therefore, an arbitral tribunal must operate within the powers and jurisdiction conferred upon it by the parties. In other words, the tribunal must remain within its terms of reference and not

[81] Babatude Osadare, cited above at note 14, p. 2.
[82] Ibid.
[83] Ibid.

exceed it.[84] Failure to abide by it would render the final award liable to be set aside or not recognized and enforced.[85]

Either of the parties, usually, the respondent may challenge or raise objection concerning the jurisdiction of the arbitral tribunal. It is often the case that one of the parties who had submitted to arbitration, often the respondent, would object to the jurisdiction of the arbitral tribunal.[86] The objections may be related with the existence of an arbitration agreement at all or the agreement becomes void or the subject matter of the dispute is not arbitrable. The respondent may allege that there was never an agreement to arbitrate disputes or that the arbitration agreement has become void or that the person who signed the agreement had no authority or that the dispute is not arbitrable.[87]

The basic question that must be raised here, therefore, is who decides the jurisdictional issues and powers of arbitral tribunals. Does an arbitrator have the jurisdiction to determine his or her own jurisdiction under an arbitration agreement? The law responds in two doctrines for this question: the theories of separability and competence-competence.[88]

In the following parts of the thesis, we will discuss the two doctrines one after the other.

3.2 Theory of Separability

The main requirement for a dispute to be resolved through arbitration is the existence of an arbitration agreement. Without an arbitration agreement, it is impossible to carry out arbitration. The reference of commercial disputes to arbitration is made by the agreement of the parties to the dispute. And this agreement is commonly termed as arbitration agreement. The agreement can be made either in the form a *compromise* which is a separate agreement to submit to arbitrators a dispute already at hand at the time of concluding the contract or in the form of *clause compromissoire* which is a clause in the contract to resolve disputes which may arise in the future relating to the underlying contract containing the clause.[89]

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[84]Redfern, A., and Hunter, M., cited above at note 24. p.278.
[85] Ibid.
[86]Babatude Osadare, cited above at note 14, p. 3.
[87]Ibid.
[88] Lee Jack Tsen-Ta. "Separability, Competence-Competence and the Arbitrator's Jurisdiction in Singapore." Singapore Academy of Law Journal., vol 7, (1995).p.4. Available at: https://ink.library.smu.edu.sg/sol_research/575, last accesed on 05/20/2023.
[89] Solomon Emiru Gerese, Comparative Analysis of Scope of Jurisdiction of Arbitrators under the 1960 Civil Code of Ethiopia , (2009, Unpublished, Central European University) .p.6. available at:http://docplayer.net/, last accessed on 11/09/2021.

As regards arbitration agreement made in the form arbitration clause (*clause compromissoire),* the important issue is whether the clause and the principal contract containing it are considered separate and independent agreements for arbitral jurisdiction. In other words, whether or not the invalidity of the main contract necessarily results in the invalidation of the arbitration clause is imperative for the proper exercise of jurisdiction by arbitrators. Such issues are addressed by the doctrine of separability. According to the doctrine of separability, if an arbitration agreement is made in the form of a clause in a contract, the arbitration clause is deemed to have independent existence from the main contract in which it is contained.[90]

Therefore, the doctrine of separability gives the arbitral tribunal power to separate the arbitration agreement from the principal contract containing the agreement and thereby determine a case despite one of the parties is challenging its jurisdiction on grounds of invalidity or termination of the arbitration agreement or the alleged absence of the principal agreement.

Separability means that an arbitration clause shall be treated as an agreement independent of the other terms of the contract. As a consequence, a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

The concept of separability provides that an arbitration clause is "separable" from the contract containing it and thus may survive a successful challenge the validity of the contract.[91] In other words, the validity of the arbitration clause does not depend on the validity of the remaining parts of the contract in which it is contained. As long as the arbitration clause itself is validly entered into by the parties and worded sufficiently broadly to cover non-contractual disputes, an arbitrator may declare a contract invalid but still retain jurisdiction to decide a dispute as to the consequences of the invalidity.[92] Treating arbitration agreements in such separable way rescues many arbitration agreements from failing simply because they are contained in contracts the validity of which is questioned.

The fact that the principal contract containing an arbitration clause becomes null and void does not oust the tribunal from having arbitral jurisdiction as the arbitration clause, which is the foundation for the jurisdiction of the arbitral tribunal, is treated as an agreement separate from other terms of the contract.

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[90] Id , p.8.

[91] H. Smith, Robert. "Separability and Competence-Competence in international Arbitration: EX Nihilo Nihil Fit? Or can something indeed come from nothing?" -vol.13, No. 1-4 (December 2003): available at: https://www.academia.edu/34735056/, last accesed on 5/20/2023.

[92] Marcus S Jacobs, "The Separability of the Arbitration Claus: Has the principle Been Finally Accepted in Australia?" (1994), p. 629.

Although it is still relatively new, the separability doctrine has been recognized in various legal instruments, both national and international law. We can find the recognition of the separation doctrine through international legal instruments, for example, in the UNCITRAL Arbitration Rules,[93] UNCITRAL Model Law,[94] and ICC Arbitration Rules.[95]

3.3 Competence-Competence Theory

The issue of arbitral jurisdiction to determine its jurisdiction becomes contentious when an objection regarding the existence and validity of an arbitration agreement is raised by either of the parties mostly by the respondent. In most circumstances, the competence of arbitral tribunals arises from an arbitration clause incorporated into a commercial contract concluded betweendisputing parties.

There is the knotty issue as to whether it is the court that should have the primary role of deciding the existence of an arbitration agreement or whether the question should be left to the tribunal.[96] Thus, as the jurisdiction of arbitral tribunal primarily originates from arbitration agreement, if the existence or the validity of the agreement is questioned, who should determine the issue between the court and the tribunal? If a party raises a total denial against an arbitral tribunal's jurisdiction, which authority should rule on such a challenge? A relevant competent court, or the arbitral tribunal involved?[97]

In the past, it was traditionally held that in the case of a dispute over an arbitral tribunal's jurisdiction, it should be determined by a competent court. However, modern theory and practice also recognize the arbitral tribunal's concurrent competence to rule itself on jurisdictional challenges raised by any of the parties. This theory is based upon the so-called *"competence-competence"* (*or "Kompetenz/Kompetenz" in German*) principle.

Competence-competence doctrine provides that the arbitrators have jurisdiction to decide challenges to the arbitration agreements upon which their own jurisdiction is based.[98] It means that the arbitral tribunal may independently rule on the question of whether it has jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, without having to resort to a court. This doctrine empowers arbitral tribunal to decide on its own

[93] UNCITRAL Arbitration Rules Article 21, Paragraph 2.
[94] UNICITRAL Model Law, (1985), Art. 16, Paragraph 1, second sentence.
[95] ICC Arbitration Rules, (1955) Article 6 Paragraph (9).
[96] Babatunde Osadare, cited above at note 14. P. 4.
[97] Xiaohong Liu, Resolving Jurisdiction Conflicts Between Courts And Arbitral Tribunals: Chinese Law Perspective (2008), p. 247.
[98] Lee Jack, cited above at note 88, p. 421.

jurisdiction including on objections related to the existence or validity of the arbitration agreement independent from judicial intervention.

The theory of "competence-competence" supplies a proper theoretical basis for arbitral tribunals to determine their own jurisdiction. This doctrine provides that arbitral tribunals are vested with the competence to be judges of their own jurisdiction. Thus, the essence of this theory is that an arbitral tribunal may rule its jurisdiction with respect to a specific arbitration agreement, including its validity; and that its jurisdiction does not depend anymore on a prior judicial ruling. As this theory deals with the question of how to resolve the issue of "the competence to determine competence," it is called the principle of "competence-competence".

This doctrine has ***two*** aspects;

Firstly, it means that arbitrators are judges of their own jurisdiction and have the right to rule on their own competence. Therefore, if the validity of arbitration agreement itself and thus the competence of arbitrator are impugned, he or she does not have to stop proceedings but can continue the arbitration and consider whether he or she has jurisdiction.[99]

As the foundation for arbitration tribunal is arbitration agreement, its jurisdiction also emanates from the agreement. Consequently, objections being raised against the existence or the validity of the arbitration agreement will not prevent the arbitrators from proceeding with the arbitration, ruling on their jurisdiction and, if they retain jurisdiction, rendering a decision on the merits of the dispute notwithstanding any court action aimed at setting aside the decision on jurisdiction.[100] This is known as the '*positive effect of the principle of competence-competence'*, today recognized in a vast majority of countries.

Secondly, in some countries, the arbitration agreement ousts the initial jurisdiction of ordinary courts. If the prima facie existence of the arbitration agreement is objected to, a court must refer the dispute to arbitration.[101]

Concerning the second aspect there is a difference between common law and continental legal system. Under the continental legal system, for instance in France, arbitrators appear to have a wide jurisdiction to determine their competence. while, in common law countries, arbitrators have only a limited competence to rule on their jurisdiction, and that these rulings may be

[99] Id., p. 422.
[100] Ibid.
[101] Carl Svernlov, "What Isn't: The Current Status of the Doctrine of Separability" Journal of international arbitration, volume 8(4) (1991), p.37. Available at: https://www.deepdyve.com. last accessed on 05/13/2023.

reopened and scrutinized by the courts.[102] Where the arbitral tribunal is provided with the authority to decide on its jurisdiction, the provision of such authority has a negative effect that the courts should refrain from engaging in the examination of the arbitrators' jurisdiction before the arbitrators themselves have had an opportunity to do so.[103]This rule of priority in favor of the arbitrators, known as the *'negative effect of the principle of competence-competence'*, is today increasingly recognized in practice. The negative effect of the arbitration agreement precludes courts from examining the jurisdiction of arbitrators before the tribunal decides on jurisdictional issues. Based on this principle, the arbitral tribunal has competence to determine on its own jurisdiction.

Thus, according to French approach the principle of negative competence-competence was codified in French law which has the meaning that when a dispute submitted to the tribunal under the arbitration agreement is submitted to the court, that court declines its jurisdiction.[104]

On the other hand, regarding the exclusivity of the competence of arbitral tribunals and the role of the regular court in deciding the jurisdiction of arbitrators before the commencement of the arbitral proceedings, three trends are followed by some countries' arbitration laws and international instruments.These are: Exclusive Competence-Competence Principle, Non-Exclusive Competence-Competence Principle, and Restricted Competence-Competence Principle. I will discuss each of them below.

3.3.1 Exclusive Competence-Competence Principle

The first trend follows the exclusivity of the competence of the arbitral tribunal in deciding on its jurisdiction. According to the proponents of this view, the court has no role in deciding the arbitrator's jurisdiction.

These scholars embrace the exclusivity of the arbitral tribunal's competence by suggesting that the tribunal's competence to rule on its competence is a right conferred on it as a priority before any other body. Thus, a plea that the arbitrator has no jurisdiction may not be invoked before the court but only before the arbitrator.[105]

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[102]Id., p. 74-78.

[103] Emmanuel Gaillard and Yas Banifatimi, Negative Effect of Competence-Competence: The Rule of Priority In Favour Of the Arbitrators. p. 258.

[104] Emmanuel Gaillard & John Savage (eds). Gojdman, Fouchard, International Commercial Arbitration, (1999). Available at: https://www.trans-lex.org/, last accessed on 05/19/2023.

[105]Anwar Ali Ahmad Alttashi, The Kompetenz-Kompetenz Principle in the Arbitration Domain. (Dar Annahda Alarabia no year), p. 113, 115.

Proponents of this view further argue that the court shall not examine the existence and validity of the arbitration agreement except at the time of setting aside application or at the time of enforcement of the award. According to these scholars, the court is under an obligation to refer the disputing parties to arbitration immediately as soon as the defendant invokes the existence of an arbitration agreement in response to the plaintiff's petition that the dispute is to be decided by the court.

Some other proponents of the view even strongly argue that the court is under the obligation to refer parties to arbitration even if the court finds that arbitration agreement is null and void or inoperative or incapable of being performed.[106]

For instance, under Egyptian law the court has no competence and that the arbitrator has exclusive competence, but this view is based on the words of section 22(1) of the Arbitration Act, which adopts the competence-competence principle.[107]

3.3.2 Non-Exclusive Competence-Competence Principle

This trend is completely the opposite of the ones stated above. Its proponents believe that the court does have authority to look into the arbitrator's competence and that the arbitrator does not have an exclusive competence to decide on its arbitral jurisdiction. They say that competence-competence principle does not mean that the arbitrator is an exclusive body in deciding issues related to the arbitrator's competence. Stated otherwise the principle of competence-competence does not aim at giving the arbitrator exclusive competence to rule on its jurisdiction. It is suggested that the principle of competence-competence should not be understood as denying the court to decide on the arbitral jurisdiction at all time as its principal objective is primarily to prevent delaying tactics in arbitration proceedings. The intervention of the court in arbitral proceedings should not be viewed as impeding the proceedings. Hence, the court has the authority to decide even on the validity of the arbitration agreement without referring the case to the arbitral tribunal as far as the intervention is not intended to obstruct the arbitral proceedings.

In this regard, the advocates of this view substantiate their assertion by stating general rules of law which gives the court the authority to inspect the validity of the arbitration agreement and it would refer the case to arbitral tribunal only after it has verified the fact that the agreement is valid.

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[106] Ibid.

[107] Mustafa Mohammad Aljammal and O'kasha Mohammad Abdel'al, Arbitration in Private International and Internal Relationships, vol 1 (no publisher, 1998) , p.530.

The New York Convention clearly gives the court authority to decide whether the arbitrator has jurisdiction over the dispute or not. It states that the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall *'refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.'*[108]

The UNCITRAL Model Law adopts a similar view and accordingly it provides that a court before which an action is brought in a matter which is the subject of an arbitration agreement shall '*refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed'*.[109]

According to the French Civil Procedure Code, the court is supposed to dismiss the case as inadmissible where the defendant has raised jurisdictional objection to the court before the hearing on the merit of the case commences and unless the court decides the arbitration agreement to be null and void, invalid, or impossible to implement. Accordingly, the provisions of the French Civil Procedure Code read as follows.

> *Should proceedings be brought before a court regarding a matter that is subject to an arbitration agreement, the court is to dismiss the complaint as inadmissible provided the defendant has raised the corresponding objection prior to the hearing on the merits of the case commencing, unless the court determines the arbitration agreement to be null and void, invalid, or impossible to implement.*[110]

3.3.3 Restricted Competence-Competence Principle

This trend lies in the middle of the two previous scenarios. Its advocates believe that in order to decide whether the arbitrator has exclusive competence to rule on his or her competence, two situations have to be distinguished, so that it is only in the first of them that should give the arbitrator exclusive competence, but not the other. They disagreed, however, on determining these situations.

According to this trend's advocates, the time of the appointment of the arbitrator determines the line between the two situations. Thus, before the time when the arbitrator is appointed as per the terms of the agreement of the parties, the court would have an exclusive competence to determine

[108]Convention on the Recognition and Enforcement of Foreign Arbitral Award. (New York, 1958), Article II (3).
[109] UNICITRAL Model Law, Article 8(1).
[110] The French Civil Procedure Code, Article 1448, paragraph 1 and 2, available at: https://www.iaiparis.com/pdf/FRENCH_LAW_ON_INTERNATIONAL_ARBITRATION.pdf, last accesed on 09/20/2023

the arbitral jurisdiction if an action is brought before it by either of the parties to the dispute. However, the tribunal would have an exclusive competence only after the arbitrator is appointed and the court is required to refer the case to the tribunal if the case is brought before it after the time of the appointment of the arbitrator. Before that point, however, the court may have its say in determining whether the arbitrator has competence or not.

Another view that follows this trend is the one adopted by French law that provides that *'when a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable.'*[111]

3.4 Separability and Competence-Competence Doctrines in Major International Arbitration Rules and Selected Jurisdictions

3.4.1 UNCITRAL Model Law on International Commercial Arbitration

The model law was issued to help states in reforming and modernize their laws on arbitral procedure so as to take into account particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award.

This Rule is first adopted in 1976 and has been used for the settlement of a broad range of disputes, including disputes between private commercial parties where no arbitral institution is involved, investor-state dispute, state-to-state disputes and commercial disputes administered by arbitral institution.[112]

The model law is not binding, but individual states may adopt the model law by incorporating it into their domestic law.[113]

There is a difference between the UNCIRAL Model Law on international Commercial Arbitration (1985) and the UNCITRAL Arbitration Rules.[114] On its website UNCITRAL explains the difference as follows:

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[111] Ibid.

[112] https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration.

[113] "International Arbitration Act 1974". Australasian Legal Information Institute.., available at: https://www.legislation.gov.au/Details/C2018C00439*, last accesed on 05/21/2023.*

[114] "International Commercial Arbitration & Conciliation". Available at: www.uncitral.org*, last accesed on 05/14/2023.*

The UNCITRAL Model Law provides a pattern that law-makers in national governments can adopt as part of their domestic legislation on arbitration. While UNCITRAL Arbitration Rules, on the other hand, are selected by parties either as part of their contract, or after a dispute between themselves. Put simply, the model law is directed as states, while the arbitration Rules are directed at potential (or actual) parties to a dispute.[115]

Accordingly, the UNICITRAL Model Law incorporates the doctrines of competence-competence and separabilty. It clearly states that the arbitral tribunal has competence to rule on its jurisdiction. This competence encompasses the authority to render a decision regarding any objections for to the existence or validity of the arbitration agreement. For instance, the tribunal, pursuant to the Model Law, has the jurisdiction to rule on the respondent's preliminary objection asserting that he has not concluded an arbitration agreement with the applicant in the first place. While the first sentence of paragraph one of article 16 of the Model Law deals with the doctrine of competence-competence the second sentence of the same article talks about the principle of separabilty. The provisions of the Model law dealing with the principles of competence-competence and separability reads as follows.

The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.[116]

3.4.2 International Center for Settlement of Investment Disputes (ICSID)

The International Centre for Settlement of Investment Disputes, which is commonly referred to as ICSID or the Centre, is established by the convention with for the settlement of investment disputes between states and nationals of other states. The Centre or the international investment arbitral tribunal is authorized by the convention to settle investment disputes arising between member states or a member state and nationals of other member states.

[115] "FAQ - UNCITRAL and Private Disputes / Litigation". Available at: www.uncitral.org, *last accesed on 5/14/2023.*

[116] UNICITRAL Model Law on International Commercial Arbitration 1985, Article 16, Paragraph 1.

ICSID recognizes only the doctrine of competence-competence. Accordingly, the international center, the arbitration tribunal, has competence to rule on its jurisdiction for any objection such as the investment dispute does not fall within the scope of its jurisdiction. The provisions of ICSID dealing with the doctrine of competence-competence read as follows.

> *(1) The Tribunal shall be the judge of its own competence.*
>
> *(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.*[117]

Article 41 of the convention restates the well-established principle that international investment tribunals are to be the judges of their jurisdiction. The investment tribunal may deliver decision on the jurisdictional objections separately or jointly with the merits of the dispute.

3.4.3 English Arbitration Act-1996

The English Arbitration Act-1996 endorses the doctrines of separability and competence-competence. The doctrine of separability is provided under article 7 of the Act. Accordingly, the principal contract and the arbitration agreement which it contains are deemed to be separate agreements of the parties. It, however, gives parties to the principal contract the freedom to make an otherwise agreement. That means parties may agree that the arbitration agreement and the arbitration clause it contains would not be considered to be separate agreements. Hence, according to the English arbitration law, the principle of separability would be applicable only in the absence of such otherwise agreement made by the parties. The provision of the English act dealing with separability reads as follows:

> *Unless otherwise agreed by the parties, an arbitration agreement that forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.*[118]

According to the above mentioned article, the invalidity, non-existent or ineffectiveness of the principal contract containing the arbitration agreement would not render the arbitration agreement to be invalid, non-existent or ineffective. The tribunal would have the authority to rule on an

[117] International Centre for the Settlement of Investment Disputes (ICSID), Article 41.
[118] The English Arbitration Act 1996, Article 7.

objection regarding the invalidity of the principal contract based on the doctrine of separability. The arbitral tribunal would not lose its jurisdiction since the contract containing the arbitration clause being invalid, non-existent or ineffective.

Similarly, the provisions dealing with the doctrine of competence-competence of the English Arbitration Act read as follows.

> *(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—*
>
> *(a) whether there is a valid arbitration agreement,*
>
> *(b) whether the tribunal is properly constituted, and*
>
> *(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.*
>
> *(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.*[119]

Article 30(1) of the English Arbitration Act clearly states that the arbitral tribunal has the authority to rule on its own jurisdiction if jurisdictional objections are raised by the respondent. The court is precluded from intervening regarding arbitral jurisdictional matters. It, therefore, follows that the arbitral tribunal mentioned in the arbitration agreement is competent to decide issues concerning its jurisdiction. Hence, according to the above mentioned provisions, the arbitral tribunal has the authority to decide jurisdictional objections raised usually by the respondent as to whether there is a valid arbitration agreement, whether the tribunal is properly composed and whether the tribunal exercises its authority within the scope prescribed in the agreement. Nonetheless, the English arbitration law permits parties to the arbitration agreement to agree to give authority to the court to rule on issues related to arbitral jurisdiction instead of the tribunal. The tribunal is competent to rule on its jurisdiction only in the absence of an otherwise agreement by parties to arbitration agreement.[120] However, the tribunal's decision on its jurisdiction could be challenged by the means of appeal or review by an aggrieved party.[121]

[119] Id., Article 30.
[120] Id., Article 30(1).
[121] Id., Article 30(2).

3.4.4 French Arbitration Law

The French law empowers an arbitral tribunal to decide on its jurisdiction, when that is challenged before the arbitral tribunal.[122] The unique thing in French law is the prohibition it imposes on courts from entertaining challenges to the jurisdiction of arbitral tribunals save in exceptional circumstances. Article 1448 of Decree No. 2011-48 provides that

> *'…a court shall refuse to hear a dispute which is covered by an arbitration agreement unless an arbitration tribunal has not been seized of the dispute… and the arbitration agreement is manifestly void or inapplicable.'*

This provision limits the judges in two ways. First, it vests in the arbitral tribunal, once it has been constituted, the first opportunity to decide on its own jurisdiction. The French judge has no option but to sit on his hands and wait until the arbitral tribunal decides on its own jurisdiction.[123] On the other hand, even where an arbitration tribunal has not yet been constituted, the new law limits the ground on which the judge may refuse to refer disputes to arbitration to cases where the arbitration agreement is manifestly void or inapplicable. This allows the French judge to conduct only the most superficial review of the arbitration agreement such as whether the agreement is clearly void for lack of any signature.[124] He/she is not allowed to pose more complex questions regarding the validity of the arbitration agreement. The imposition made by the French Law on a court to refer disputes to arbitration is broader than that under the New York Convention.[125]

Generally, French law incorporates Competence-Competence plus it also strictly limits intervention by courts in arbitral proceedings. It is the pro-efficiency end of the spectrum when it comes to striking balance between efficiency and legitimacy of arbitration. In fact, its emphasis on procedural efficiency is such that it embodied a provision, which is considered a novelty, requiring efficiency from both the arbitral tribunal and the parties and the parties to arbitration, though not directly relevant to Competence-Competence.[126]

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[122] Beatrice Castellane, The New French Law on International Arbitration, (2011), p.16.
[123] John J. Barcelo, Cited above at note 152, p. 239.
[124] Ibid.
[125] Convention on the Recognition and Enforcement of Foreign Arbitral Awards,1958, cited above at note 153.
[126] Nadia Darwazeh and Baqtistste Rigaudeau, "Clues to Construing the New French Arbitration Law: An ICC Perspective on Procedural Efficiency, Good Faith, and Independence," J.INT. ARB. Vol. 28(4) (2011), p.381.

3.5 The Doctrines of Separability and Competence-Competence under Ethiopian Law

3.5.1 General Overview

On April 2021, Ethiopia enacted a new arbitration and conciliation law, known as the Arbitration and Conciliation, Working Procedure Proclamation No. 1237/2021, to apply to commercial domestic arbitrations and international arbitrations whose seat is in Ethiopia. Structurally, the proclamation has ten sections and 81 articles.

Before this proclamation, Ethiopia did not have an independent and separate piece of legislation that regulates the manner in which alternative means of settling disputes operate. Thus, before the enactment of the proclamation, Arbitration law was found in the Civil Code of Ethiopia, Article 3325 – 3346 of the Civil Code and partly in Civil Procedure Code, Article 315 – 319, Article 350 – 357 and other scattered provisions in various laws, which were used in conducting arbitration and conciliation. However, recognizing the fact that arbitration is becoming part and parcel of the mainstreaming of dispute resolution mechanisms, the law maker comes up with the new arbitration proclamation. These old laws provide for basic frameworks of conducting arbitration and conciliation such as governing the arbitration agreement, manner of composition of tribunals, and the arbitration award. However, these laws were criticized for failing to sufficiently address, among other things, the manner of establishment and operation of arbitration centers, identifying arbitrable and non-arbitrable matters, providing a limitation on the role of courts during the arbitration and the tribunal's power to decide on its own jurisdiction. Moreover, the provisions under our laws are highly incompatible with the internationally recognized principles of commercial arbitration. The proclamation regulates arbitration and conciliation modes of dispute settling. It is primarily applicable to commercial related arbitrations, international arbitrations with a seat in Ethiopia or outside Ethiopia and national conciliation proceedings. The Proclamation is also applicable when one of the contracting parties is situated in Ethiopia and where the place of arbitration is not designated.[127]

As a basic departure from the old laws, the proclamation introduced a prohibition on the intervention of courts in the arbitration proceeding. However, the proclamation specifically mentions some exceptions where courts may intervene in the arbitration proceeding.

[127] Id., Art.3.

Most importantly the proclamation recognizes doctrines of Competence-Competence and separability.

In this part of the thesis, the writer will try to discuss the two doctrines, i.e., the doctrines of separebility and competence-competence, enshrined in the new proclamation by comparing the proclamation with the old arbitration law and there by discussing the main features of the proclamation related with the two doctrines. and in the following two sub-sections, the role of courts towards arbitral jurisdiction will be discussed.

3.5.2 The Principle of Competence-Competence under Ethiopian Law

Under the previous legal frame work, i.e. before the enactment of the proclamation, there was a limitation on the scope of the Competence-Competence doctrine, which allows arbitrators to rule on their jurisdiction only if authorized to do so by the parties. While the civil code allows arbitrators to rule on their jurisdiction, under article 3330(3) it barred them from deciding the validity of an arbitral submission (arbitration agreement).[128] As a result, challenges to the validity of arbitration agreements were decided by the courts.

However, as a major departure from the previous law, according to the new Arbitration and conciliation working procedure proclamation, if a suit emanating from the arbitration agreement is taken to a regular court and the other party challenges the suit alleging that the dispute should have been resolved through arbitration, the court shall dismiss the suit and refer it to arbitral tribunal unless it finds the agreement is void and becomes ineffective.

Accordingly, the provisions of the law read as follows.

> *Where a suit falling under an arbitration agreement is brought before a court and the defendant raises a preliminary objection that the parties agreed to resolve their dispute through arbitration agreement, the court shall dismiss the suit and the parties to resolve their dispute in accordance with the arbitration agreement….unless it finds the agreement is void and becomes ineffective.*[129]

Similarly, The first paragraph of article 19(1) of the proclamation recognizes the principle of competence-competence and provides that:

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[128] The Civil Code of Ethiopia. Article 3325 (1) defines an arbitral submission as a "contract where the parties to a dispute entrust its solution to a third party, the arbitrator, who undertakes to settle the dispute in accordance with the principles of law."

[129] Arbitration and Conciliation Working Procedure Proclamation, 2021, cited above at note 51, Article 8 Sub-Articles (1) & (2).

..The tribunal shall have the power to determine the existence or non existence of a valid arbitration agreement between the contracting parties including as to whether it has jurisdiction to hear the caseor not.[130]

Thus, according to the above provision of the law, the arbitration tribunal designated by the parties have a power to determine the existence or non-existence of a valid arbitration agreement and whether the tribunal itself has a jurisdiction to preside over the matter. Thus, the Proclamation acknowledges that the arbitration tribunal designated by the parties has a power to determine the existence or nonexistence of a valid arbitration agreement and whether the tribunal itself has a jurisdiction to preside over the matter.

Thus, Regarding Competence-competence principle, the Ethiopian Arbitration and Conciliation working Procedure Proclamation follows the trend of non-exclusive competence-competence Principle.

In the following part of the thesis, we will see some practical cases in relation with competence-competence principle internationally and domestically.

1. Saline Consruttori v. the FDRE, Addis Ababa Water and Sewerage Authority.[131]

The Case is decided on the international court of Arbitration, international Chamber of Commerce ICC Arbitration. The Claimant in this arbitration is Salini Costruttori S.p.A. and the Respondent is the Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority.

In the case the Respondent (as Employer) and the Claimant (as Contractor) entered into a contract for the construction and completion of the Emergency Dire Dam and Raw Water Transmission Line Project. The Respondent objected that there was no relevant agreement between the parties to arbitrate disputes between them under the ICC Rules. Rather, in the Respondent's submission, the parties had agreed to submit their disputes under the Contract to *ad hoc* arbitration under Article 3325 *et seq.* of the Civil Code of Ethiopia. Notwithstanding the Respondent's jurisdictional objection, the ICC Court decided to set this arbitration in motion pursuant to Article

[130] Id, Art.19(1), first paragraph.

[131] Saline Consruttori v. The FDRE, Addis Ababa Water and Sewerage Authority international Chamber of Commerce ICC Arbitration no. 10623/AER/ACS available at: https://jusmundi.com/en/document/decision/en-salini-costruttori-s-p-a-v-the-federal-democratic-republic-of-ethiopia-addis-ababa-water-and-sewerage-authority-award-friday-7th-december-2001, last accesed on 09/21/2023.

6(2) of the ICC Rules. The ICC Court further decided that the matter would be submitted to three arbitrators.

The Arbitral Tribunal issued a preliminary award on the issues of: (a) whether these arbitral proceedings should be suspended as a consequence of the decisions taken, at the Respondent's behest, by the Federal Supreme Court and Federal First Instance Court; and (b) whether the Tribunal has jurisdiction over the present proceedings notwithstanding the objection raised by the Respondent.

Among the above two issues framed and decided by the tribunal, the pertinent issue to the thesis is whether the Arbitral Tribunal constituted under the ICC Rules, has jurisdiction in the proceedings.

The parties are in dispute as to whether they have agreed to submit their disputes to ad hoc arbitration under Articles 3325 *et seq.* (Arbitral Submission) of the Civil Code of Ethiopia (as the Respondent contends), or to institutional arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce, supplemented where appropriate by Articles 3325 *et seq.* of the Civil Code of Ethiopia (as the Claimant contends).

The tribunal in its decision argued that *''this Arbitral Tribunal, set up under the auspices of the ICC, will thus have to determine, pursuant to the principle of compétence-compétence embodied in Article 3330 of the Civil Code of Ethiopia, whether it has jurisdiction to rule in the dispute submitted to it.*[132] And the Tribunal concluded that it has jurisdiction over the present dispute as an ICC tribunal properly constituted in accordance with the ICC Rules.

The Writer of the thesis disagrees with the arguments and the conclusion forwarded by the tribunal to accept it has jurisdiction to entertain the case. This is because, *firstly,* the parties argued whether the dispute should be submitted to ad hoc arbitration under article 3325 *et seq.* of the Civ.Co. or to institutional arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce, supplemented where appropriate by Articles 3325 *et seq.* of the Civ. Co. Especially, the Respondent objected that there was no relevant agreement between the parties to arbitrate disputes between them under the ICC Rules. However, the tribunal decided the case out of the argument raised by the parties basing itself on Art.3320 of the Civ.Co.

In addition to that, the tribunal concluded that it has jurisdiction pursuant to the principle of compétence-compétence embodied in Article 3330 of the Civil Code of Ethiopia. However,

[132] Ibid.

While the Civ. Co. under Article 3330(1) and (2) allows arbitrators to rule on their jurisdiction, under article 3330(3) it barred them from deciding the validity of an arbitral submission. Since the Respondent objected that there was no relevant agreement between the parties to arbitrate disputes between them under the ICC Rules, we can conclude that it is questioning the validity of the Arbitration Agreement. As a result, before the enactment of the Arbitration and conciliation working procedure proclamation, challenges to the validity of arbitration agreements, which is the issue of competence-competence principle, were decided by the courts and not by the Arbitrators. Thus, tribunals are allowed to decide on the challenges to the validty of the arbitration agreement after the enactment of the proclamation. And since the award is given on December 07, 2001[133] which is before the enactment of the proclamation, the tribunal cannot have jurisdiction to decide on the case based on Article 3330 of the Civ.co.

2. Kalkidan Abate v. Hibret Insurance Co.[134]

In this case, the Federal First Instance Court dismisses the suit of the plaintiff and refers the parties to arbitration/conciliation based on jurisdictional preliminary objection of the defendant raised on the ground that the court does not have material jurisdiction as parties to the dispute have arbitration agreement which requires the parties to resolve disputes arising from their principal contract through arbitration/conciliation.[135]

The order of striking out the suit of the plaintiff which is given by the Federal First Instance Court under File no. 302799, based itself on Article 54 of the Federal Arbitration and Conciliation Working Procedure Proclamation No.1237/2021, Article 10 of the arbitration/conciliation clause incorporated under the Insurance Policy and Article 244(2)(A) and Article 245(1) of the Civil Procedure Code of Ethiopia.

The writer of the thesis fully agrees with the decision of the Federal first instance Court for lack of material jurisdiction.

3.5.3 The Principle of Separability under Ethiopian Law

The principle of Separabilty is also recognized under the Arbitration and conciliation Working Procedure Proclamation.

Accordingly, the provision of the law dealing with separability reads as follows:

[133] Ibid.
[134] Kakidan Abate v. Hibret Insurance Co.(Federal First Instance Court, File no.302799, 2014) (unpublished).
[135] Ibid.

....For this purpose, arbitration clause which is included in an agreement shall be deemed to be a separate and independentagreement. The fact that the principal agreement becomes null and void shall not make the arbitration clause null and void.[136]

The proclamation provides that the arbitration tribunal designated by the parties have a power to determine the existence or non-existence of a valid arbitration agreement and whether the tribunal itself has a jurisdiction to preside over the matter.

To this effect, the Proclamation recognizes that the arbitration agreement will remain operational irrespective of the fact that the main contract becomes null and void. This limits an ill intended party from bringing the matter before courts by objecting the jurisdiction of the tribunal. According to Article 19(5) of the proclamation, it is only after the decision of the tribunal on its own jurisdiction that the party may bring the matter before Federal First Instance Court. Under the Civil Code, only the contracting parties are expected to authorize the arbitrator to decide disputes pertaining to jurisdiction.

In one case,[137] the Federal First Instance Court decided that the court lacks Jurisdiction since the parties agreed to settle their dispute through Arbitration even though the main contract contatning the arbitration clause is void.[138]

The principle of Sparability, which recognizes that the arbitration agreement will remain operational irrespective of the fact that the main contract becomes null and void is incorporated under Ethiopian law through Article 19(1) of the Arbitration and conciliation working procedure proclamation. And the case is decided before the enactment of the proclamation. Thus, the writer of this thesis do not agree with the decision of the court to decline material jurisdiction to entertain the case.

3.6 The Doctrines of Separability and Competence-Competence vis-à-vis Judicial Intervention

As we know the involvement of national courts is crucial to the overall efficacy of arbitration, both domestic and international. Occurrences calling for court intervention may appear at all stages of the arbitral proceedings. However, we need to maintain a balance between the levels of court involvement and the smooth functioning of arbitration. It is because arbitration is a

[136] Id, Art.19(1), second paragraph.
[137] Legese Abdi v. Eprem Wedaj (Federal First Instance Court, 2013), File no.289623.) (unpublished)
[138] Ibid.

contractual alternative to judicial dispute settlement. Courts mainly intervene in three stages of arbitration.

3.6.1 Before the Commencement of the Arbitral Proceedings

In order to see the role of the regular courts regarding their power to rule on the jurisdiction of the arbitral tribunal before the commencement of the arbitral proceedings, the following scenarios need to be considered. Suppose that a party to the dispute, a claimant, brings an action to a court regarding his dispute and the other party, the respondent, raises an objection that the court is not competent to rule on the dispute due to the existence of an arbitration agreement. Nevertheless, the claimant responds that the arbitration agreement is invalid or that the subject matter of the claim does not fall within the scope of this agreement. In this case, the court needs to render a decision on the plea in order to determine whether it has jurisdiction over the dispute or not. Yet the court's decision encompasses determining whether the arbitrator has competence concerning the same dispute.

The other scenario supposes that an action may be instituted before the court in order to receive a decision that an arbitration agreement is void, but the defendant responds that agreement in question is valid. Similarly, the court's ruling includes the rendition of a decision whether the arbitrator has jurisdiction or not. These scenarios solicit the question as to whether or not the court is capable of rendering such a decision. In most instances, the answer to this question has been contentious. It has been suggested that three trends exist in this regard: the first adopts the view that the court has no jurisdiction since the jurisdiction of the arbitral tribunal is exclusive. The second trend is quite the opposite to the first trend which means the court has authority to decide on the arbitral jurisdiction as the later has no an exclusive jurisdiction. Lastly, there is the view that both the arbitrator and the court have a role in determining the arbitrator's competence, but in a manner that is regulated in one way or another.

3.6.2 During the Process of the Arbitral Proceedings

Arbitration is a method of dispute settlement which is alternative to, not part of, court litigation.[139] It is widely held that court intervention, especially during the preceding of the

[139]Hailegabriel Gaddissa Feyssa, "The role of Ethiopian courts in commercial arbitration" Mizan Law Review,, vol. 4, no. 2(2010), p 297.

arbitration, is undesirable as it may frustrate and disrupt this alternative dispute settlement process.[140]

The autonomy of commercial arbitration from national court supervision is not, however, absolute even in Model Law countries where mandatory rules on independence and impartiality of arbitrators and party equality enjoy a complete free rein.[141] Pending the arbitral proceeding, the autonomy of arbitration does not preclude a party to an arbitration agreement from applying to the court in order to preserve his rights. The right of parties to apply to the court for assistance is imperative as arbitrators lack actual power – though not legal power – to compel parties to, for example, arbitrate and give evidence. For instance, court-issued summons are needed subsequent to a witness's failure to appear in answer to the summons issued by an arbitral tribunal.

The arbitral tribunal's jurisdiction, thus, may also be challenged by either of the parties to the agreement during the process of the arbitral proceedings. Parties may challenge the arbitral tribunal's jurisdiction before the tribunal directly while the tribunal holds its proceedings, in which case the arbitral tribunal in question may render an interim award to affirm or decline its jurisdiction. The tribunal's interim award, however, is subject to court's supervision or inspection. The party dissatisfied with an interim award regarding arbitral jurisdiction may request a court to rule on such matter.

Suppose that a party to the dispute (usually the defendant) raises an objection claiming the tribunal has no jurisdiction once the arbitral proceeding resumes and the plaintiff or the respondent argues that the tribunal has competence to decide on the dispute. Suppose also that the tribunal rules that it has jurisdiction to resolve the dispute as per the arbitration agreement concluded by the parties by striking out the objection of the claimant. Hence, the party dissatisfied by the preliminary jurisdictional decision of the arbitral tribunal may take the issue to the regular court having jurisdiction in this regard. As a result, the tribunal's ruling given on the jurisdictional challenge, which is commonly referred to as interim or interlocutory award, is not final and is, therefore, subject to court's supervision and control.

Regarding the role of the regular court in supervising the jurisdictional ruling given by the tribunal after the commencement of the proceeding, some states' legislations provide that the

[140] Ibid.

[141] Petrochilos, G. (2004) Procedural Law in International Arbitration. Available at: https://lib.ugent.be/en/catalog/rug01:000943224, last accesed on 09/07/2023.

party dissatisfied with the interim award rendered by the arbitral tribunal may promptly lodge a complaint with a local court and request the latter to make a final decision.[142]

For instance, the German Civil Procedure Law authorizes the arbitral tribunal to decide on jurisdictional objections raised by either of the parties to the arbitration agreement including an objection related to the existence or validity of the arbitration agreement.[143]

The German law, regarding such objections to jurisdiction, provides that the arbitral tribunal ordinarily may render an interlocutory award if it considers that it has jurisdiction.[144] According to this law, the court would intervene in the arbitral proceedings only after the tribunal has rendered its preliminary ruling on the jurisdictional objection and a party dissatisfied with such ruling has petitioned to the regular court within one month. In this regard, after receiving the award either party may request within one month the court to decide the matter. In the meantime, the arbitral tribunal may continue the arbitral proceedings and make a final award. The relevant provisions of the German arbitration law in this regard read as follows.

> *Where the arbitral tribunal believes it has competence, it shall rule on an objection raised pursuant to subsection (2) in an interim decision as a matter of principle. In such event, each of the parties may apply for a court decision to be taken, doing so within one (1) month of having received the written notice as to the interim decision. For the period during which such a petition is pending, the arbitral tribunal may continue the arbitration proceedings and may deliver an arbitration award.*[145]

Likewise, the Swiss Arbitration Law stipulates that parties dissatisfied with the preliminary award on jurisdiction may appeal to and request the local court to make a final determination.[146]

Similarly, international arbitration law instruments recognize that courts authority to rule on the decision of the tribunal on its jurisdiction. For example, the UNCITRAL Model Law stipulates that if the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days after having received notice of that ruling, the court specified in the

[142] Xiaohong Liu, cited above at note 127, P., 254.
[143] German Civil Procedure Law, Article 1040(1).
[144] Id., Article 1040(3).
[145] Ibid.
[146] Swiss Inter Concordat On Arbitration (1969), Articles 9 & 36(2).

article 6 to decide the matter of which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.[147]

> The new arbitration law of Ethiopia follows the UNCITRAL model law approach concerning the recourse permitted to the party aggrieved with the decision of the tribunal on jurisdictional dispute. In this regard the law reads: *An objection against the decision of the tribunal on its jurisdiction shall be submitted to First Instance Court within one month from the date of rendering of such decision and this fact shall not prevent the tribunal from continuing with the arbitration proceeding and rendering an award.*[148]

3.6.3 After Conclusion of the Arbitral Proceedings

Either of the party to the dispute may also request the court to set aside the arbitral award on the ground that the tribunal does not have jurisdiction after the conclusion of the arbitral proceedings. Parties in arbitral proceedings may request a court at the place of arbitration to set aside the arbitral award in question on the ground that the arbitral tribunal lacked jurisdiction.[149]

The competent court may exercise judicial review over such an arbitral award by reference to provisions of the agreement in question.[150] If the court finds that the arbitration agreement is invalid, the court may set aside the arbitral award rendered on the basis of such an agreement.[151]

Thus, even though the principle of competence-competence empowers arbitral tribunals to render decision on their own jurisdiction, arbitral tribunals are not the sole decision-makers in this regard. Rulings made by arbitral tribunals on the validity of arbitration agreements and their own jurisdiction with respect to them are ultimately subject to the supervision and control of competent courts.[152]

Therefore, the above assertion shows that although arbitral jurisdiction overrides judicial jurisdiction by reference to an arbitration agreement, the final authority to determine the jurisdiction of an arbitration tribunal still rests upon courts.[153]

The UNCITRAL Model Law on International Commercial Arbitration envisages the involvement of a court in arbitral proceedings after the rendition of an arbitral award. A party dissatisfied with

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[147] UNCITRAL Model Law On International Commercial Arbitration (1985), Article 9(3).
[148] Arbitration and Conciliation Working Proceedure Proclamation, 2021, cited above at note 51, Article 19(5) & (6).
[149] Xiaohong Liu., Cited above at note 128, P.254.
[150] Id., P.253.
[151] Ibid.
[152] Ibid..
[153] Ibid.

the award may apply to the court to set aside such award. The Model law lists the grounds for applying for setting aside the award provided the party is able to produce evidence proving the existence of such grounds.

Accordingly, the relevant provisions of the Model law regarding the grounds for setting aside the arbitral award read as follows:

> *The party making the application furnishes proof that a party was under some incapacity or the said agreement is not valid under the law to which the parties subjected it or under the law of this State, none proper service of notice to the party making the application concerning the appointment of the arbitrator or the arbitral proceedings or unable present his case to the arbitral tribunal as result, the award dealing the dispute which was not contemplated by the arbitration agreement or the composition of the arbitral tribunal or the arbitral procedure was not as per the terms of the arbitration agreement.*[154]

The Model Law does not give an exclusive power to the arbitral tribunal in determining its jurisdiction even after the rendition of the arbitral award. The court could intervene and decide on issues related to objections of arbitral jurisdiction if a party applies for setting aside the award based on the grounds mentioned in the Law provided the application is submitted within three months from the date the award is given to the party.[155]

The Model Law also empowers the court to intervene in arbitral proceeding after the rendition of an arbitral award and thereby setting aside the award if the court finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of this state or the award is in conflict with the public policy of this state.[156]

Similarly, the German arbitration law authorizes the regular court to intervene in arbitration proceedings even after the delivery of an arbitral award and decide on the jurisdiction of the tribunal if a party having sufficient cause applies to the court to set aside the arbitral award based on the grounds mentioned in the law.

Accordingly, the appropriate provisions of the law regarding the grounds for setting aside the award read as follows:

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[154] UNCITRAL Model Law on International Commercial Arbitration, Article 34(2)(a)(i-iv).
[155] Id, Article 34(3).
[156] Id, Article 34(2) (b).

if the applicant shows sufficient cause that a party was under some incapacity or the arbitration agreement is not valid or he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case or the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration.[157]

In previous laws, there were question regarding the finality of arbitral awards in Ethiopia, resulting from the application and interpretation of article 350(2) of the civil procedure code, which presumes a right of appeal from any arbitral award unless parties agree to waive the right of appeal from any arbitral award "with full knowledge of the circumstances".[158]

Unlike the Civil Procedure Code, the Proclamation adopts a liberal approach towards appeal right. It starts with the presumption that arbitral awards are final and not appealable unless the parties agree otherwise in their arbitration agreement.[159]

However, the law is not clear whether the decision of the tribunal on its jurisdiction under Article19 (1) of the proclamation amounts to an award as defined under Article 2(2) of the proclamation or not; If it is an award, whether there should be an agreement of the parties to lodge an appeal against the decision of the tribunal on its jurisdiction under Article 49 (1) of the proclamation? Whether the legal status of an objection made under Article 19(5) of the proclamation amounts to an 'appeal' under article 49 of the proclamation or not?

In addition to the appeal right, Article 49(2) of the proclamation allows parties to apply for cassation "where there is a fundamental or basic error of law", but parties may waive the right of cassation review. Thus, unless the parties are able to agree to wave judicial review for errors of law, the potential for second-guessing final arbitral awards still exists through the cassation process.

This is separate from the set-aside provision of article 50 of the proclamation, which mirrors the UNCITRAL Model Law's grounds for setting aside arbitral awards and thus requires that judicial review of arbitral awards[160] be limited to narrow and well-defined situations.[161]

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[157] German Civil Procedure Law, Section 1059(2)(1(a-d)).

[158] The 1965 Civil Procedure Code of Ethiopia, Article 350(2): "The parties may waive their right of appeal but any such waiver shall be of no effect unless made with full knowledge of the circumstances."

[159]The Arbitration and Conciliation Working Procedure Proclamation, 2021, cited above at note 51, Article 49 (1).

[160]United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, Article 34.

Thus, according to the Ethiopian arbitration and conciliation working procedure proclamation, parties could not opt out from their freedom to request the court to set aside the arbitral award. In this regard, the provision of the law states that "*notwithstanding any agreement to the contrary, contracting parties may apply to the court that has jurisdiction over the case had the case not been submitted to arbitration to have the arbitral award set aside*.[162] Hence, either of the parties to the arbitral award has the right to submit his application to the court having jurisdiction to have the award set aside even in the presence of an otherwise agreement.

However, the application shall be submitted within three months from the date of delivery of the arbitral award to the applicant and the application shall not be acceptable if the arbitral award is enforced by the Ethiopian court.[163] An application to have an arbitral award set aside may be lodged on the following grounds and the burden of proof of the existence of the alleged ground rests with the applicant.[164]

> *The applicant does not have the capacity to conclude an arbitration agreement, the arbitration agreement is null and void or such agreement has expired, the applicant shows that he has not been given proper notice about the appointment of arbitrators and arbitration proceedings or has not been able to present his case during the proceedings, the arbitrators did not make the award by maintaining their impartiality or independence or have delivered the award by receiving bribe..*[165]

Most of the above stated grounds for the application of setting aside the arbitral award are related to arbitral jurisdiction. Hence, if party applying for setting aside the arbitral award is able to prove the existence of such grounds, the court would set aside the award. It can, therefore, be concluded that pursuant to the Ethiopian arbitration law the intervention of the regular court is possible even after the rendition of an arbitral award.

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[161]Ortolani, Article 34: Application for Setting Aside as Exclusive Reourse against Arbitral Award, in UNCITRAL Model Law on International Commercial Arbitration: a Commentary, eds. I.Bantekas, 2020,p.859.
[162] Arbitration and Conciliation Working Proceedure Proclamation, 2021, cited above at note 51, Article 50(1).
[163] Id., Art. 50(3).
[164] Id., Art. 50(2).
[165] Id., Art. 50(2) (a-f).

3.7 Provisional Interim measure vis-à-vis Jurisdiction of Courts

3.7.1 Meaning And Significance Of Provisional Interim Measure

The concept of provisional interim measures is frequently raised in relation with current arbitral proceeding litigations. Interim measures are also referred to as "provisional" or "conservatory" relief. The use of interim measures in arbitration proceedings has grown recently alongside the popularity of arbitration as a form of dispute resolution, and protects a party's rights pending the outcome of a dispute. During and even before the arbitration process kicks off, issues may arise that could have an effect on the final outcome of the arbitration, and this may be when interim measures are requested or required. As arbitration cases become more complex and proliferate, including more international cases that add further complexity, interim measures are becoming increasingly more varied, and adapting to meet the practical needs of the parties involved in arbitration.[166]

Interim relief is defined as a relief granted on a preliminary basis before an order finally disposing of a request for a relief. The role of interim or protective measures is to protect and preserve a factual or legal situation so as to safeguard where from the court having jurisdiction as to the substance of the matter. Interim relief is ordered for the purpose of maintaining the status quo of the parties or to preserve evidence during litigation.[167]

Black's law dictionary defines provisional interim measures in conjunction with international arbitral practice.[168] It states that:

> *provisional measure is an order given by the tribunal in order to protect the outcome of the proceeding from any act which would jeopardize the outcome of the proceeding. It further describes provisional interim measures as a procedure "roughly equivalent" to an interim order, which can be either a temporary restraining order or a temporary directive order, in national legal systems.*[169]

Interim measures are orders issued for the purpose of protecting one or both parties to a dispute from damage during the course of the arbitral process. The objective is ordinarily to

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[166] Ibid.

[167] Mesfin Beyene, ''Towards a Better Commercial Arbitration: Should Ethiopia Ratify the NY Convention?'', Mizan Law Review, vol 13, no.1 (2019) P, 125. Available at: http://www.repository.smuc.edu.et/handle/123456789/6576, last accesed on 09/07/2023.

[168] Blacks Law Dictionery, available at https://www.findbestresults.co/web, last accessed on 07/02/2023.

[169] Ibid.

maintain a factual or legal situation, but the protection of party rights may also take the form of orders for specific performance or resuming interrupted operations.[170]

Interim measures are a type of remedy or relief that is aimed at safeguarding the rights of the parties for the duration of the proceedings, pending the final resolution of the dispute. The main focus when empowering the tribunal to grant interim measures is on allowing the tribunal to proceed with the arbitration in as smooth manner as possible. These measures are granted by arbitral tribunals, national courts, or emergency arbitrators in accordance with the arbitration agreement, applicable (institutional) arbitral rules, or the national laws of the country of the seat or the state where relief is sought. Usually it is done from the court before the tribunal has been constituted and after that from the tribunal itself. Various sources of arbitration law (statute, institutional rules, international conventions and arbitral awards) reveal a growing acceptance of the principle that courts and tribunals have concurrent powers to order provisional or protective measures.[171] Thus, a party may seek for interim measures from a court or from the tribunal.

The UNCITRAL Model Law permits judicial intervention before or during arbitral proceedings and give an interim measure upon the request of either of the parties to the arbitration agreement and the law reads that it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.[172]

According to the ICSID Convention, Arbitration Rule, except as the parties otherwise agree, the tribunal may recommend any provisional measures that may be necessary to preserve the parties' rights during the proceeding.[173] Thus, according to this convention, a party may seek provisional measures at any time after proceedings have been instituted. If the request is made before the Tribunal has been constituted, the Secretary-General fixes a briefing schedule so that the Tribunal

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[170] UNCITRAL Model Law on International Commercial Arbitration, a Commentary, pp.343-372. Cambridge University Press. Available at:https://www.cambridge.org/core/books/uncitral-model-law-on-international-commercial-arbitration/CC3C5F7998BB5C3E645A4F51DD471465, last accesed on 09/03/2023.

[171]Haikola, Elina, Arbitral tribunals and national courts–constant battle or efficient co-operation? (2013), available at: https://lauda.ulapland.fi/handle/10024/60002, last accesed on 09/03/2023.

[172] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, Article 17(A). Available at:https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration. last accesed on 09/03/2023.

[173] ICSID CONVENTION, REGULATIONS AND RULES, (2006), Washington, D.C. ,Article 47, available at: https://icsid.worldbank.org/services/arbitration/convention/process/provisional-measures, last accesed on 09/03/2023.

may consider the request as soon as possible after constitution.[174] A party requesting provisional measures must specify the rights to be preserved, the measures requested, and the circumstances that require such measures.[175]

Based on the ICSID Convention Tribunals will typically consider whether the provisional measures are necessary, urgent and required to avoid irreparable harm. Examples of requests for provisional measures concern the release of confidential information, obtaining or preserving evidence, securing financial guarantees, staying parallel domestic or arbitral proceedings, staying the execution of administrative decisions, or preventing prejudicial interference by one party.[176] The Tribunal may recommend, modify or revoke provisional measures after giving each party an opportunity to present its observations.[177]

3.7.2 Application and Enforcement of Provisional Interim measures in Commercial Arbitration under Ethiopian Law

Disputes between traders can entail negative outcomes on the award creditor like evidences may be taken out of the reach of the tribunal and assets that are eventually important for the enforcement of the award may be hidden in a place where enforcement is quite difficult. Since arbitration proceeding may and frequently does take some time to be finally decided, it is necessary to make provision for the protection of parties and the maintenance of the property in dispute pending the final determination of the case.

The application and enforcement of interim measures in commercial arbitration surrounds questions like the substantive type of the orders, the territorial scope of such orders, the jurisdiction of the tribunal to grant them, their availability in aid of proceedings on the merits of another tribunal, and the availability and enforceability of *ex parte* relief.[178]

Different legal systems take different approaches to the issue of interim measures in support of arbitration and the institution that may be empowered to issue such measures. These approaches can be divided into three: legal systems that reserve the authority only to courts; those that

[174] ICSID Arbitration Rule 39(5).
[175] Id., Rule 39(1).
[176] Id., Rule 39(4).
[177] Ibid.
[178] Ibid.

mandate arbitral tribunals to issue interim measures; and, those that validate concurrent powers between national courts and arbitration tribunals.

In countries such as Kenya[179] and India[180] the high court has exclusive material jurisdiction to grant an interim measure.

Under Ethiopian law, in ordinary Court litigation, provisional interm orders could be given by courts and these orders are termed as 'provisional remedies' under the Civ. Pro.Code.[181] The Civ. Pro.Code, however, does not clearly provide the time when these orders are given, .i. e. the law is not clear whether it is before or after the commencement of the ordinary proceeding. As per the binding interpretiation given by the Federal Supreme Court Cassation Division, according to Proclamation no. 454/2003,[182] courts are given the power to issue provisional interim orders even before the initation of the ordinary court proceeding.

Court practices shows that these provisional remedies like attachement before judgement and preliminary injuction are ordered following the initation of the main(ordinary) proceeding.The Cassation Division of the Federal Supreme Court gave the interpretion to allow the application of interim orders before and independently from the main pleading, not because the law expressly provides, but rather taking in to consideration the rational behind the giving of the order.

On the other hand, until the coming in to force of the Arbitration and Conciliation Working Procedure Proclamation Number 1237/2021, the application and enforcement of interim measures in commercial arbitration in Ethiopia was open ended, because neither case laws nor clear provisions exist to guide us through the application and enforcement of such measures. Even if, as discussesed above, the Civ. Pro.Code, contains provisions about interim relief and attachment of property before judgment, it preferred to remain silent when it comes to arbitral interim relief.[183]

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[179] Kenya arbitration act , Laws Of Kenya, Revised Edition 2012 [2010 1995 art 7. available at: available at: https://icsid.worldbank.org/services/arbitration/convention/process/provisional-measures, last accesed on 09/03/2023., last accesed on 31/08/2023.

[180] The Arbitration and Concilation Act of India, 1996, Chapter 2, Section 9. Available at:https://www.indiacode.nic.in/handle/123456789/1978, last accesed on 31/08/2023.

[181] Some of the orders which could be regarded as Provisional measures under the Civ.Pro.Code are: attachment before judgment) under Art. 151 ፣ temporary injunction) under Art.151 and Interlocutory Orders under Art. 160 ff.

[182] File no 191402, yemane girmay general contractor plc. vs. china CEMC Enginering company limited(September 26,2013(vol. 23)

[183] Mesfin Beyene, ''Towards a Better Commercial Arbitration: Should Ethiopia Ratify the NY Convention*?'',* Mizan Law Review, vol 13, no.1 (2019) P, 125. Available at: http://www.repository.smuc.edu.et/handle/123456789/6576, last accesed on 09/07/2023.

With the introduction of the Arbitration and Conciliation Working procedure Proclamation, arbitration tribunals are granted the jurisdiction to order interim measures of protection during arbitration proceeding, and also authorize the tribunals to give *ex parte* relief.[184]

Moreover, in relation with Arbitration and Concilation Working Procedure, the Ethiopian arbitration law allows judicial intervention regarding Provisional interim measures, before or while arbitral proceedings going on upon the request of either of the parties to the arbitration agreement.[185] Thus, one of the new introduction brought by proclamation no 1237/2013 is that it allows parties to apply for the application of provisional interim measure as an independent remedy.

Accordingly, the provision of the law reads as follows:

> *With respect to matters falling under the arbitration agreement, the contracting parties may request the court interim measures to be taken before proceeding is initiated or during the proceedings. This shall not be considered as violation of the arbitration agreement by the contracting parties and as intervention by the court.*[186]

From this it is discernable that regular courts could grant an interim measure before the arbitration proceeding begins or after the arbitration proceeding commenced. Thus, the Ethiopian arbitration law seems to follow the Restricted Competence-Competence Principle. However, it slightly adopts different approach regarding the role of the regular court with the submission of a request for the rendition of a provisional measure by the party to an arbitration agreement before the commencement of the arbitral proceedings and during the proceedings too.

However, even if this provisional interim measure could be instituted as an independent remedy, whether in ordinary court litigation or arbitral proceeding, question may be raised as to whether it follows the subject matter(material) jurisdiction of the court or not?

In ordinary court litigation, based on the above stated binding interpretiation given by the Federal Supreme Court Cassation Division, though it provides application for provisional interim measures could be made before the institution of the statement of claim, it doesnot clearly specify to which court the application is to be submitted or which court has the material jurisdiction to entertain the application. For instance, in relation with the amount of money involved in the

[184] Arbitration and Conciliation Working Proceedure Proclamation, 2021, cited above at note 51, Art 20.
[185] Id. Art. 5, Art 9 and Art.27.
[186] Id. Art 9.

claim, for matters which fall under the pecuniary jurisdiction of the Federal High Court,[187] the law doesnot answer wheter the Federal First Instance Court Can entertain such matters. Similarly, during Arbitral Proceedings, since the Ethiopian Arbitration and conciliation working Procedure proclamation no.1237/2013 is drafted to allow parties to submit an application for the order of provisional interim meaures independently, the question as to which court the application should be submitted is crucial and must be stipulated clearly.

However, the close examination of the above cited proclamation, except in limited circumstances, reveals that the Ethiopian arbitration law has not provided clearly the court which has material jurisdiction to entertain issues relating to interim measures. Thus, there are no clear rules addressing the matter. Therefore, it is controversial whether the application should be submitted following the pecuniary jurisdiction of courts or whether it shold always be entertained by the Federal First instance court. As result of this, there is no consistency and predictability between and among various levels of courts with respect to the issue which court has a jurisdiction to order interim measures. As result, dominantly there are ***two*** arguments with regard to which court has a jurisdiction to order an interim measure. The ***first*** one argues that an application for interim measures of protection shall be submitted to the Federal First Instance Court as this court is empowered to decide on claims which cannot be expressed in term of money.[188]

According to this view, provisional interim order, like any other injuction order during ordinary proceeding, without following the pecuniary jurisdiction of courts, should be ordered by the Federal First Instance Court.

The proponents of this view argues that even if the amount of money involved in the dispute is more than the pecuniary jurisdiction of Federal First Instance Court, the First Instance Court has the power to issue the provisional interim order.[189]

Their arguments to suppliment their view that the Federal First Instance Court has the jurisdiction to order provisional interim orders among others are:

1. Since provisional interim order is regarded as matter not involving pecuniary amount and the Federal First Insance Court establishes tribunals which could entertain matters beyond its pecuniary jurisdiction, it could give an order beyond its material jurisdiction.

[187] Federal Courts Proclamation, 2021, Proc. No. 1234, Fed. Neg. Gaz., year 27, no.26.
[188] Id., Art. 14 cum. 11(2).
[189] Ato Neway Negeso, LLB, LLM, Federal High court judge, interviewed on Julay 22/2022 in his office.

2. Since in other ordinary court litigations like succesation of property cases, divorce cases, dissolution of business organization cases and the like, an injuction order given by courts is not based on the amount of money involved in the litigation but rather it is based on matters not measured in moneytary values or these are claims which can not be expressed in money under art 14 cum. 11(2) of proclamation no. 1234/2013, by the same token, when provisional interim measures in Arbitration disputes are taken in order to decide the jurisdiction of courts, the amount of money involved in the the litigation should not be considered.
3. Since provisional interim orders including temporary injuction is given temporarily and since they donot create final rights and obligations like decisions or judgements, the amount of money involved in the litigation should not be considered to decide the jurisdiction of the court.

The ***second*** group argues that an application for interim measures of protection must be submitted to a court which would have jurisdiction had it not been submitted to the arbitral tribunal.

According to the proponents of this view, provisional interim orders follows the material jurisdiction of courts.They argue that ordinary courts could take provisional interim orders based on the amount of money involved in the litigation or the pecuniary jurisdiction of the courts.[190] They contend that in relation with the provision and enforcement of interim measures, proclamation no. 1237/2020 is prepared to follow the material jurisdiction of courts.

The proponents of this view bases their argument in the following four grounds:

1. According to Article 55(3) and 70(2) of the proclamation, regarding disputes to be resolved through conciliation, an order of interim measures may be made by the court that has material jurisdiction on the subject matter. Since this proclamation governs matters related with both Arbitration and conciliation, if it clearaly stipulates in relation with conciliation, the court that has jurisdiction to order interim measure is the court having material jurisdiction, this holds true to disputes to be resolved through arbitration.

[190] Fekadu Andargie Mekonen, ጊዜያዊ የ ማ ጠ ባ በ ቂ ያ እ ር ም ጃ (Provisional Interim measure) እ ና የ ፍ ር ድ ቤ ት ሥ ል ጣ ን ,(2023), available at:: https://www.abyssinialaw.com/blog/provisional-interim-measure, last accesed on 09/09/2023.

2. According to Article 37(1) of the proclamation the court that has the Material jurisdiction over the case is the one which can support the arbitral tribunal in receiving evidence.Thus, for stronger reason, it must be this court which has the power to order interim measures.

3. Had the proclamation intended to grant the power to order interim orders to the first instance court, it would have provided in a clear terms; like it has stipulated in the case of disagreement of the parties on the appointmentment of the Arbitrators,[191] or; on the Procedure of objection against the appointment of arbitrators,[192] or on costs of Arbitration.[193]

4. Provisional interim measures are not similar to succesation of property cases, divorce cases, dissolution of business organization cases and the like, the injuction order given by courts is not based on the amount of money involved in the litigation but rather it is based on matters not measured in moneytary values. by the same token, when provisional interim measures are taken in order to decide the jurisdiction of courts, the amount of money involved in the the litigation should not be considered.

5. Enforcement of an order of interim measure, if it is made with in the country, shall be submitted to a court which would have had jurisdiction had it not been submitted to the Arbitral Tribunal,[194] but where the order is issued by a foreign tribunal, the Federal High Court shall have jurisdiction over the case.[195] Thus, if the law empowers the enforcement of interim order to the court which would have had jurisdiction had it not been submitted to the arbitral tribunal, for stronger reason, the interim order which gave rise to the enforcement order should be made by the court which has the subject matter jurisdiction to give such order.

3.7.3 Practical Application of Provisional Interim Measures in the Federal Courts of Ethiopia

It is rare to find cases related with Practical Application of Provisional Interim Measures related with Arbitral Proceedings, which are brought at the federal courts of Ethiopia.

[191] Arbitration and conciliation working Procedure Proclamation, cited above at note 51, Article 12(3) (b)
[192] Id, Art.15(4).
[193] Id, Art. 46.
[194] Id, Art. 25(3).
[195] Ibid.

When we see backlogs of judgments of the Federal First Instance and High Courts, which also become included in literature, we will find the following cases mostly with respect to the material Jurisdiction of Federal Courts to grant Provisional Interim Measures in Arbitral Proceedings.

In the coming part of the thesis, first, in the first sub-section, I will discuss the selected cases briefly and in the up coming sub-section, I will forward my reflection towards the selected case.

Case 1. The Federal First Insance Court's Decision in Beijing urban construction group company limited v Ethiopian roads authority

In a case between Beijing urban construction group company limited and Ethiopian roads authority at The Federal First Instance Court,[196] the applicant requested the court for an order of an interim measure which requires a certain bank (Dashen bank), not to pay to the respondent the amount of money specified under performance guarantee and advance payment guarantee until arbitral panel is constituted. The amount of money specified under performance guarantee was 30,605,318.13 birr and 2650519.21 dollars. Where as, the amount of money specified under advance payment guarantee were 55,789,226.78 birr and 4,831526.88 dollars.

The court without summoning the defendant examined whether it has material jurisdiction to pass an interim order on the amount of money specified on performance guarantee and advance payment guarantee.

The court declined jurisdiction based on the following assertions.

Firstly, it stated that art. 25(3) of proclamation no 1237/13 provides that enforcement of an order of interim measure shall be submitted to a court which would have jurisdiction had it not been submitted to the arbitral tribunal. *Secondly*, the federal Supreme Court cassation division on file number 75788 has given a binding decision applicable at all level of Ethiopian courts which says the enforcement of an order or a decision is coextensive with the material jurisdiction of courts. So, for whatever reason, if an interim order given by the tribunal is failed to be enforced an application for its enforcement should be requested from the court which has a jurisdiction to entertain the matter. *Thirdly*, it argued that, as stipulated under art. 26 (1) (d) of proclamation no. 1237/13, when recognition of an interim measure requested from a court, a court should decline to recognize an interim measure order in case where such a court has no jurisdiction. *Fourthly*,

[196] Beijing urban construction group company limited v Ethiopian Roads Authority, Federal First Instance Court of Ethiopia, Civil Case No.02833, 2013, (unpublished).

the court argued that, art. 37 of proclamation no. 1237/13 has clearly expressed the requirement of material jurisdiction either to provide assistance to arbitral tribunal or to execute an interim measure ordered by the arbitral tribunal. It further added that though the petition requesting for an order of interim measure seems that its value cannot be expressed in terms of money, an interim order given by a court on property which can be expressed in terms of money or on a certain amount of money at least temporarily could create rights or obligations for the parties. So, when the court give an interim order on a certain amount of money or on property which can be expressed in terms of money, it could be taken as if the courts are deciding on the property the value of which is known. Thus, request for an interim measure should follow the material jurisdiction of courts.

Basing itself on the above arguments, the court came to the conclusion that the Federal First Instance Court has no a material jurisdiction to give an interim order on the amount of money or on property the value which exceeds 10 million birr.

Case 2. China Railway 14 Group Company Limited v Ethiopian Roads Authority[197]

In this case, the Federal First Instance Court rejected the petition requiring an interim measure requesting for an order not to pay to the defendant the amount of money specified under performance guarantee and advance payment guarantee the values of which are 1291062976 dollars and 6453810.44 birr respectively.

The court, in its decision, argued that, the value of the two guarantees is more than 10 million birr. Thus, had the case not been submitted to the tribunal, it would have been submitted to Federal high court pursuant to Arts. 11(1), and 14 of proclamation No. 1234/13 and art. 25(3) of proclamation No. 1237/13. Therefore, the court concluded that, it has no material jurisdiction to give an interim order not to pay the value of money specified under the performance guarantee and advance payment guarantee.

Case 3. The Federal High Court's Decision in Ethiopan Roads Authority v China National Communication Construction

In this case, the Federal High Court in File number 293311,[198] reversed the decision rendered by the Federal First Instance Court in the case between the Ethiopian roads authority and china

[197] China Railway 14 Group Company Limited v Ethiopian Roads Authority (Federal First Instance Court of Ethiopia, Civil Case No.01999), 2015, (unpublished).

national Chemical communication construction in File No. 302195.[199] The Federal First Instance Court, in its decision refused to accept the provisional injuction order application of the applicant, alledging that it is beyond its jurisdiction.

In reversing the decision of the Federal First Instance Court, the Federal High Court argued that under the Federal Courts Proclamation no. 1234/13, the material jurisdiction of courts is determined based on the competency of judges and the complexity of cases. Under the Proclamation, the federal first instance court is empowered to see complex suits relating to dissolution of company and the like. This power given to the federal first instance court believing that the court has competent judges. Thus, it is difficult to conclude that the federal first instance court has no competency to decide over interim measure or these types of cases are complex to it. The Federal High Court in reversing the decision of the lower court, further argued that, a court fee that should be paid on a petition requiring an interim order is 25 birr according to legal notice no 177/1945. From this, it is understandable that such claims fall under the category of claims which cannot be expressed in money. The jurisdictions of the federal high court on claims which are not expressed in money are listed under art 11(2) of the proclamation. In this list the federal high court is not empowered to rule over interim measures. So, it plausible to conclude that the federal first instance court has a jurisdiction on matters which are not expressed in money in accordance with art 14 of the proclamation so long as it does not fall under art 11(2) of the proclamation.

The Federal High court, in reversing the decision of the lower court, further Argued that the other provision cited by the lower court, i.e Article 25(3) of proclamation no. 1237/14 is not related with and pertainent to the case at hand. In the case at hand, the applicant require an interim order which is categorized under claims which cannot be expressed in terms of money. Thus, the relevant provision governing the matter is Art. 14 of proclamation no. 1234/14 and Art. 18 of the Civ. Pro. Co.

Moreover, the Federal High Court stated that, the lower court declines to give interim order arguing that it has no jurisdiction over claims which involves more than one billion birr. However, the lower court is not to litigate the parties on the claim of one billion birr as this

[198] Ethiopian Roads Authority v China National Camical Communication Construction (Federal High Court of Ethiopia, Civil Case No. 293311), 2015,(unpublished).

[199] Ethiopian Roads Authority v China National Camical Communication Construction (Federal First Instance Court of Ethiopia, Civil Case No. 302195), 2014,(unpublished).

entirely belongs to the jurisdiction of an arbitral panel that will be constituted in the future. The demand of the applicant from the court is interim order on money specified above.

Based on the above analysis, the Federal High Court has reversed decision of the federal First Instance court and remanded the case back to the lower court.

Case 4: Bejing Urban Construction v Ethiopian Roads Authority[200]

In this Case, The Federal High Court rejected an application requiring an interim order submitted to it in its first instance jurisdiction.

The court, in rejecting the application of the plaintiff, reasoned that, where one of the contracting parties fail to appoint the co-arbitrator within 30 days from the date of receipt of notice by the other party, or where the two arbitrators fail to agree on the appointment of the third arbitrator within 30 days from the date of their appointment or where the contracting parties fail to agree on the appointment of sole arbitrator, the federal first instance court is empowered to appoint arbitrator up on the request of one of the parties, as provided under art. 12(3) of proclamation No. 1237/13.

The court further argued, even if the proclamation under art. 9 stipulates that, with respect to matters falling under arbitration agreement, the contracting parties may request the court interim measures to be taken before the arbitration proceeding is initiated or during the proceedings, it does not answer the query about to which court an application for an interim order must be submitted. On one hand a power to appoint an arbitrator is given to the federal first instance court under art. 12(3) of proclamation No 1237/13. On the other hand, under art 25 of the proclamation once the arbitral tribunal is constituted, the power to grant an interim measure belongs to the tribunal. In case where an interim order granted by the tribunal is not enforced, according to art 25(3) of the proclamation an application requiring the enforcement of an interim relief must be submitted to a court which would have had a jurisdiction, had it not been submitted to the tribunal. However, this provision talks about the enforcement of an interim order once the arbitral tribunal has given an order of interim measure. Thus, this provision, i.e., Art.25(3), does not answer the question which court has a material jurisdiction to receive and decide on the application of interim measures before the institution of the claim. The court further argues that, a petition for an interim measure could not stand by itself, but it is an accessory to the suit

[200] Beiging Urban Construction v Ethiopian Roads Authority (Federal High Court of Ethiopia, Civil Case No. 289023), 2014, (unpublished).

brought before the court. As long as the power to appoint an arbitrator is given to the federal first instance court, there is no need to consider the amount of money that could be litigated in the arbitral tribunal. And it conclude that, the federal first instance court has a material jurisdiction to order an interim measure before the arbitral tribunal is instituted as provided under art. 9 of the proclamation and the federal high court lacks a material jurisdiction on the issue at hand.

Case 5: Ethiopian Roads Authority v Akir Construction

This case is decided in January 2015 E.C with case number 293123, Ethiopian Roads Authority v Akir Construction,[201] The federal First Instance Court[202] rejected the Provisional Interim measure application of the appellant alleging that it is beyond the Jurisdiction of the court, since the amount requested is up to birr 150,529,154.74.In reversing the decision of the Federal First Instance Court, the Federal High Court raised the same arguments mentioned in the above cited case 3 of this thesis. Thus, in order to avod redendency, it is better not to discuss those arguments here.

Case 6: Kenticha P.L.C v. Federal Mining Minister[203]

This case is decided by the Federal First Instance Court, in relation with a pleading submitted by an applicant requesting the court to render a provisional measure to suspend the measure of the respondent that revoked exploration license of the applicant. The respondent revoked exploration license given to the applicant on the ground that the applicant did not discharge its obligations as stated under the exploration agreement and Mining Operations Proclamation No. 678/2010.

The applicant lodged its application to the Federal First Instance Court, requesting the court to render provisional measure that will temporarily suspend the respondent's decision pursuant to Article 9 and 27 of the Ethiopian arbitration and conciliation working procedure proclamation until the commencement of the arbitration tribunal based on the exploration agreement made between the applicant and the respondent and the Mining Operations Proclamation.

[201] Ethiopian Roads Authority v Akir COnstruction (Federal High Court of Ethiopia, Civil Case No. 293123), 2015, (unpublished).

[202] Ethiopian Roads Authority v Akir COnstruction (Federal First Instance Court of Ethiopia, Civil Case No. 301454), 2014, (unpublished).

[203] Kenticha P.L.C v. Federal Mining Minister (Federal First Instance Court of Ethiopia, 2014, File No.304969) (unpublished)

The applicant alleged that if the decision of the respondent is not temporarily suspended by provisional measure until the commencement of the tribunal, the respondent will give the exploration area to third party that would make the arbitral award inoperative if the applicant wins the award.

However, the court dismisses the pleading of the applicant stating that it has no jurisdiction to give a provisional measure.The Court in decision canceled the request of the defendant alledging that since the mining licence given by the respondent to the applicant is already canceled by the respondant, and the legality of the cancelation is to be resolved by the arbitral panal as per Article 26 of the the Ethiopian arbitration and conciliation working procedure proclamation, the court cannot grant an interim measure based on Article 9 of the proclamation.

In the following part of the thesis, the writer will try to reflect its viewa towards the above cited decisions of the Federal First Instance court and Federal High Court.

1. The Federal First Instance Court's Decision on Civil Case No. 02833 (Case 1) and Civil Case No. 01999(Case 2)

The writer of this thesis argues that the federal first instance court has made erroneous decision in the decisions made under file number 02833(Case 1) and File no. 01999 (Case 2) based on the following justifications.

Firstly, the court, in its decision, has interpreted art. 25(3) of proclamation no 1237/13 out of its sprit and purpose. This provision primarily talks about recognition and enforcement of an interim order but not about the material jurisdiction of courts to grant an interim measure. According to this provision *one of the contracting party may apply to court for the recognition and enforcement of an order and such application shall be submitted to a court which would have had a jurisdiction had it not submitted to the tribunal.*[204] This is one of the instances where ordinary courts could assist and help tribunals which are already established by the parties. In other words, this provision never intended to regulate the material jurisdiction of courts to grant an interim measure. Thus, while the provision clearly talks about the enforcement of an interim measure, it is absurd to use it for determining the jurisdiction of courts to grant an interim measures. Therefore, it can be concluded that, the court, in its decision, has interpreted art. 25(3) of proclamation no 1237/13 erroneously.

[204] Arbitration and conciliation working Procedure Proclamation, cited above at note 51, Article 25(3).

Secondly, the court has cited irrelevant federal Supreme Court cassation decision. The Federal Supreme Court cassation division on file number 75788 has made a binding decision on the issue of determining material jurisdiction, local jurisdiction and the power of courts to transfer decree for execution to other courts which have no jurisdiction on the matter. Moreover, in this decision the cassation division clearly mentioned the factors that are necessary to determine the material and the local jurisdiction of courts and affirmed the power of courts to delegate their power for the purpose of executing the decree passed by them as well as the power of executing a decree not necessarily follows the material jurisdiction of courts.

Thirdly, Art. 26 of proclamation no. 1237/21 lists down the grounds for refusal of the request for recognition or enforcement of interim measure by ordinary courts. Especially, Sub art 26 (1) (d) provides that a court should decline to recognize an interim measure order in case where such a court has no jurisdiction. A court which is requested for an enforcement of an interim order may lack judicial, material or local jurisdiction. In case where the court lacks one of the kinds of jurisdiction mentioned above may decline to enforce an interim order granted by the tribunal. Again, this provision talks about refusal to recognize or to enforce an interim order. It does not specifically stipulate the material jurisdiction of the courts. Thus, this provision is irrelevant to determine the material jurisdiction of the courts to grant an interim measures.

Fourthly, it is clear that art. 37 of proclamation 1237/21 stated that either the tribunal or the contracting parties may request the assistance of a court that has material jurisdiction over a case in receiving evidence. This provision tells us that in case where the tribunal requires the assistance of the court for receiving evidence, it must ask the assistance of the court which would have a material jurisdiction had the case not been submitted to the tribunal. However, this provision cannot led us to conclude that the federal first instance court should not grant an interim order on the thing which has pecuniary value of more than ten million birr. In addition to this, had the legislature intention were as described by the federal first instance court, it would have been easy to legislator to clearly provide the court which has a material jurisdiction to grant an interim order. Thus, from the silence of the proclamation on this matter, it is plausible to conclude the legislature has intended the issues of material jurisdiction which are not regulated under the proclamation No 1237/21 to be regulated in accordance with the federal courts proclamation No 1234/21 and the civil procedure code.

Finally, the Federal First Instance Court in its decision under file no. 02833, for holding its position has stated that an interim order temporarily creates rights or obligations for the parties.

However, the purpose of an interim order is to protect the status quo of the parties. It has no purpose to grant a right either for the plaintiff or defendant. And it always creates obligation or impose a burden on the defendant. This is understandable from the kinds of interim measure provided under art 20 of proclamation No 1237/21. Thus, the federal first instance court has wrongly concluded that an interim order could create rights for the parties.

Therefore, in the writer of this thesis opinion, the federal first instance court in its decisions made under File no. 02833 and 01999, has wrongly concluded that the court which has material jurisdiction to order an interim order is the Federal First Instance Court.

2. The Federal High Court's Decision in Ethiopan Roads Authority v China National Communication Construction (Case 3)

The writer of the the thesis agrees with the holding of the Federal High Court in the case between the Ethiopian roads authority and china national Chemical communication construction**.**

Firstly, in the absence of clear provision regulating the material jurisdiction of courts to grant an interim order under proclamation No 1237/21 , it is acceptable to resort other laws such as the federal courts proclamation no. 1234/21 and the civil procedure code. It can be inferred from art 11 of proclamation No 1234/21 Civil cases that do not fall under exclusive jurisdiction of the federal high court fall under jurisdiction of the federal first instance court as provided under art 14 of proclamation No 1234/13. In addition to this, competence of courts is required to determine the rights of the parties concerning all or any of the matters in dispute in suit. This is inferable from art 3, 16,226,227and 228 of the civil procedure code. Granting an interim order is quite different from litigating the parties beyond pecuniary jurisdiction since the latter falls squarely within the jurisdiction of arbitral panel. And also art 151 and 154 of the civil procedure code nowhere stated the court has no power to order an interim measure/injunction on the amount or value of the subject matter suit which goes beyond its pecuniary jurisdiction.

Moreover, art 25(3) of proclamation No 1237/21 talks about enforcement of an interim order and it is not relevant to determine the material jurisdiction of courts to grant an interim measure.

Furthermore, an application requiring an interim orders are categorized under claims which cannot be expressed in terms of money. Thus, the relevant provision to determine the material jurisdiction of courts to grant an interim measure are art 14 of proclamation 1234/21 and art 18

of civil procedure code. Therefore, based on the above analysis the court which has a material jurisdiction to grant an interim measure is the federal first instance court.

3. Bejing Urban Construction v Ethiopian Roads Authority (Case 4)

In this case, the writer of the thesis agrees with the final finding made under the decision given by the federal high court in rejecting an application for an interim order. However, partially disagrees with some of the arguments forwarded by the federal high court in the case.

The Federal High Court, in this case, has concluded that an application for an interim measure could not stand by itself, but it is always an accessory to the suit brought before the court and the federal first instance court has a material jurisdiction to order an interim measure before the arbitral tribunal is constituted as provided under art. 9 of proclamation No. 1237/21.

However, the inference made by the court is not correct since an interim measure application can be made separately without there being made part of another claim to constitute an arbitral tribunal. Thus, it is erroneous to conclude that an interim measure application is always made as a part of a claim requiring the court of law for establishment of arbitral tribunal.

CHAPTER FOUR

CONCLUSION AND RECOMMENDATION

4.1 CONCLUSION

Jurisdiction is the life blood of all legal proceedings. It is the power of a court or an arbitration tribunal to hear and decide on a suit. A regular court needs to have jurisdiction in order to hear and deliver valid judgment. Otherwise, the court's proceedings will be challenged due to lack of judicial, material or local jurisdiction. Similarly, an arbitral tribunal requires to have jurisdiction so that its proceedings will not be objected by the respondent or subjected to set aside and award would be recognizable and enforceable.

While the jurisdiction of regular courts emanates from the law or law making organ of the government, the jurisdiction of arbitration tribunals evolves from arbitration agreement in general and applicable laws in particular. Parties to the principal contract confer power to the arbitration tribunal to resolve present or future disputes that may be arising from their contractual relationships via the terms of the arbitration clause. Either of the parties, usually the respondent, may challenge the arbitral proceedings claiming the arbitration agreement or the main contract containing the arbitration clause is invalid.

The objection on the arbitration agreement could be that the respondent did not in fact conclude the terms of the agreement or have the legal capacity make the agreement. Since arbitrators obtain their power from the parties' agreement, a challenge to this agreement would logically leave them powerless to hear a case until it was determined that the agreement was indeed effective, conferring on them the authority to resolve the relevant disputes. Should the court intervene and deicide on the respondent's objection or the tribunal determine the objection? Is the crucial issue revolving around jurisdictional objections.

Currently, most modern commercial arbitration laws such as the UNCITRAL Model Law, German Arbitration Law, and French Arbitration Law devise techniques in order to solve problems related to arbitration jurisdictional objections. These techniques are commonly referred to as the doctrines of separability and competence-competence. These doctrines give primary authority to arbitration tribunals to decide on jurisdictional objections. According to these principles, the role of the court is providing assistance or support to the proceedings of arbitration tribunal. The arbitration tribunal, therefore, has competence to decide on an objection raised by the respondent against its jurisdiction.

The new Ethiopian Arbitration and Conciliation Working Procedure Proclamation, significantly departs from the previous arbitration law concerning the power of the tribunal to decide on its jurisdiction. In this regard, Article 3330(3) of the civil code of Ethiopia denies the arbitral tribunal to have competence in deciding on jurisdictional objections related to whether the arbitration agreement is valid or not. However, Article 19(1) of the new Arbitration and Conciliation Working procedure proclamation unequivocally empowers the arbitration tribunal to rule on all jurisdictional related objections including the existence or non existence of a valid arbitration agreement.

The new Ethiopian arbitration and conciliation working procedure proclamation endorses the doctrines of separability and competence-competence. Accordingly, the arbitration tribunal has the power to decide on its jurisdiction. Such power of the tribunal shall include the power to determine on jurisdictional objections raised by the respondent as to whether there exists a valid arbitration agreement which includes whether the tribunal has the jurisdiction to hear and decide the subject matter of the dispute. Besides, the arbitration tribunal shall have the power to determine on the validity of the principal contract containing the arbitration clause as the clause is deemed considered separate from the main contract.

According to the applicable Ethiopian arbitration law, the role of the regular court is assisting the arbitration tribunal in arbitration jurisdictional matters. When is judicial assistance allowed as far as arbitral jurisdiction is concerned according to the Ethiopian arbitration law? Is it during the commencement or in the process or after hearing and deciding jurisdictional objections? The court will intervene in arbitration proceedings only after the tribunal has delivered its decision on jurisdictional objections particularly when the party dissatisfied with the decision of the tribunal has submitted an objection to the court. The submission of an objection to the court by the party contending jurisdictional decision of the tribunal shall not, however, prevent the tribunal from continuing with the arbitration proceedings and rendering an award.

Interim measures can be described as awards or orders issued for the purpose of protecting one or both parties to a dispute from damage during the course of the arbitral process. The arbitration and conciliation, working procedure proclamation provides that the contracting parties may request the court an interim measures to be taken before the arbitration proceeding is initiated or during the proceedings.

However, the `proclamation lacks explicit provision with respect to the material jurisdiction of courts to grant an interim measures. As result of this there is no consistency and predictability

between and among various levels of courts in their decisions. . Dominantly there are two arguments with regard to which court has a jurisdiction to order an interim measure. The first one argues that an application interim measures of protection shall be submitted to a court which would have jurisdiction had it not been submitted to the arbitral tribunal while, the second group contends that it must be submitted to the federal first instance court as this court is empowered to decide on claims which cannot be expressed in term of money.

Therefore, the researcher finds that some important issues related to the jurisdictional matters of arbitration tribunal are not vividly addressed by the proclamation. As a result, the law lacks clarity as far as the following issues are concerned. Some of these issues are: Does the decision of the tribunal on its jurisdiction under Article19 (1) of the proclamation amounts to an award as defined under Article 2(2) of the proclamation or is it similar to the decision made under Article 245(1) of the CPC against preliminary objections? If it is an award, should there be the agreement of the parties to lodge an appeal against the decision of the tribunal on its jurisdiction under Article 49 (1) of the proclamation? What is the legal status of an objection made under Article 19(5) of the proclamation? Is it an 'appeal' under article 49 of the proclamation? What would be the legal status of the decision given by the first instance court? Is it an 'award' under article 2(2) of the proclamation? What would be the fate of the arbitration tribunal's award on the merit of the case if an objection against the decision of the tribunal on its jurisdiction is reversed by the first instance court? If a case is not arbitrable under Article 7 of the proclamation, then does it necessarily mean that the arbitration tribunal has no jurisdiction? Which court has the material jurisdiction to order an interim measures during Arbitral proceedings?

Having mentioned the above loopholes identified in the new arbitration law of Ethiopia, the researcher has given remarks in the following recommendation part.

4.2 RECOMMENDATION

Based on the above concluding remarks, the following recommendations are given.

1. The Arbitration and Conciliation Working Procedure Proclamation lacks clarity as to whether the tribunal's decision on its jurisdiction based on Article 19(1) of the Proclamation is considered to be a decision(order) against preliminary objection as stated under the CPC or an award as it is defined under Article 2(2) of the Proclamation. The law should be amended and include a clear provision regardinding the status of the

tribunal's decision on this issue. This will help to avoid unnecessary confusion and limit the room for unwarranted litigation that could have been arisen related to this issue.

2. The Proclamation lacks clarity concerning the legal status of an objection made under Article 19(5) of the law. i.e., whether such an objection be considered as an appeal under Article 49(1) or should it be set aside under Article 50 of the Proclamation. Thus, the proclamation should be amended so that the status of the objection is clearly stipulated under the proclamation in light with the relevant provisions of the CPC.
3. According to Articcle 49(1) of the Proclamation, there should be an agreement of the parties to institute an appeal against an Arbitrial Award's decision. If the decision of the tribunal on its jurisdiction is regarded as an award, the law is not clear whether there should be an agreement of the patrties to lodge an appeal against the decision of the tribunal on its jurisdiction under Article 19 (5) of the proclamation.
4. According to Articcle 49(2) of the Proclamation, parties are at liberty to waive their right to lodge an application for cassation provided that there is a fundamental or basic error of law. Thus, the proclamation is not clear whether parties can make an agreement to waive their right to cassation given under Art. 80(3) (a) of the FDRE Constitution. Thus, the law should be amended in light with the pertainent provisions of the FDRE Constitution.
5. The Proclamation fails to clearly indicate the jurisdiction of the First Instance Court entertaining an objection against the decision of the tribunal on its jurisdiction stated under Article 19(5) of the proclamation. This court should have been defined under the definition part of the proclamation or it should have been stated as "an Appropriate Court" instead of "the First Instance Court". Thus, the law should be amended in light with the Federal Courts Proclamation no. 1234/2021 and the CPC.
6. The Proclamation is ambiguous regarding the fate of the arbitration tribunal's award on the merit of the case if an objection against the decision of the tribunal on its jurisdiction is reversed by the First Instance Court. Thus, the law should be amended in order to reconcile these two problems.
7. The proclamation is not clear which court has the material jurisdiction to grant provisional interim measure during Arbitral proceedings thus, the law needs to be amended to regulate the material jurisdiction of courts to grant an interim measure.

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